Interconnection regulation and contract law

Gijrath, S.J.H.

Published: 01/01/2006

Document Version
Publisher's PDF, also known as Version of Record (includes final page, issue and volume numbers)

Please check the document version of this publication:

• A submitted manuscript is the author’s version of the article upon submission and before peer-review. There can be important differences between the submitted version and the official published version of record. People interested in the research are advised to contact the author for the final version of the publication, or visit the DOI to the publisher’s website.
• The final author version and the galley proof are versions of the publication after peer review.
• The final published version features the final layout of the paper including the volume, issue and page numbers.

Link to publication

Citation for published version (APA):

General rights
Copyright and moral rights for the publications made accessible in the public portal are retained by the authors and/or other copyright owners and it is a condition of accessing publications that users recognise and abide by the legal requirements associated with these rights.

• Users may download and print one copy of any publication from the public portal for the purpose of private study or research.
• You may not further distribute the material or use it for any profit-making activity or commercial gain
• You may freely distribute the URL identifying the publication in the public portal

Take down policy
If you believe that this document breaches copyright please contact us providing details, and we will remove access to the work immediately and investigate your claim.

Download date: 07. Dec. 2018
Interconnection Regulation and Contract Law
Stellingen behorende bij het proefschrift

‘De regulering van interconnectie en het verbintenissenrecht’

Serge J.H. Gijrath

1. Regelgevers zouden meer oog moeten hebben voor beginselen van het verbintenissenrecht, wanneer zij (soms) tegenstrijdige beleidsdoelstellingen formuleren die rechtstreeks ingrijpen in de contractvrijheid.

2. Technologieneutrale regelgeving is bijna onmogelijk te realiseren. Het recht is niet in staat effectief te anticiperen of te reageren op marktgedreven technologische ontwikkelingen.

3. Diensteninteroperabiliteit is een leuke beleidsdoelstelling, maar draagt niet bij tot het bewerkstelligen van convergentie.

4. De onderhandelplicht bevoordeelt aanbieders van elektronische communicatiennetwerken en -diensten met aanmerkelijke marktmacht.

5. De contractenpraktijk rechtvaardigt de vraag of de onderhandelplicht uitsluitend van toepassing zou moeten zijn op een onderneming met aanmerkelijke marktmacht.

6. De EG zou beter artikel 4 (1) Toegangsrichtlijn intrekken en Artikel 6 (1) Telecommunicatiewet kan worden geschrapt bij de volgende wetsherziening.

7. De interventie door de nationale regelgevende autoriteit in de toestandkoming van het referentie interconnectie aanbod is niet erg effectief of houdbaar gebleken.

8. Het verdient de voorkeur om de bevoegdheid ten aanzien van de formatie, nakoming en beëindiging van interconnectie overeenkomsten – met uitzondering van tariefregulering – bij de burgerlijke rechter te leggen.

9. Een ieder die godsdienst aangrijpt om aan te zetten tot haat tegen mensen die anders denken, is geen godsdienstige.

10. De voormalige leden van Abba dient een onderhandelplicht te worden opgelegd met het oog op het nog eenmaal gezamenlijk uitbrengen van een nieuw album.
Theses, accompanying the dissertation

‘Interconnection regulation and contract law’

Serge J.H. Gijrath

1. Regulators should consider principles of contract law when formulating (sometimes) conflicting regulatory objectives that affect the freedom of contract directly.

2. Technology neutral regulation is nearly impossible to achieve. The law is unable to anticipate or respond effectively to market-driven technological developments.

3. Services interoperability is a nice policy goal, but does not contribute towards achieving convergence.

4. The duty to negotiate interconnection benefits the electronic communications network and services providers with significant market power.

5. Contract law practice justifies the question whether the duty to negotiate needs to apply only to an undertaking with significant market power.

6. The EC should withdraw article 4 (1) Access Directive. Article 6 (1) (1) Telecommunications can subsequently be deleted in the next overhaul of the law.

7. The national regulatory authority’s intervention in the formation of the reference interconnection offer has not been very effective or sustainable.

8. It is preferred to shift the competence to decide in respect of the formation, performance and termination of interconnection agreements – with the exception of tariff regulation – to the civil courts.

9. Anybody who uses religion to incite hatred against people, who believe something else, is not religious.

10. A duty to negotiate should be imposed on the former members of Abba, in order to have them release one more album together.
Interconnection regulation and contract law

in het openbaar verdedigen in de aula van de Universiteit van Tilburg, Warandelaan 2, Tilburg. Om 16.00 uur is het lekenpraatje.

Wij nodigen u namens Serge uit om bij de promotie en de aansluitende receptie aanwezig te zijn.

De paranimfen,

Jan-Paul de Wit
020-6851715 / 06-53592944
janpauldewit@hotmail.com

Claudia Zuidema
020-3452212 / 06-21560474
czuidema@delex.nl
INTERCONNECTION REGULATION AND CONTRACT LAW

Serge J.H. Gijrath

deLex
The author defended this book as a doctoral thesis on 5 April 2006 at the University of Tilburg.

deLex B.V., Amstelveen

Cover design: rdesign
ISBN-10: 90-8692-002-0
NUR 827/828

© 2006 S.J.H. Gijrath

All rights reserved. No part of this publication may be made public and/or reproduced in any form (including photocopying or storing it in any medium by electronic means and whether or not transiently or incidentally to some other use of this publication) without the prior written permission of the copyright owner. Applications for the copyright's owner permission to reproduce part of this publication should be addressed to the publisher.

Should the making of copies of this publication be allowed under Articles 16h-16m Netherlands Copyright Act and the Decree of 27 November 2002, Stb. 575 (or other applicable legislation and regulation), then the compensation due under the law for the Netherlands must be paid to 'Stichting Reporecht', P.O.B. 3051, 2130 KB Hoofddorp (or the competent collecting society).
# Table of contents

## LIST OF ABBREVIATIONS

<table>
<thead>
<tr>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>XV</td>
</tr>
</tbody>
</table>

## GLOSSARY

<table>
<thead>
<tr>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>XXI</td>
</tr>
</tbody>
</table>

## 1. INTRODUCTION

### 1.1 Interoperability, access and interconnection

<table>
<thead>
<tr>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
</tr>
</tbody>
</table>

### 1.1.1 Public law versus private law

<table>
<thead>
<tr>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>3</td>
</tr>
</tbody>
</table>

### 1.2 Regulating access and interconnection

#### 1.2.1 The role of technology and economics

<table>
<thead>
<tr>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>7</td>
</tr>
</tbody>
</table>

#### 1.2.2 Asymmetric regulation and freedom of contract

<table>
<thead>
<tr>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>8</td>
</tr>
</tbody>
</table>

#### 1.2.3 The timing of NRA intervention

<table>
<thead>
<tr>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>9</td>
</tr>
</tbody>
</table>

### 1.3 Interconnection and contract law

#### 1.3.1 Inequality of parties under contract law

<table>
<thead>
<tr>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>11</td>
</tr>
</tbody>
</table>

#### 1.3.2 The reference interconnection offer

<table>
<thead>
<tr>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>13</td>
</tr>
</tbody>
</table>

#### 1.3.3 Conflicts regarding interconnection agreements

<table>
<thead>
<tr>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>14</td>
</tr>
</tbody>
</table>

### 1.4 Delineation of research objectives and justification of comparative approach

<table>
<thead>
<tr>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>14</td>
</tr>
</tbody>
</table>

#### 1.4.1 Delineation of research and normative framework

<table>
<thead>
<tr>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>14</td>
</tr>
</tbody>
</table>

#### 1.4.2 Research objectives

<table>
<thead>
<tr>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>20</td>
</tr>
</tbody>
</table>

#### 1.4.3 Justification of Dutch law and comparative law approach

<table>
<thead>
<tr>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>22</td>
</tr>
</tbody>
</table>

1.4.3.1 Dutch law and interconnection

<table>
<thead>
<tr>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>23</td>
</tr>
</tbody>
</table>

1.4.3.2 Comparative analysis

<table>
<thead>
<tr>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>23</td>
</tr>
</tbody>
</table>

#### 1.4.4 Legal resources

<table>
<thead>
<tr>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>24</td>
</tr>
</tbody>
</table>

### 1.5 Different stakes and the research objectives

<table>
<thead>
<tr>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>25</td>
</tr>
</tbody>
</table>

## I. THE REGULATION OF INTEROPERABILITY, AND OF ACCESS/INTERCONNECTION AGREEMENTS

### 2. TECHNOLOGICAL AND ECONOMIC ASPECTS

<table>
<thead>
<tr>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>29</td>
</tr>
</tbody>
</table>

#### 2.1 Introduction

<table>
<thead>
<tr>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>29</td>
</tr>
</tbody>
</table>

2.1.1 Technological aspects

<table>
<thead>
<tr>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>30</td>
</tr>
</tbody>
</table>

2.1.2 Economic aspects

<table>
<thead>
<tr>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>32</td>
</tr>
</tbody>
</table>

2.1.3 Scope of work

<table>
<thead>
<tr>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>33</td>
</tr>
</tbody>
</table>

#### 2.2 Technical notions

<table>
<thead>
<tr>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>34</td>
</tr>
</tbody>
</table>

2.2.1 Basic ECN

<table>
<thead>
<tr>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>34</td>
</tr>
</tbody>
</table>

2.2.2 Network topology

<table>
<thead>
<tr>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>37</td>
</tr>
</tbody>
</table>

2.2.3 Network architecture

<table>
<thead>
<tr>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>38</td>
</tr>
</tbody>
</table>

2.2.4 Standardization

<table>
<thead>
<tr>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>40</td>
</tr>
</tbody>
</table>

#### 2.3 Basic forms of interconnection

<table>
<thead>
<tr>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>41</td>
</tr>
</tbody>
</table>

2.3.1 Simple interconnection

<table>
<thead>
<tr>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>42</td>
</tr>
</tbody>
</table>

2.3.2 Transit interconnection

<table>
<thead>
<tr>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>42</td>
</tr>
</tbody>
</table>
2.3.3 By-pass interconnection ................................................................. 43
2.3.4 Indirect (transit) by-pass interconnection ..................................... 44
2.3.5 Peering .......................................................................................... 45
2.3.6 Consequences for interconnection agreements .......................... 45
2.4 Structuring interconnection ................................................................. 46
2.4.1 Parallel or cooperative interconnection ....................................... 46
2.4.2 Vertical interconnection ................................................................. 47
2.4.3 Horizontal interconnection ............................................................ 47
2.5 Economic aspects ............................................................................... 47
2.5.1 The primary interconnection rule ............................................... 48
2.5.2 The secondary interconnection rule ............................................. 52
2.5.3 Setting the price .......................................................................... 54
2.5.4 Different methods for calculating interconnection charges ....... 58
2.5.5 Regulatory competition ................................................................. 64
2.6 Interim conclusion .............................................................................. 64
2.6.1 Influence of technology on regulation ........................................ 65
2.6.2 Different effects of primary and secondary interconnection rules 65
2.6.3 Pricing .......................................................................................... 66

3. THE INTERNATIONAL AND EC REGULATORY FRAMEWORK ........................................ 67
3.1 Introduction .......................................................................................... 67
3.1.1 Scope of work ............................................................................... 70
3.2 The international regulatory framework ......................................... 70
3.2.1 The WTO and GATS .................................................................... 71
3.2.2 The ITU .......................................................................................... 72
3.2.2.1 ITU models for regulatory intervention in access and interconnection .............................................. 73
3.2.2.2 Summary .................................................................................. 76
3.3 The EC regulatory framework ............................................................. 77
3.3.1 Major policy decisions and available legal instruments .............. 80
3.3.2 The 1987 Green Paper and the ONP Framework .......................... 83
3.3.2.1 The ONP principles ............................................................... 86
3.3.2.2 The Full Competition Directive ............................................. 91
3.3.2.3 The ONP Framework Directive and competition law .......... 94
3.3.3 The NRF ......................................................................................... 97
3.3.3.1 From ex ante to ex post intervention .................................. 101
3.3.3.2 EC regulatory objectives with the NRF ......................... 102
3.3.3.3 Interconnection and services of general interest ............... 105
3.3.4 The Framework Directive .............................................................. 105
3.3.4.1 Compromise .......................................................................... 106
3.3.4.2 New criterion for SMP ......................................................... 106
Interconnection Regulation and Contract Law

3.3.4.3 Intervention by the NRA .......................................................... 112
3.3.5 The Communications Competition Directive .......................... 113
3.3.6 Other NRF Directives ................................................................. 114
  3.3.6.1 The Universal Services Directive ........................................ 114
  3.3.6.2 The Authorizations Directive .............................................. 115
  3.3.6.3 The Privacy and Electronic Communications Directive ........ 116
3.4 EC specific regulation of access and interconnection ................. 116
  3.4.1 Interoperability ................................................................. 117
  3.4.2 Access and interconnection .................................................... 120
    3.4.2.1 ECN and ECS ................................................................. 120
    3.4.2.2 Definitions of access and interconnection ......................... 123
  3.4.3 The Interconnection Directive ................................................. 125
    3.4.3.1 Purpose and scope .......................................................... 125
    3.4.3.2 The duty to negotiate interconnection .............................. 126
    3.4.3.3 Dispute resolution regarding primary interconnection rule .... 129
    3.4.3.4 Additional obligations for operators with SMP ............... 131
    3.4.3.5 ONP related obligations ................................................. 132
  3.4.4 The Access Directive .............................................................. 136
    3.4.4.1 Purpose and scope ......................................................... 138
    3.4.4.2 The duty to negotiate interconnection .............................. 138
    3.4.4.3 Additional obligations for operators with SMP ............... 141
    3.4.4.4 Enhanced ONP related obligations ................................ 146
    3.4.4.5 Transitional measures .................................................... 152
  3.4.5 Summary ............................................................................. 152
3.5 Other regulated markets .............................................................. 153
  3.5.1 Brief comparison with energy, gas, transport and postal market regulation ................................................................. 155
    3.5.1.1 The electricity sector ......................................................... 155
    3.5.1.2 The gas sector ................................................................. 157
    3.5.1.3 The transport sector ......................................................... 158
    3.5.1.4 The postal sector ............................................................. 159
    3.5.1.5 Summary ....................................................................... 160
  3.5.2 Contract formation regulation in civil law ............................. 161
3.6 Interim conclusion ................................................................. 161
  3.6.1 Interconnection negotiations models ..................................... 161
  3.6.2 The scope of EC regulation .................................................. 161
  3.6.3 The timing of intervention .................................................... 162
  3.6.4 Other regulated markets ....................................................... 163

4. IMPLEMENTATION ISSUES WITH EMPHASIS ON THE NETHERLANDS ................................. 165

VII
Interconnection Regulation and Contract Law

4.1 Introduction ......................................................... 165
  4.1.1 Scope of work .................................................. 167

4.2 Harmonization of notions of interoperability and interconnection .... 168
  4.2.1 Disparity of definitions ..................................... 168
  4.2.2 No distinction between direct and indirect interconnection ...... 175
  4.2.3 No statutory definition of originating and terminating access .... 177

4.3 The 1998 Tw ........................................................ 178
  4.3.1 Purpose and scope ............................................. 179
  4.3.2 The duty to negotiate interconnection ...................... 179
  4.3.3 Other obligations as a result of the implementation of the ONP framework ... 184
  4.3.4 Summary ....................................................... 189

4.4 The 2004 Tw ........................................................ 189
  4.4.1 Purpose and scope ............................................. 189
  4.4.2 The duty to negotiate interconnection revisited ............ 190
  4.4.3 A duty to provide interoperability? ......................... 195
  4.4.4 Other issues impacting on the secondary interconnection rule .... 200

4.5 Interim conclusion .............................................. 203
  4.5.1 Divergences in the notions of interconnection and interoperability ............................................. 203
  4.5.2 Duty to negotiate versus duty to contract .................. 203

5. THE POWERS OF THE NATIONAL REGULATORY AUTHORITY ........................................... 205

5.1 Introduction ....................................................... 205
  5.1.1 The NRA and network convergence ....................... 206
  5.1.2 Scope of work .................................................. 207

5.2 The empowerment of the NRA under EC regulation .................... 208
  5.2.1 Preliminary observations .................................... 208
  5.2.2 General powers ................................................ 209
  5.2.3 Decision making by the NRA ................................ 210
    5.2.3.1 Publication of information ............................ 211
    5.2.3.2 Consultation .............................................. 211
    5.2.3.3 Cooperation .............................................. 214
  5.2.4 Powers in respect of access and interconnection ............... 214
    5.2.4.1 Dispute resolution between undertakings .......... 214
    5.2.4.2 Request to intervene .................................... 215
    5.2.4.3 Intervention 'on its own initiative' to meet the policy objectives ............................................. 216
    5.2.4.4 Right to lay down technical or operational conditions ...... 217
    5.2.4.5 Other powers and corresponding obligations ........ 217
  5.2.5 Decision must be binding ................................... 218
Interconnection Regulation and Contract Law

5.2.6 Timelines ................................................................. 218
5.2.7 Right to appeal ........................................................ 219
5.2.8 International dispute resolution ................................... 219

5.3 The NRA and the notion of SMP ........................................ 220
5.3.1 Powers of the NRA under EC Guidelines and Recommendations ................................................................. 221
5.3.1.1 The Commission Guidelines ....................................... 221
5.3.1.2 The Commission Recommendation ........................... 222
5.3.1.3 Determination of SMP by the NRA .............................. 223

5.4 Powers of the NRA at the national level ............................ 229
5.4.1 Competencies of the NRA after implementation of the ONP Framework ................................................................. 230
5.4.2 Competencies of the NRA after implementation of the NRF 232
5.4.3 Status of NRA decision and principles applied ......... 233
5.4.3.1 Procedural principles ................................................ 234
5.4.3.2 Material principles .................................................. 235
5.4.3.3 General principles .................................................. 236
5.4.4 Enforcement and appeal ............................................... 237

5.5 Concurring competencies .............................................. 238
5.5.1 The NRA and the NMAs ................................................ 240
5.5.2 The NRA and the CvdMs ............................................ 241
5.5.3 The NRA and the civil courts ........................................ 242
5.5.3.1 Overlapping competencies? ..................................... 242
5.5.3.2 Matters brought before the civil courts .................... 248

5.6 The ERG ................................................................. 250
5.6.1 Identification and categorization of standard competition problems ................................................................. 251
5.6.2 Catalogue of available standard remedies ................... 252
5.6.3 Matching between the standard competition problems and available remedies ................................................................. 253
5.6.4 Summary of the ERG Position .................................... 253

5.7 Interim conclusion ........................................................ 254
5.7.1 The NRA's competencies in respect of contract formation 254
5.7.2 The NRA's competencies in respect of contractual non-performance ................................................................. 255
5.7.3 The NRA and other institutions .................................... 255
5.7.4 Final remark ............................................................ 255

II NEGOTIATION, FORMATION AND PERFORMANCE OF ACCESS AND INTERCONNECTION AGREEMENTS

6. CONTRACT LAW ASPECTS ..................................................... 259
6.1 Introduction ................................................................. 259
Interconnection Regulation and Contract Law

6.1.1 Conflicting interests and purpose of the agreement ........................................ 264
6.1.2 Scope of work ................................................................................................... 265
6.2 Qualification of access and interconnection agreements .................................... 266
6.3 Duty to negotiate interconnection and the principle of good faith ............... 269
6.3.1 Good faith negotiations and freedom of contract ........................................ 271
6.3.2 Good faith in the Access Directive .................................................................. 275
6.3.3 Good faith in the absence of a right and duty to negotiate interconnection ......................................................................................................................... 277
6.3.4 Good faith and the efforts or results obligation to provide interconnection ............ 279
6.3.5 Good faith and parallel negotiations ................................................................. 281
6.3.6 Good faith and failed negotiations .................................................................... 281
6.3.7 Application of good faith to failed interconnection negotiations ..................... 285
   6.3.7.1 Regulatory intervention by the NRA ......................................................... 287
   6.3.7.2 Court intervention .................................................................................... 289
   6.3.7.3 Arbitration ................................................................................................. 293
6.3.8 Summary .......................................................................................................... 293
6.4 How the interconnection agreement comes about .............................................. 294
6.4.1 Offer .................................................................................................................. 295
6.4.2 Intention to create a legal relationship ............................................................... 296
6.4.3 Acceptance ....................................................................................................... 298
   6.4.3.1 The OLO accepts the RIO without modification ........................................ 300
   6.4.3.2 The OLO and the TO reach a partial agreement ......................................... 302
   6.4.3.3 The OLO accepts the RIO without modification, but under protest .......... 303
   6.4.3.4 The OLO issues a counter proposal ............................................................ 305
   6.4.3.5 The OLO rejects the RIO in full ................................................................ 307
   6.4.3.6 The OLO does not respond to the RIO, places an order with the TO and the TO performs the order ................................................................. 308
6.4.3.7 Summary ..................................................................................................... 309
6.5 The RIO ............................................................................................................ 310
6.5.1 Qualification of the RIO .................................................................................... 311
   6.5.1.1 The RIO as general terms and conditions .................................................. 311
   6.5.1.2 The RIO as a public offer or an invitation to treat ...................................... 313
   6.5.1.3 The RIO as a minimum standard package .................................................. 319
   6.5.1.4 The RIO as a substitute for a freely negotiated contract ............................ 320
6.5.2 Summary ........................................................................................................ 321
6.6 Non-performance, damages and error ................................................................. 322
6.6.1 Good faith, reasonableness and the interconnection agreement .................... 323
   6.6.1.1 Interpretation of the interconnection agreement .......................................... 325
   6.6.1.2 Supplementation of the interconnection agreement .................................... 327
   6.6.1.3 Derogation of the interconnection agreement ............................................. 327
X
<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>7.5.2</td>
<td>Negotiating peering agreements</td>
<td>391</td>
</tr>
<tr>
<td>7.6</td>
<td>Interim conclusion</td>
<td>392</td>
</tr>
<tr>
<td>7.6.1</td>
<td>Intervention in the RIO reconsidered</td>
<td>392</td>
</tr>
<tr>
<td>7.6.2</td>
<td>Practical points for OLOs</td>
<td>393</td>
</tr>
<tr>
<td>7.6.3</td>
<td>Final remark</td>
<td>394</td>
</tr>
<tr>
<td>8.</td>
<td>DISPUTES</td>
<td>395</td>
</tr>
<tr>
<td>8.1</td>
<td>Introduction</td>
<td>395</td>
</tr>
<tr>
<td>8.1.1</td>
<td>Quantitative overview of disputes before the Dutch NRA</td>
<td>395</td>
</tr>
<tr>
<td>8.1.2</td>
<td>Scope of work</td>
<td>397</td>
</tr>
<tr>
<td>8.2</td>
<td>Selected disputes on access and interconnection in the Netherlands  1997-2005</td>
<td>398</td>
</tr>
<tr>
<td>8.2.1</td>
<td>Definition of interconnection, special access and third party interest</td>
<td>398</td>
</tr>
<tr>
<td>8.2.1.1</td>
<td>Interconnection</td>
<td>399</td>
</tr>
<tr>
<td>8.2.1.2</td>
<td>Special access</td>
<td>401</td>
</tr>
<tr>
<td>8.2.1.3</td>
<td>Interested third party</td>
<td>403</td>
</tr>
<tr>
<td>8.2.2</td>
<td>Duty to negotiate interconnection</td>
<td>404</td>
</tr>
<tr>
<td>8.2.2.1</td>
<td>Duty of interoperability</td>
<td>404</td>
</tr>
<tr>
<td>8.2.2.2</td>
<td>Urgent interest</td>
<td>406</td>
</tr>
<tr>
<td>8.2.2.3</td>
<td>Reasonability of access request</td>
<td>407</td>
</tr>
<tr>
<td>8.2.2.4</td>
<td>Obligation to offer capacity</td>
<td>408</td>
</tr>
<tr>
<td>8.2.2.5</td>
<td>Setting timelines</td>
<td>412</td>
</tr>
<tr>
<td>8.2.3</td>
<td>Performance</td>
<td>412</td>
</tr>
<tr>
<td>8.2.3.1</td>
<td>Intervention in contract terms and enforcement</td>
<td>412</td>
</tr>
<tr>
<td>8.2.3.2</td>
<td>No requirement of a written contract</td>
<td>414</td>
</tr>
<tr>
<td>8.2.3.3</td>
<td>Intervention prior to completion of market analysis</td>
<td>414</td>
</tr>
<tr>
<td>8.2.4</td>
<td>Tariff regulation</td>
<td>415</td>
</tr>
<tr>
<td>8.2.4.1</td>
<td>Obligations regarding unbundling</td>
<td>415</td>
</tr>
<tr>
<td>8.2.4.2</td>
<td>Obligations regarding cost-orientation</td>
<td>417</td>
</tr>
<tr>
<td>8.2.4.3</td>
<td>Fixed and mobile terminating access rates</td>
<td>419</td>
</tr>
<tr>
<td>8.2.4.4</td>
<td>Local exchange</td>
<td>423</td>
</tr>
<tr>
<td>8.2.5</td>
<td>Other issues raised by the ONP framework and the NRF</td>
<td>423</td>
</tr>
<tr>
<td>8.2.5.1</td>
<td>Obligations regarding non-discrimination</td>
<td>423</td>
</tr>
<tr>
<td>8.2.5.2</td>
<td>Obligations regarding transparency</td>
<td>425</td>
</tr>
<tr>
<td>8.2.5.3</td>
<td>Other obligations</td>
<td>425</td>
</tr>
<tr>
<td>8.2.6</td>
<td>Germany and England</td>
<td>426</td>
</tr>
<tr>
<td>8.3</td>
<td>Interim conclusion</td>
<td>427</td>
</tr>
<tr>
<td>8.3.1</td>
<td>Interconnection and special access</td>
<td>428</td>
</tr>
<tr>
<td>8.3.2</td>
<td>Tariff regulation</td>
<td>428</td>
</tr>
<tr>
<td>8.3.3</td>
<td>Non-contentious issues</td>
<td>428</td>
</tr>
<tr>
<td>8.3.4</td>
<td>Final remark</td>
<td>429</td>
</tr>
</tbody>
</table>
## III CONCLUSION AND RECOMMENDATIONS

9. FINAL REMARKS ................................................................. 433  
  9.1 Introduction .................................................................................. 433  
  9.2 The normative framework – synthesis ........................................ 434  
  9.3 Specific observations on the main question ................................. 447  
  9.4 Recommendations ....................................................................... 449  
    9.4.1 The role of the NRA ................................................................. 449  
    9.4.2 The role of the Courts ......................................................... 450  
    9.4.3 The RIO ................................................................................ 450  
    9.4.4 Closing remark ..................................................................... 451  

**BIBLIOGRAPHY** ........................................................................ 453  

**OVERVIEW OF CASES** ............................................................ 479  

**OVERVIEW OF RELEVANT EU AND NATIONAL Regulation** ............................... 487  

**TRANSLATION OF SELECTED PROVISIONS IN 1998-2004 TELECOMMUNICATIONS ACT (TELECOMMUNICATIEWET, ‘TW’)** ......................................................... 499  

**REGISTER** .................................................................................. 521  

**ACKNOWLEDGEMENTS** .............................................................. 529  

**RESUME** .................................................................................... 531
# List of abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
</tr>
</thead>
<tbody>
<tr>
<td>3G</td>
<td>Third generation (telecommunications networks)</td>
</tr>
<tr>
<td>AA</td>
<td>Ars Aequi</td>
</tr>
<tr>
<td>ADSL</td>
<td>Asymmetric Digital Subscriber Line</td>
</tr>
<tr>
<td>ADC</td>
<td>Access Deficit Charges (or: Analog-to-Digital Converter as the case may be)</td>
</tr>
<tr>
<td>ADR</td>
<td>Astra Digital Radio or Alternative Dispute Resolution (as the case may be)</td>
</tr>
<tr>
<td>AGB-Gesetz</td>
<td>Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen (Standard Contract Terms Act)</td>
</tr>
<tr>
<td>AJIL</td>
<td>American Journal of International Law</td>
</tr>
<tr>
<td>AP</td>
<td>Access Point</td>
</tr>
<tr>
<td>API</td>
<td>Application Programming Interface</td>
</tr>
<tr>
<td>ATM</td>
<td>Asynchronous Transfer Mode</td>
</tr>
<tr>
<td>Awb</td>
<td>Algemene wet bestuursrecht (Dutch Act on Administrative Law)</td>
</tr>
<tr>
<td>Am Econ Rev</td>
<td>The American Economic Review</td>
</tr>
<tr>
<td>BATS</td>
<td>Basic Agreement on Telecommunications Services</td>
</tr>
<tr>
<td>BGB</td>
<td>Bürgerliches Gesetzbuch (German Civil Code)</td>
</tr>
<tr>
<td>BGH</td>
<td>Bundesgerichtshof</td>
</tr>
<tr>
<td>BGHZ</td>
<td>Entscheidungen des Bundesgerichtshof in Zivilsachen</td>
</tr>
<tr>
<td>BIE</td>
<td>Bijblad Industriële Eigendom</td>
</tr>
<tr>
<td>BOHT</td>
<td>Besluit ONP Huurlijnen en Telefonie</td>
</tr>
<tr>
<td>BR</td>
<td>Bouwrecht</td>
</tr>
<tr>
<td>BT</td>
<td>British Telecom</td>
</tr>
<tr>
<td>BTS</td>
<td>Base Transceiver Station Terminal</td>
</tr>
<tr>
<td>BU-LRIC</td>
<td>Bottom Up Long Run Incremental Costs</td>
</tr>
<tr>
<td>BW</td>
<td>Burgerlijk Wetboek (the Dutch Civil Code)</td>
</tr>
<tr>
<td>CA</td>
<td>Communications Act (UK Telecommunications regulation)</td>
</tr>
<tr>
<td>CAS</td>
<td>Conditional Access System</td>
</tr>
<tr>
<td>CAT</td>
<td>Competition Appeal Tribunal</td>
</tr>
<tr>
<td>CATV</td>
<td>Cable (Access) Television</td>
</tr>
<tr>
<td>CBB</td>
<td>College van Beroep voor het Bedrijfsleven</td>
</tr>
<tr>
<td>CC</td>
<td>Competition Commission</td>
</tr>
<tr>
<td>CCIR</td>
<td>Consultative Committee for International Radio</td>
</tr>
<tr>
<td>CCITT</td>
<td>Comité Consultatif International Télégraphique et Téléphonique</td>
</tr>
<tr>
<td>CEO</td>
<td>Chief Executive Officer</td>
</tr>
<tr>
<td>CEPT</td>
<td>Conference Européenne des Administrations des Postes et des Télécommunications</td>
</tr>
<tr>
<td>CFI</td>
<td>Court of First Instance</td>
</tr>
</tbody>
</table>
Interconnection Regulation and Contract Law

CLI Calling Line Identity
CLID Calling Line Identity (ISDN Class)
CLSR Computer Law & Security Report
CMLR Common Market Law Review
CPS Carrier Pre-Selection
CTLR Computer & Technology Law Review
CvdM Commissariaat voor de Media (Dutch Broadcasting Committee)
DCS Digital Communications System
DECT Digital European Cordless Telecommunications
DG Directorate-General
DGFT Director General of Fair Trading (UK)
DGT Director General of Telecommunications (UK)
DSL Digital Subscriber Line
DTAG Deutsche Telekom AG
DTe Dienst Uitvoering en Toezicht Energie (Dutch Electricity Regulatory Service)
DTI Department of Trade and Industry
EC European Communities
ECJ European Court of Justice
ECLR European Competition Law Review
ECN Electronic Communications Network
ECOSOC European Social Council
ECPR Efficient Component Pricing Rule
ECR European Court Reports
ECS Electronic Communications Service(s)
ECTRA European Committee for Telecommunications Regulatory Affairs
EDC Embedded Direct Costs
EDGE Enhanced Data GSM Environment
EDI Electronic Data Interchange
EEC European Economic Community
EFTA European Free Trade Association
EJCL European Journal of Comparative Law
EMC Electromagnetic Compatibility
EPG Electronic Programming Guides
ER English Reports
ERG European Regulators Group
ERSN Evidently Recognizable Separate Network
ERMES European Radio Message System
ETNO European Telecommunications Public Network Operators Association
ETSI European Telecommunications Standards Institute

XVI
<table>
<thead>
<tr>
<th>Acronym</th>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>ETO</td>
<td>European Telecommunications Office</td>
<td></td>
</tr>
<tr>
<td>EU</td>
<td>European Union</td>
<td></td>
</tr>
<tr>
<td>FCC</td>
<td>Federal Communications Commission</td>
<td></td>
</tr>
<tr>
<td>FCLJ</td>
<td>Federal Communications Law Journal</td>
<td></td>
</tr>
<tr>
<td>FDC</td>
<td>Fully Distributed Cost</td>
<td></td>
</tr>
<tr>
<td>FIST</td>
<td>Forum Interconnectie Bijzondere Toegang</td>
<td></td>
</tr>
<tr>
<td>FL-LRAIC</td>
<td>Forward looking long-run average incremental cost</td>
<td></td>
</tr>
<tr>
<td>FL-LRIC</td>
<td>Forward looking long-run incremental cost</td>
<td></td>
</tr>
<tr>
<td>FRIACO</td>
<td>Flat Rate Internet Access Call Origination</td>
<td></td>
</tr>
<tr>
<td>FSS</td>
<td>Fixed Satellite Services</td>
<td></td>
</tr>
<tr>
<td>GATS</td>
<td>General Agreement on Trade in Services</td>
<td></td>
</tr>
<tr>
<td>GATT</td>
<td>General Agreement on Tariffs and Trade</td>
<td></td>
</tr>
<tr>
<td>GRUR</td>
<td>Gewerblicher Rechtsschutz und Urheberrecht</td>
<td></td>
</tr>
<tr>
<td>GSM</td>
<td>Global System for Mobile Communications</td>
<td></td>
</tr>
<tr>
<td>GWB</td>
<td>Gesetz gegen Wettbewerbs einschränkungen (German Competition Act)</td>
<td></td>
</tr>
<tr>
<td>HTML</td>
<td>Hypertext Markup Language</td>
<td></td>
</tr>
<tr>
<td>IBP</td>
<td>Internet Backbone Provider</td>
<td></td>
</tr>
<tr>
<td>ICT</td>
<td>Information and Communication Technology</td>
<td></td>
</tr>
<tr>
<td>IEC</td>
<td>International Electro-technical Commission</td>
<td></td>
</tr>
<tr>
<td>ILM</td>
<td>International Legal Materials</td>
<td></td>
</tr>
<tr>
<td>IM</td>
<td>Instant Messaging</td>
<td></td>
</tr>
<tr>
<td>IN</td>
<td>Intelligent Network</td>
<td></td>
</tr>
<tr>
<td>IP</td>
<td>Internet Protocol</td>
<td></td>
</tr>
<tr>
<td>IRG</td>
<td>Independent Regulators Group</td>
<td></td>
</tr>
<tr>
<td>IRU</td>
<td>Indefeasible Right of Use</td>
<td></td>
</tr>
<tr>
<td>ISDN</td>
<td>Integrated Digital Services Network</td>
<td></td>
</tr>
<tr>
<td>ISO</td>
<td>International Organisation for Standardisation</td>
<td></td>
</tr>
<tr>
<td>ISP</td>
<td>Internet Service Provider</td>
<td></td>
</tr>
<tr>
<td>ITeR</td>
<td>Nationaal Programma Informatietechnologie en Recht</td>
<td></td>
</tr>
<tr>
<td>ITLR</td>
<td>International Technology Law Review</td>
<td></td>
</tr>
<tr>
<td>ITR</td>
<td>International Telecommunications Regulations</td>
<td></td>
</tr>
<tr>
<td>ITU</td>
<td>International Telecommunications Union</td>
<td></td>
</tr>
<tr>
<td>ITU-T</td>
<td>International Telecommunications Union - Telecoms (formerly: Comite Consultatif International Telegraphique et Telephonique CCITT)</td>
<td></td>
</tr>
<tr>
<td>IVIR</td>
<td>Instituut voor Informatierecht</td>
<td></td>
</tr>
<tr>
<td>IWF</td>
<td>Interworking Function</td>
<td></td>
</tr>
<tr>
<td>JLE</td>
<td>Journal Law and Economics</td>
<td></td>
</tr>
<tr>
<td>JNI</td>
<td>Journal of Network Industries</td>
<td></td>
</tr>
<tr>
<td>JOL</td>
<td>Jurisprudentie online</td>
<td></td>
</tr>
</tbody>
</table>
Interconnection Regulation and Contract Law

<table>
<thead>
<tr>
<th>Acronym</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>JWT</td>
<td>Journal of World Trade</td>
</tr>
<tr>
<td>J Econ Pers</td>
<td>Journal of Economic Perspectives</td>
</tr>
<tr>
<td>KPN</td>
<td>Koninklijke PTT Nederland</td>
</tr>
<tr>
<td>K&amp;R</td>
<td>Kommunikation und Recht</td>
</tr>
<tr>
<td>LAN</td>
<td>Local Area Network</td>
</tr>
<tr>
<td>LAP</td>
<td>Local Access Points</td>
</tr>
<tr>
<td>LJN</td>
<td>Landelijk Jurisprudentienummer</td>
</tr>
<tr>
<td>LLU</td>
<td>Local Loop Unbundling</td>
</tr>
<tr>
<td>LQR</td>
<td>Law Quarterly Review</td>
</tr>
<tr>
<td>LRIC</td>
<td>Long-run incremental costs</td>
</tr>
<tr>
<td>LWTS</td>
<td>Long-term wholesale tariff system</td>
</tr>
<tr>
<td>Mbit</td>
<td>Megabit</td>
</tr>
<tr>
<td>MDF</td>
<td>Main Distribution Frame</td>
</tr>
<tr>
<td>MHP</td>
<td>Multimedia Home Platform standard</td>
</tr>
<tr>
<td>MIA</td>
<td>Model Interconnection Agreement (when referring to the KPN standard interconnection agreement)</td>
</tr>
<tr>
<td>MIACO</td>
<td>Metered Internet Access Call Origination</td>
</tr>
<tr>
<td>MIT</td>
<td>Massachusetts Institute for Technology</td>
</tr>
<tr>
<td>MLR</td>
<td>Modern Law Review</td>
</tr>
<tr>
<td>MMR</td>
<td>Multimedia und Recht</td>
</tr>
<tr>
<td>MVNO</td>
<td>Mobile Virtual Network Operator</td>
</tr>
<tr>
<td>MSC</td>
<td>Mobile Switching Centre</td>
</tr>
<tr>
<td>MTA</td>
<td>Mobile Terminating Access</td>
</tr>
<tr>
<td>NAP</td>
<td>National Access Points</td>
</tr>
<tr>
<td>NbBW</td>
<td>Nieuwsbrief BW</td>
</tr>
<tr>
<td>NCA</td>
<td>National Competition Authority</td>
</tr>
<tr>
<td>NJ</td>
<td>Nederlandse Jurisprudentie</td>
</tr>
<tr>
<td>NJW</td>
<td>Neue Juristische Wochenschrift</td>
</tr>
<tr>
<td>NMA</td>
<td>Nederlandse Mededingings Autoriteit</td>
</tr>
<tr>
<td>NRA</td>
<td>National Regulatory Authority</td>
</tr>
<tr>
<td>NRF</td>
<td>New Regulatory Framework</td>
</tr>
<tr>
<td>NTBR</td>
<td>Nederlands Tijdschrift voor Burgerlijk Recht</td>
</tr>
<tr>
<td>NTP</td>
<td>Network Termination Point</td>
</tr>
<tr>
<td>NTvE</td>
<td>Nederlands Tijdschrift voor Energier recht</td>
</tr>
<tr>
<td>NZLR</td>
<td>New Zealand Law Review</td>
</tr>
<tr>
<td>NZV</td>
<td>Netzzugangsverordnung</td>
</tr>
<tr>
<td>O&amp;F</td>
<td>Onderneming &amp; Financiering</td>
</tr>
<tr>
<td>OECD</td>
<td>Organization for Economic Cooperation and Development</td>
</tr>
<tr>
<td>OFCOM</td>
<td>Office for Communications</td>
</tr>
<tr>
<td>OFTEL</td>
<td>Office for Telecommunications</td>
</tr>
<tr>
<td>OJ</td>
<td>Official Journal of the European Communities</td>
</tr>
<tr>
<td>Abbreviation</td>
<td>Description</td>
</tr>
<tr>
<td>--------------</td>
<td>-------------</td>
</tr>
<tr>
<td>OJLS</td>
<td>Oxford Journal of Legal Studies</td>
</tr>
<tr>
<td>OLG</td>
<td>Oberlandesgericht</td>
</tr>
<tr>
<td>OLO</td>
<td>Other Licensed Operator</td>
</tr>
<tr>
<td>ONP</td>
<td>Open Network Provision</td>
</tr>
<tr>
<td>OPT</td>
<td>Office for Post and Telecommunications</td>
</tr>
<tr>
<td>OPTA</td>
<td>Onafhankelijke Post en Telecommunicatie Autoriteit</td>
</tr>
<tr>
<td>OSI</td>
<td>Open Systems Interconnection</td>
</tr>
<tr>
<td>OVG</td>
<td>Oberverfassungs Gericht</td>
</tr>
<tr>
<td>PABX</td>
<td>Private Automatic Branch Exchange</td>
</tr>
<tr>
<td>PATS</td>
<td>Publicly Available Telecommunications Service</td>
</tr>
<tr>
<td>PECL</td>
<td>Principles of European Contract Law</td>
</tr>
<tr>
<td>PECN</td>
<td>Public Electronic Communications Network</td>
</tr>
<tr>
<td>POA</td>
<td>Point of Access</td>
</tr>
<tr>
<td>POC</td>
<td>Point of Connection (see POI)</td>
</tr>
<tr>
<td>POI</td>
<td>Point of Interconnection</td>
</tr>
<tr>
<td>POP</td>
<td>Point of Presence</td>
</tr>
<tr>
<td>PSDS</td>
<td>Packet-switched data services</td>
</tr>
<tr>
<td>PSTN</td>
<td>Public switched telephony network</td>
</tr>
<tr>
<td>PT-APRII</td>
<td>Project Team - Accounting Principles &amp; Regulatory Interconnection Issues</td>
</tr>
<tr>
<td>PT-TRIS</td>
<td>Project Team - Technical Requirements &amp; Standard Requirement for Interconnection</td>
</tr>
<tr>
<td>QB</td>
<td>Quarterly Bulletin</td>
</tr>
<tr>
<td>QoS</td>
<td>Quality of Service</td>
</tr>
<tr>
<td>RAP</td>
<td>Regional Access Points</td>
</tr>
<tr>
<td>Rb.</td>
<td>Rechtbank (Court)</td>
</tr>
<tr>
<td>RegTP</td>
<td>Regulierungsbehörde für Telekommunikation und Post</td>
</tr>
<tr>
<td>RIO</td>
<td>Reference Interconnection Offer</td>
</tr>
<tr>
<td>RO</td>
<td>Reference Offer</td>
</tr>
<tr>
<td>RWG</td>
<td>Regulatory Working Group</td>
</tr>
<tr>
<td>Scrt</td>
<td>Staatscourant (Official Gazette)</td>
</tr>
<tr>
<td>SEC</td>
<td>Securities Exchange Commission</td>
</tr>
<tr>
<td>SEW</td>
<td>Sociaal Economisch Weekblad</td>
</tr>
<tr>
<td>SIA</td>
<td>Standard Interconnection Agreement (when referring to the BT standard interconnection agreement)</td>
</tr>
<tr>
<td>SLA</td>
<td>Service Level Agreement</td>
</tr>
<tr>
<td>SMP</td>
<td>Significant Market Power</td>
</tr>
<tr>
<td>SMS</td>
<td>Short Message Service</td>
</tr>
<tr>
<td>Stb.</td>
<td>Staatsblad (Bulletin of Acts, Orders and Decrees of the Kingdom of the Netherlands)</td>
</tr>
<tr>
<td>Stcrt.</td>
<td>Staatscourant</td>
</tr>
</tbody>
</table>
Interconnection Regulation and Contract Law

<table>
<thead>
<tr>
<th>Acronym</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>S-PCS</td>
<td>Satellite Personal-Communications Services</td>
</tr>
<tr>
<td>TCP/IP</td>
<td>Transmission Control Protocol/Internet Protocol</td>
</tr>
<tr>
<td>TETRA</td>
<td>Terrestrial Trunked Radio</td>
</tr>
<tr>
<td>TKG</td>
<td>Telekommunikationsgesetz</td>
</tr>
<tr>
<td>TO</td>
<td>Telecommunications Operator</td>
</tr>
<tr>
<td>Tw</td>
<td>Telecommunicatiewet, the Netherlands Telecommunications Act (the Netherlands; abbreviation used both for the 1998 and the 2004 acts)</td>
</tr>
<tr>
<td>UK</td>
<td>United Kingdom</td>
</tr>
<tr>
<td>UMTS</td>
<td>Universal Mobile Telecommunications Services</td>
</tr>
<tr>
<td>UP</td>
<td>UNIDROIT Principles</td>
</tr>
<tr>
<td>US</td>
<td>United States</td>
</tr>
<tr>
<td>VoIP</td>
<td>Voice over the Internet Protocol</td>
</tr>
<tr>
<td>VPN</td>
<td>Virtual Private Network</td>
</tr>
<tr>
<td>WAN</td>
<td>Wide Area Network</td>
</tr>
<tr>
<td>WAP</td>
<td>Wireless Application Protocol</td>
</tr>
<tr>
<td>Wet RO</td>
<td>Wet op de Rechterlijke Organisatie (Act on the Judicial Organization)</td>
</tr>
<tr>
<td>WiFi</td>
<td>Wireless Frequency</td>
</tr>
<tr>
<td>WIPO</td>
<td>World Intellectual Property Organization</td>
</tr>
<tr>
<td>WLL</td>
<td>Wireless Local Loop</td>
</tr>
<tr>
<td>WPC</td>
<td>Wholesale Price Cap</td>
</tr>
<tr>
<td>WPNR</td>
<td>Weekblad voor privaatrecht, notariaat en registratie</td>
</tr>
<tr>
<td>WTO</td>
<td>World Trade Organization</td>
</tr>
<tr>
<td>Wtv</td>
<td>Wet op de telecommunicatievoorzieningen (Telecommunications Facilities Act, the Netherlands 1989)</td>
</tr>
</tbody>
</table>
Glossary

General overview of selected terms that are relevant to interconnection. The terms access and interconnection are discussed in detail in chapters 2 and 3.

Access: The making available of facilities and/or services, to another undertaking, under defined conditions, on either an exclusive or a non-exclusive basis, for the purpose of electronic communications services.

Associated facilities: “Those facilities associated with an electronic communications network and/or an electronic communications service which enable and/or support the provision of services via that network and/or service.” This includes, *inter alia*, CAS and EPG.

Asynchronous Transfer Mode (ATM): an international packet switching standard established by the CCITT. The system organizes digital packets of data in such a manner that very high speed transmission is possible.

Broadband: A connection that enables a large amount of information to be conveyed over a network, generally over 2 Mbits, as opposed to narrowband.

Carrier pre-selection (CPS): A system that enables subscribers to a fixed electronic communications network to have their traffic being handled by another provider of electronic communications services by means of the application of a CPS code. Contrary to carrier selection, which must be made every time a call is made, CPS enables the subscriber to fix the code beforehand.

Circuit switched v. packet switched: The difference between circuit switched and packet switched communications is that with circuit switching the capacity thus used is exclusive for the connection; whereas with packet switched communications, which is used for data communications mostly, the information to be transmitted is divided into various smaller packets, that are all labelled. Routers will temporarily store the labelled packets and transmit them as appropriate. In practice, an important consequence of the different techniques is that with circuit switching, lines are kept busy, whereas with packet switching, for instance if the asynchronous transfer mode (ATM) is employed, lines stay open, and different packs may be transferred simultaneously.

In general, – and this is a marked difference with circuit switched interconnection – service providers will not charge each other for the settlement of packet switched traffic on a per minute basis. In case of packet-switched interconnection, which is

---

1 See Nihoul, Rodfod 2004, p. XXXVIII.
2 See article 2(c) Framework Directive.
Interconnection Regulation and Contract Law

usually the case for internet peering agreements, the architecture of the network will look differently.\(^3\)

It is not always certain whether all of the EC regulation refer to both circuit and packet switched communications. For example, the Privacy and Electronic Communications Directive defines 'call' as 'a connection established by means of a publicly available telephone service allowing two-way communication in real time.'\(^4\)

**Co-location:** The possibility for a provider to place the communications equipment required to offer its communications services and for connecting to the connecting line in or at the respective MDF of the provider controlling such MDF.\(^5\)

**Conditional access systems (CAS):** Systems that allow providers who transmit, e.g., encoded television programmes to have their end-users decrypt the signals. The technology can be embedded in three forms: (1) a new TV set, which integrates the decoder without a need for a separate box, (2) in a proprietary set-top box, or (3) in a detachable conditional access module, which can be inserted into a common interface socket in a set-top box.\(^6\)

**End-user:** 'A user not providing public communications networks or publicly available electronic communications services?' It is not clear whether this means that electronic communications services providers can never be considered end-users themselves. Perhaps this intended by the term user, which is also defined as: 'a legal entity or national person using or requesting a publicly available communications service.'\(^8\) In this book, the term end-user, customer and subscriber are used interchangeably.

**Electronic communications network:** Terms used in the new regulatory framework establishing that the technical means for transmission had become irrelevant. Means transmission systems and, where applicable, switching or routing equipment and other resources which permit the conveyance of signals by wire, by radio, by optical or by other electromagnetic means, including satellite networks, fixed (circuit- and packet switched, including Internet) and mobile terrestrial networks, electricity cable systems, to the extent that they are used for the purpose of

\(^3\) See Kariyawasam 2001, p. 188 for a graphic.

\(^4\) Article 2 (e) Privacy and Electronic Communications Directive.

\(^5\) A distinction can be made between physical, adjacent and virtual co-location.


\(^7\) Article 2 (n) Framework Directive.

\(^8\) Article 2 (h) Framework Directive. See also the definition of 'User' in Article 2 (a) Privacy and Electronic Communications Directive, meant: any natural person using a publicly available electronic communications service, for private or business purposes, without necessarily having subscribed to this service.'
transmitting signals, networks used for radio and television broadcasting, and cable television networks, irrespective of the type of information conveyed.

**Intelligent network (IN):** an intelligent network is used as part of the non-public part of an electronic communications network (it is ‘behind’ the PSTN) and includes advanced software allowing the customization of service provision. It will distinguish the services offered by an operator from services offered by another operator.

**Interconnection:** the physical and logical linking of public electronic communications networks used by the same or different undertaking in order to allow the users of one undertaking to communicate with users of the same or another undertaking, or to access services provided by another undertaking. Interconnection is considered a special form of access implemented between public network operators.\(^9\)

**Interface:** a software application, which enables the communication between different (computer) networks, or between a computer and the user.

**Interoperability:** is a term not defined in the EU Regulatory Framework. A device is generally interoperable with another device when, in addition to communicating with each other, they can also perform a common task together. Additional standards, such as API may be required.\(^10\)

**Latency:** Loss of data resulting from the transit over third party networks.

**Local Area Network (LAN):** a computer network confined to a single location, or a closely knit community of locations.

**Local Loop:** “The physical circuit connecting the network termination point at the subscriber’s premises to the main distribution frame or equivalent facility in the fixed public telephone network.”\(^11\)

**Operator:** “An undertaking providing or authorised to provide a public communications network or an associated facility.”\(^12\)

**Peering:** An interconnection of two public networks that provide connectivity to hosts whose routes are advertised on the global internet, on a settlement free basis that allows customers of one network to exchange traffic to customers directly on the second ISP’s network.

\(^9\) Cf. Nihoul, Rodford 2004, p. XLVI.

\(^10\) Cf. Nihoul, Rodford 2004, p. XLVII.

\(^11\) Article 2 (e) Access Directive and see also Article 2 (c) Regulation on unbundled access to the local loop.

\(^12\) See Article 2 (c) Access Directive.
Public Switched Telecommunications Network (PSTN): The basic network for most voice traffic. A circuit is set up between two locations to communicate information.

Quality of Service (QoS): The standard of quality to be applied to the services provided under the interconnection agreement. The national NRAs have attempted setting minimum standards for the different services, such as VoIP.

Transmission link: The link between different telecommunications networks providing for the trafficking of voice and/or data.

Unbundled access: In case of fully unbundled access, other providers will be enabled to convey their telecommunications services independently from the TO over its network to their subscribers. In the event of shared access, a provider will have access to the frequency spectrum lying beyond the voice layer in the access network, for the provision of data services. In case of shared access, the TO will remain the provider of telecommunications services to the subscriber.

Voice over the Internet Protocol (VoIP): A generic name – to be distinguished from Voice over the Internet – for the transport of voice traffic using an IP stream. VoIP is used more often for private networks, which require a minimum QoS and is thus delivered at a higher quality than Voice over the Internet, although, initially, the quality left a lot to be desired.

Wireless Local Loop (WLL): A technique whereby the subscriber can be wholly or partly connected with the help of a radio communications network. A WLL network is built out of cells, just as a mobile network, which means that it can be efficiently used, as frequencies may be re-used as appropriate.
Interconnection Regulation and Contract Law

Samenvatting

Het centrale onderzoeksthema in dit boek is of de onderhandelingen tussen aanbieders van elektronische communicatienetwerken en/of -diensten zo veel mogelijk vrij moeten plaatsvinden, of dat er een noodzaak blijft voor regulering van het onderhandelingsproces. Het boek behandelt een onderwerp op het snijvlak van het privaat- en het publiekrecht (of economisch ordeningsrecht), waarbij getracht wordt de verschillende belangen met elkaar te vergelijken. De dissertatie concentreert zich op netwerk interconnectie-overeenkomsten, een vorm van toegangsovereenkomsten binnen het domein van de telecommunicatie (thans het 'elektronische communicatierecht').

1. Inleiding

Interoperabiliteit van netwerken vormt een belangrijke beleidsdoelstelling van de Europese en de nationale regelgever. Toegang en interconnectie dienen daarbij het interoperabiliteitsdoel: door toegang- en interconnectie-overeenkomsten te sluieren wordt het wholesalenniveau tussen aanbieders van netwerken bereikstellig dat hun eindgebruikers met elkaar kunnen communiceren en verschillende diensten kunnen afnemen. De doelstellingen die de Europese regelgever bij de regulering van elektronische communicatie en interconnectie hanteert zijn: (1) het doorbreken van monopolies, (2) het verminderen van transactiekosten, (3) het bevorderen van technologische vooruitgang, en (4) het beschermen van consumenten/eindgebruikers. Dit betekent dat (soms politieke) overwegingen van technologische en economische aard aanzienlijke invloed hebben uitgeoefend zowel op de regulering als de inhoud van interconnectie-overeenkomsten. Opmerkelijk is dat de regulering diep ingrijpt in de vrijheid van professionele partijen om zelf (zonder interventie vooraf) over interconnectie- of toegangsovereenkomsten te onderhandelen en deze uit te voeren. Dit leidt tot spanning, omdat de publiekrechtelijke nationale regelgevende instantie ('NRI') andere bevoegdheden heeft en andere beginselen hanteert dan de rechter. Daarbij komt dat het verbintenissenrecht nog niet is geharmoniseerd in de Europese Unie ('EU').

In dit boek is bij de analyse van de regulering van interconnectie-overeenkomsten een belangrijke rol weggelegd voor de contractvrijheid. Daartoe richt het onderzoek zich vooral op de kwesties van het verbintenissenrecht afdoende mogelijkheden biedt aan partijen die een contract willen sluiten met een dominante aanbieder. Tevens komt aan de
orde hoe telecommunicatieaanbieders een prestatie kunnen afdwingen; wat voor rol het gebruik van standaardvoorwaarden speelt; en of er lessen kunnen worden getrokken uit geschillen met betrekking tot interconnectie-overeenkomsten. Al wordt met de literatuur aanvaard dat een ongelijke positie van contractpartijen met zich mee kan brengen dat de 'zwakkere' partij moet worden beschermde, plaatst dit boek vraagtekens bij de vraag of er ook vooraf moet worden ingegrepen; zeker nu de elektronische communicatiemarkten zijn opengesteld en er (in meer of mindere mate) sprake is van daadwerkelijke concurrentie.

Aan de andere kant wordt in het mededingingsrecht aanvaard dat ingrijpen achteraf in contractuele verhoudingen tussen professionele partijen gerechtvaardigd kan zijn, bijvoorbeeld indien sprake is van misbruik van een machtspositie (voor dit boek de meest relevante situatie). Doordat de regulering van het elektronische communicatierichts gericht is op de sector (ze is 'sectorspecifiek'), is echter steeds meer sprake van interventie vooraf, bijvoorbeeld het door de NRI vaststellen van prijzen van de aanbieder met aanmerkelijke marktmacht (AMM). Blijft nog steeds de vraag of deze interventie vooraf ook gerechtvaardigd is bij de onderliggende contracten.

Het boek benadert deze problematiek aan de hand van een aantal normatieve uitgangspunten: (1) interventie moet de mededinging bevorderen, (2) regulering worden onderbouwd door helder geformuleerde, niet voor meerdere uitleg vatbare beleidsdoelstellingen, (3) regulering moet adequaat zijn, (4) beginselen van het verbintenissenrecht moeten in beginsel interconnectie kunnen waarborgen en (5) contractenrecht moet afdoende remedies bieden.

Het eerste deel bespreekt de technologische en economische aspecten van interconnectie, de regulering op Gemeenschapsniveau, de implementatie in Nederland en de bevoegdheden van de Nederlandse NRI, OPTA. Het tweede deel beschouwt interconnectie-overeenkomsten vanuit een verbintenissenrechtelijk perspectief. Gekeken wordt naar de onderhandeling en totstandkoming van interconnectie-overeenkomsten, de referentie interconnectie-aanbieding ('RIA'), de nakoming en beëindiging van interconnectie-overeenkomsten, de interventie in de RIA en een aantal geschillen betreffende interconnectie- en andere toegangsovereenkomsten. Er vindt in beide delen in enige mate rechtsvergelijking plaats met Duitsland en Engeland.
2. Technologische en economische aspecten

Interconnectie van netwerken is gebaseerd op een aantal beginselen, zoals dat iedereen met elkaar zou moeten kunnen communiceren, waar dan ook binnen de gelaagde telecomunicatiennetwerken en tegen eerlijke prijzen. De Europese regelgever heeft aangegeven de voorkeur te geven aan ‘technologieonafhankelijke’ regelgeving. Regulering zou technologische ontwikkelingen niet mogen beperken en zou gelijke technische infrastructuren ook gelijk moeten behandelen. Er is een onderscheid te maken tussen fysieke en logische interconnectie. Fysische interconnectie handelt over de vraag waar in het netwerk koppeling plaats vindt en logische interconnectie over de vraag of diensten via verschillende netwerklagen kunnen worden geleverd (bijvoorbeeld televisie over een breedbandcommunicatiennetwerk).

Hoofdstuk 2 bespreekt de opmaak en topologie van elektronische communicatiennetwerken, enkele basisvormen van interconnectie en peering, en de gevolgen van technologische aspecten en beperkingen voor interconnectie-overeenkomsten. Vooral het verschil tussen directe en indirecte (by-pass) interconnectie heeft in de regelgeving en praktijk tot problemen geleid.

Tevens komt de samenwerking ten aanzien van interconnectie tussen partijen, die met elkaar concurreren, kort aan de orde.

De economische behandeling van interconnectie bespreekt een in de literatuur en regelgeving geïntroduceerd, maar niet altijd helder uitgewerkt onderscheid: tussen de primaire en de secundaire interconnectie regels. Kort gezegd komt de primaire interconnectie regel er op neer dat het de voorkeur verdient dat partijen zelf onderhandelen met als laatste mogelijkheid ingrijpen door de NRI. De secundaire interconnectie regels beogen het (markt-)gedrag van de aanbieder met AMM te reguleren: ze gaan ook in op belangrijke toegangvraagstukken.

Tariefregulering wordt beperkt besproken: alleen de regulering van prijzen en kosten ten aanzien van interconnectie.

3. Internationale en Europese regulering

Hoofdstuk 3 bespreekt de regulering van interconnectie en toegang op internatioaal en Europees niveau (met uitzondering van de rol van de NRI, hieraan is een afzonderlijk hoofdstuk gewijd).

In de eerste plaats passeren een aantal onderhandelingsmodellen voor interconnectie de revue. De Internationale Telecommunications Union (‘ITU’)
Interconnection Regulation and Contract Law

heeft deze ontwikkeld, maar ze hebben geen bindende rechtskracht. Toch geven deze modellen een goed beeld van de rol die regulering en interventie bij contractonderhandelingen al dan niet kan spelen.

Daarna volgt een bespreking in algemene zin van het 'oude' en het 'nieuwe' regelgevende kader voor elektronische communicatiennetwerken en -diensten, waarbij de nadruk blijft liggen op het wholesale niveau: het boek gaat niet in op specifieke toegangsvraagstukken of op de regulering van de belangen van eindgebruikers. Vooral wordt ingegaan op de 'open network provision' ('ONP') beginselen: non-discriminatie, transparantie, kostenoriëntatie en scheiding van de boekhouding.

De nadruk ligt op de behandeling van de regulering van de begrippen interoperabiliteit, toegang en interconnectie. Het hoofdstuk constateert dat het begrip interoperabiliteit op Europees niveau in ieder geval twee betekenissen heeft: diensteninteroperabiliteit en logische interoperabiliteit. Het beginsel is enigszins verwarring uitgewerkt en heeft geleid tot geschillen. Ook de begrippen toegang en interconnectie zoals vastgelegd in regelgeving worden besproken.

Zowel de Interconnectie- als de Toegangsrichtlijn komt aan de orde in hoofdstuk 3. Het is nuttig om het huidige kader te vergelijken met het eerdere stelsel, om te duiden of de verschillen er toe hebben geleid, dat de regelgever nu meer ruimte laat voor vrije onderhandelingen. Naast de doelstellingen van de beide richtlijnen, wordt uitgebreid het recht op en de plicht tot onderhandelen besproken; en de additionele verplichtingen voor AMM aanbieders onder de secundaire interconnectie regels aan de hand van de ONP beginselen.

Ook staat dit hoofdstuk kort stil bij andere nutsectoren: elektriciteit, gas, transport en post.

4. Implementatiekwesties met nadruk op Nederland

Omdat zich vooral onder het oude kader problemen hebben voorgedaan als gevolg van de soms gebrekkige interpretatie van het Europese regelgevend kader, kijkt hoofdstuk 4 naar interconnectie en (bijzondere) toegang vanuit de Nederlandse telecommunicatiwet. Er wordt stil gestaan bij inconsistenties in de (wettelijke) definities van de begrippen en het wetgevingsproces aan de hand waarvan de begrippen toegang en interconnectie in de nieuwe Telecommunicatiwet zijn terecht gekomen. Zo wordt ingegaan op problemen die marktpartijen aan de orde hebben gesteld omdat de wet geen onderscheid maakte tussen directe en indirecte
Interconnection Regulation and Contract Law

Interconnectie; op de wettelijke onderhandelingsplicht zowel onder de oude en de nieuwe wet en de vraag of de Nederlandse wet wellicht een plicht om interoperabiliteit te bewerkstelligen heeft geïmplementeerd.

Aan de orde komt het verschil tussen een onderhandelingsplicht en contractdwang, welke relevant is voor de verbintenisrechtelijke behandeling van interconnectie.

5. De bevoegdheden van de NRI

De NRI heeft van de Europese regelgever vergaande bevoegdheden gekregen. In dit boek gaat de aandacht vooral uit naar de bevoegdheden met betrekking tot regulerings en interventie in interconnectie-overeenkomsten. Daartoe worden de bevoegdheden (en verplichtingen) van OPTA ten aanzien van consultatie, samenwerking met de Commissie en geschilbeslechting geanalyseerd. De wet maakt onderscheid tussen interventie op het verzoek van partijen en regulering op eigen initiatief en beide zijn relevant voor interconnectie-overeenkomsten.

Ook bespreekt hoofdstuk 5 de behandeling van partijen met AMM, aan de hand van twee recente Europese documenten, de Commissieaanbeveling relevante producten- en dienstenmarkten en de Commissie richtlijnen voor marktanalyse en het bepalen van AMM.

Vervolgens wordt gekeken naar de bevoegdheden van de NRI vanuit een administratiefrechtelijke invalshoek. Welke materiële en procedurele beginselen van administratief recht spelen een rol voor de NRI? De afdwinging van beslissingen van de NRI en het administratieve beroep komt tevens aan de orde.

Nu de bevoegdheden van de NRI soms overlappen met andere instanties, bespreekt hoofdstuk 5 ook de Nederlandse Mededingingsautoriteit, het Commissariaat voor de Media en – uitgebreider – de burgerlijke rechter.

Tenslotte gaat dit hoofdstuk in op de rol die European Regulator Group, een samenwerkingsverband van de nationale NRI's, speelt ten aanzien van interconnectie.

6. Verbintenissenrechtelijke aspecten

Hoofdstuk 6 handelt over de onderhandeling, totstandkoming, nakoming en beëindiging van interconnectie-overeenkomst, evenals op de RIA.

Na een juridische kwalificatie van de interconnectie-overeenkomst, bespreekt het boek eerst de onderhandelingsplicht aan de hand van het beginsel van de goede trouw. Het begrip wordt vanuit verschillende
Invalshoeken besproken: de contractvrijheid, de Toegangsrichtlijn, de afwezigheid van een onderhandelingsplicht, de (beweerdelijke) interconnectie-verplichting, parallelle onderhandelingen, afgebroken onderhandelingen. Ten aanzien van afgebroken onderhandelingen wordt uitgebreid stil gestaan bij de rol die de rechter daarbij kan spelen, ook in het licht van recente Nederlandse jurisprudentie. Tevens wordt gekeken naar de maatregelen die de rechter aan partijen kan opleggen, zoals, bijvoorbeeld, een plicht tot dooronderhandelen.

De totstandkoming van de interconnectie-overeenkomst wordt besproken aan de hand van de begrippen aanbod en aanvaarding. Daarbij geeft hoofdstuk 6 een zestal situaties weergegeven die de onderhandelingen beïnvloeden, variërend van de situatie dat de wederpartij het aanbod van de AAI integraal accepteert, tot de situatie dat partijen er niet in slagen contractuele overeenstemming te bereiken maar toch overgaan tot het koppelen van hun netwerken.

De RIA wordt juridisch gekwalificeerd: is hier sprake van algemene voorwaarden, een openbaar aanbod, een uitnodiging tot het doen van een voorstel, een minimum diensten pakket, of zelfs een vervanger van een vrij onderhandeld contract?

Hierna bespreekt hoofdstuk 6 een aantal contractuele leerstukken, zoals aanspraken uit hoofde van toerekenbare en niet-toerekenbare niet-nakoming van de interconnectie-verplichtingen en dwaling. Ook noemt dit deel een aantal beginselen, dat het mogelijk maakt om in reeds gesloten interconnectie-overeenkomsten te kunnen interveniëren.

Om het verband met de regulering van interconnectie te benadrukken volgt in paragraaf 6.6.2 een behandeling van de ONP beginselen vanuit het perspectief van het verbintenissenrecht. De vraag is of de burgerlijke rechter deze beginselen zou willen toepassen.

Tenslotte gaat dit hoofdstuk in op de beëindiging van de interconnectie-overeenkomst, zoals de vraag of beëindiging gezien de regulering wel mogelijk is.

7. De referentie interconnectie-aanbieding

Om een oordeel te kunnen geven op de effectiviteit en de houdbaarheid van de interventie in de markt, biedt hoofdstuk 7 een analyse van de RIA, in het bijzonder van een procedure waarbij de Nederlandse NRI, OPTA de RIA van KPN Telecom N.V. heeft beoordeeld en doen veranderen in de periode 2000-2002.

XXX
In de eerste plaats wordt besproken waarom de NRI heeft ingegrepen en welke criteria zij daarbij heeft gehanteerd.

Vervolgens wordt een analyse gegeven van de beoordeling van de RIA van KPN. Hierbij wordt uitgebreid ingegaan op de elementen in de RIA die volgens de NRI moesten worden veranderd, en hoe KPN daarop heeft gereageerd. Daarna volgt een analyse een van de RIA 2004, waarbij wordt gekeken of deze ook rekening heeft gehouden met de opmerkingen van de NRI.

Ook vindt een vergelijking plaats tussen de RIA van KPN en de RIA van BT en worden enkele suggesties voor verbeteringen gedaan.

Tenslotte biedt hoofdstuk 7 enkele praktische handvaten voor het onderhandelen van interconnectie- en peeringovereenkomsten.

8. Geschillen
Gezien de formele bevoegdheden van de NRI is het niet verwonderlijk dat de meeste geschillen betreffende toegang en interconnectie zijn uitgevochten bij OPTA.

Dit hoofdstuk beoogt in zekere mate een analyse te geven van deze geschillen – en enkele geschillen bij de burgerlijke rechter – juist vanuit het burgerlijke recht. Daartoe zijn de geschillen die zich hebben voorgedaan zoveel mogelijk naar onderwerp gerangschikt en komen onder meer aan de orde: de definities van interconnectie, bijzondere toegang en belanghebbende, de onderhandelingsplicht, geschillen betreffende de nakoming van interconnectie-overeenkomsten, de regulering van tarieven (niet alleen uit hoofde van geschillen, maar ook op eigen initiatief van de NRI) en geschillen waarin de ONP beginselen een rol speelden.

9. Slotopmerkingen
De dissertatie staat in principe positief tegenover de interventie op Europees en nationaal niveau wat betreft toegang en interconnectie-overeenkomsten omdat dit de mededinging bevordert. Echter, er wordt een kritische kanttekening geplaatst dat de Europese regelgever, die als uitgangspunt van regulering zei contractvrijheid te hanteren, nauwelijks oog heeft gehad voor de uitwerking van dit beginsel en de gevolgen voor de primaire interconnectie regel. Ook constateert hoofdstuk 9 dat in de loop der jaren de interventie met behulp van secundaire interconnectie regels niet of nauwelijks lijkt te zijn verminderd.
Interconnection Regulation and Contract Law

Ten aanzien van de vraag of de regulering is onderbouwd door helder geformuleerde, niet voor meerdere uitleg vatbare beleidsdoelstellingen, is de schrijver kritisch. Hij meent dat de uitgesproken beleidsdoelstellingen in praktijk anders zijn uitgewerkt en dat ze niet helder zijn verwoord in de wetsgeschiedenis, wat leidt tot problemen van interpretatie.

Ten aanzien van de vraag of de regulering van de interventie in interconnectie-overeenkomsten adequaat is geweest, stelt de schrijver dat dit niet helemaal het geval is. Hij is van mening dat de Europese regelgever ten tijde van het nieuwe regelgevende kader beter de primaire interconnectie regel had kunnen heroverwegen en nationale verschillen had moeten bekijken. Ook spreekt de schrijver twijfels uit over de effectiviteit van de interventie van de NRI, althans op het onderwerp waarover dit boek gaat.

De schrijver is van mening dat de toepassing door partijen van de beginselen van het verbintenissenrecht in beginsel interconnectie kunnen waarborgen. Hij ziet niet goed in dat onder de primaire interconnectie regel interventie door de NRI noodzakelijk zou zijn. Ten aanzien van de secundaire interconnectie regels maakt hij een onderscheid tussen interventie wat betreft tariefregulering en wat betreft contractuele kwesties. Tariefregulering behoort in ieder geval niet bij de burgerlijke rechter.

Tenslotte is de schrijver van mening dat het contractenrecht afdoende remedies biedt ten einde interconnectie af te dwingen, vooral onder de primaire interconnectie regel.

Hoofdstuk 9 concludeert dat er in ieder geval tussen aanbieders van elektronische communicatienetwerken en -diensten geen noodzaak is voor een wettelijke onderhandelingsplicht. Deze conclusie is gekwalificeerd in de zin dat dit anders kan liggen indien een partij AAM heeft. Hij sluit af met enkele aanbevelingen wat betreft de rol van de NRI en de burgerlijke rechter.
1. Introduction

1.1 Interoperability, access and interconnection

Interoperability of networks and services is the key to the growth and further development of the European communications sector. The notion of interoperability is embedded in the EC Treaty. It is further elaborated on in the European Community ('EC') regulatory framework for electronic communications. It posits that electronic communication in any form can take place from any to any. "Any" has a double meaning: whatever technology or service, and any person, wherever she is. This consideration

1 Interconnection and (special) access emanate from the European framework for Open Network Provision ('ONP'). The ONP framework was intended to harmonize the telecommunications markets within the European Union ('EU'). An important requirement for competition on the various telecommunications markets was and remains the assurance of transparent, objective and non-discriminatory conditions for access to already existing infrastructures.

2 See Recitals (6) and (9) Council Directive 2002/19/EC of 7 March 2002 on access to, and interconnection of, electronic communications networks [2002] OJ L 108/7, ('Access Directive') where it is stated as an aim of regulation: “National regulatory authorities should have the power to secure, where commercial negotiations fail, adequate access and interconnection and interoperability of services in the interest of end-users. In particular, they may ensure end-to-end connectivity by proposing proportionate obligations on undertakings that control access to end-users. (...)” And: “Interoperability is of benefit to end-users and is an important aim of this regulatory framework. (...).”

3 See Article 154 (2) European Community ('EC') Treaty, discussed, infra, Chapter 3 paragraph 3.4.

4 In this book, the term ‘electronic communications’ and ‘telecommunications’ will be used interchangeably when describing the networks, services and equipment used for the transmission of voice and data. When describing the ONP framework the term telecommunications is preferred. Granted, the industry still refers to telecommunications and the term is used more commonly worldwide than it is in the EU — cf. Walden, Angel 2005, p. 4 —, but I wanted to refer to ‘electronic communications’ for the new regulatory framework ('NRF') and the current law as well.


6 See the Explanatory Memorandum to the Access Directive, p. 3, which provides that the NRF proposes to regulate: “(...) all forms of communications networks carrying publicly available communications services, whether used for voice, fax, data or images, including fixed and mobile telecommunications networks, cable TV networks, networks used for terrestrial broadcasting, satellite networks, networks using Internet Protocol (IP).”
Interconnection Regulation and Contract Law

...gains importance where the communications market is broadening and traditional network hierarchy is becoming less decisive, for instance, due to the growth in communications networks adhering to the Internet Protocol ('IP'), including voice over the Internet Protocol ('VoIP').

Interoperability is the objective, and thus an aim of interconnection and, conversely, interconnection and access are concrete means to support interoperability. Put simply: networks need to be interconnected, either directly, or indirectly, to each other to allow for customers to call each other and complete transactions. Customers of networks — even of the smallest — get the benefits of connecting to everyone, and this enhances competition.

Interconnection and access agreements between electronic communications providers serve as an instrument in establishing the interoperability of networks, whatever the technology. Thus, agreements are put in place to provide for the legal, commercial and technical conditions for interconnection. Since interoperability, access and interconnection are regulated heavily, the question arises what use there is for contract law in establishing these complex technological arrangements between undertakings.

The scope of interoperability obligations and its relation with the notions of access and interconnection is not always clear. The regulator distinguished between network infrastructure and service provision and the breaking down of state monopolies developed across these two features. As part of its regulation of telecommunications markets, the Commission issued rules that also affected the negotiation and performance of interconnection agreements.

---

7 For a description and classification of VoIP, see Bach, Sallet 2005, p. 12ff; Quarantini 2005, p. 7ff.
8 Cf Larouche 2000, p. 380. See also Lloyd, Mellor 2003, p. 90 on International Telecommunications Union ('ITU') surveys on the topic.
10 Part I describes access and interconnection both from a regulatory and technological perspective. See Chapter 2 for an overview of definitions of access and interconnection in regulation. Although interconnection can be considered a form of access and the notions are often used simultaneously, see, for instance Article 3 (1) Access Directive, this book focuses on network interconnection.
11 See Explanatory Memorandum to the Access Directive, p. 3.
1.1.1 Public law versus private law

Telecommunications regulation is public law and economic regulation. The emphasis of public law lies with the regulation of competences of administrative bodies towards citizens. Within specific sectors, regulation can be used as an instrument to achieve policy goals. Economic regulation is concerned mainly with regulating market failure, such as through the prevention of abuse of dominant positions.

In the field of telecommunications, hybrid technological, economic and public interest rationales and goals sculpted the set of rules. These goals sometimes overlapped, conflicted, concerned different stakeholders and aimed at protecting different interests.

The major explanations for the government’s role in regulating interconnection were: (1) the antimonopoly or essential facilities rationale - i.e., telecommunications were services essential to society and economy and the provision of such services by a single monopoly provider was undesirable; (2) the transaction cost rationale - i.e., interconnection was designed to provide an element of integration to an increasingly disparate network environment; (3) the technological progress rationale - i.e., technological development required a neutral approach to regulation, with an emphasis on promoting interoperability and standardization; and (4) the consumer protection rationale - i.e., end-users would benefit from transparent and cost-oriented rules that enhanced the desired end-to-end connectivity.

---

13 This also holds true for other regulated markets, such as the utility sectors. On the successive regulatory models applied for electronic communications law: Larouche 2000, p. 1-108.

14 See Correa 2001, p. 17-18, adding that economic regulation should not distort business decisions, that the costs of regulation should be limited to what is essential and that regulation should try to ‘mimic’ the likely operation of a competitive market.

15 See on the various approaches, e.g., Smits 1992.

16 See Noam 2001, p. 10-16. Noam considered that these goals co-exist uneasily and each encompasses different sub rationales.

17 According to this doctrine, an enterprise that has a dominant position with respect to essential facilities, may abuse this dominant position if it denies access to other parties, without having objective reasons to do so. The essential facilities doctrine has been subject to review and its practical use for interconnection and access may be somewhat restricted. See, e.g., European Court of Justice (ECJ) 26 November 1998, C-7/97, Jur. 1998, p. 1-7791ff. (Brommer). For a thorough analysis of the essential facilities doctrine, and its application under EC law, see Bavasso 2003, p. 221ff., Doherty 2001, in particular p. 404ff. and Houben 2005, p. 190ff. For a discussion putting emphasis on the doctrine as applied by the United States Supreme Court, see also Lipsky, Sidak 1999.
Interconnection Regulation and Contract Law

As a result of these disparate goals, interconnection and the different related agreements were regulated rather instrumentally.\textsuperscript{18}

The access or interconnection agreement between two or more undertakings concerned a horizontal arrangement of a private business relationship, albeit that the agreement could be impacted, for instance, by public law considerations.\textsuperscript{19}

In the European Union (‘EU’) Member States, private law is a consistent set of rules. The EC Treaty perhaps provided an indirect basis for contract law harmonization, having regard at, \textit{inter alia}, the principle of subsidiarity under EC law.\textsuperscript{20} Nevertheless, at the time of the new regulatory framework (‘NRF’), contract law remained national law and – contrary to telecommunications regulation – was not harmonized across the EU.\textsuperscript{21} National civil courts were bestowed with competencies to decide on contract conflicts. Courts developed open norms that could be interpreted flexibly, when dealing with provisions in agreements that might need to be redefined or even set aside.\textsuperscript{22} Although at different levels attempts were undertaken to set uniform principles for contract law, notable differences between national systems both as regards such diverse issues as contract formation, negotiations, inequality of parties, remedies and termination, continue to exist.\textsuperscript{23} As a result, the EC was not in a position to model the regulation of interconnection agreements according to a single contract law.


\textsuperscript{19} See, e.g., on the convergence of contract and administrative law: Vranken 1988. Administrative law as not harmonized across the EU either. For more details, see Chapter 6 paragraph 6.1.


\textsuperscript{21} Some exceptions left aside, one being Articles 9-11 E-Commerce Directive. See also Smits 2004, p. 492, who lists seventeen harmonization measures in the EU.

\textsuperscript{22} See Dommering 2003, p. 173 who qualifies this picture to realistic proportions.

\textsuperscript{23} On harmonization of contract law, The UNIDROIT Principles of International Commercial Contracts (‘UP’); see also Bonell 1994; Principles of European Contract Law (‘PECL’); see Lando, Beale 2000 and the comments of Busch et al. 2002. At the European level, there is an initiative to harmonize contract law as shown in the Communication from the Commission to the European Parliament and the Council on A More Coherent European Contract Law, 2003/C 63/01. One of the purposes of the action plan is “to examine further whether problems in the European contract law area may require non-sector-specific solutions such as an optional instrument.” The chapter that defines problems in respect of the uniform application of Community law (3.1) does not mention as an example interconnection agreements pursuant to the Access Directive.
According to some authors, public and private law aim at the same objective, notably the maximization of public wellbeing. Yet, the EU and the Member States' governments' intervention to achieve broadly formulated policy goals in the electronic communications market through sector-specific initiatives created a tension between public and private law. This tension arose, inter alia, because: (1) administrative bodies, such as national regulatory authorities ('NRAs'), were required to understand – but not apply – the impact of private law principles, in addition to economic and technological issues, to conflicts surrounding interconnection agreements; (2) conversely, courts when competent in deciding interconnection conflicts, were to have regard not only for private law, but also for public policy objectives and principles, in addition to economic and technological issues; (3) a new approach to the application of competition law principles emerged that severely impacted the treatment of sector policies: more powers were bestowed on NRAs and the national legislator was required to implement technical measures in its laws; and (4) the EC principles guiding electronic communications law – such as non-discrimination and transparency – differed significantly from principles enshrined in contract law – such as good faith and reasonableness. The notions applicable to EC regulation were introduced in the Open Network Provision ('ONP') framework, but not explained in great detail. By comparison, the existing principles of contract law had a broad context, and evolved in a casuistic fashion: they left adequate room for interpretation.

1.2 Regulating access and interconnection

Operators of electronic communications networks ('ECNs') are spiders in the web, either as service providers to their end-users, or as transmission service providers to others, or as both.

The starting point for intervention was market failure, notably imperfect competition, network externalities and the fact that it concerned public goods and services and an information asymmetry.

24 See Bergkamp 2003, p. 569ff.
25 See Bergkamp 2003, p. 567, for an analysis of the divide between public and private law, with particular emphasis on EC regulation. Bergkamp finds a dichotomy is caused because the deregulation of industry sectors to become more market oriented has led to more regulation.
27 See, supra, paragraph 1.1.1. See also e.g., Stiglitz 2000, p. 77ff., Cooter, Ulen 2004, p. 44-47, on the economic aspects. For a discussion on information asymmetry and service providers, Barendrecht, Van den Akker 1999.
Interconnection Regulation and Contract Law

The provision of telecommunications networks and services had been subject of harmonization since 1988 and liberalization since 1990.²⁸ Initially, the focus was the liberalization of the market for voice telephony. One of the purposes of liberalization was to ensure fair and equal access through the interconnection of telecommunications networks, in order that: (1) providers of new telecommunications services were enabled to let their customers communicate without limitation with customers who were subscribing to providers of other telecommunications services; and (2) providers who did not operate their own infrastructure were given access to points of connection (‘PoCs’) in existing networks, in order that they could offer their services over that network to their own customers. The ONP framework was designed to manage the transition from monopoly to competition in all telecommunications markets. It aimed at both liberalization of the market and harmonization of market conditions across the EU.²⁹ Particular emphasis was given to the rights of new entrants, be it service or network providers.³⁰ Consequently, the incumbent


²⁹ On the notion of liberalization see: Dommering 1993, Larouche 2000; on liberalization in the mobile sector, see Eccles 2002. On controlling market behaviour see, e.g.: Geradin, Kerf 2003. This falls into preventing abuse towards other operators, which is the topic of this book, and preventing abuse towards end-users, which this book does not cover.

³⁰ See Explanatory Memorandum to the Framework Directive, p. 3.
Introduction

telecommunications operator's (in this book: 'the TO') position was the centre of the regulator's attention. This led to the devising of the notion of significant market power ('SMP'), in order to apply regulatory intervention to the TO in a flexible manner.

By 2002 (the time of the NRF), the communications markets had become considerably more sophisticated and layered. Presumably, the continuing liberalization of the various markets and increase in competition was to lead to a gradual shift in the approach to the regulation of telecommunications.

This book will discuss whether such shift also occurred, in respect of the regulation of interconnection agreements. In doing so, a look will be had at, inter alia: (1) the role of technology and economics in interconnection agreements; (2) the public law regulation of inequality of parties in light of the freedom of contract; and (3) the scope and timing of prospective regulatory intervention by the NRA.

1.2.1 The role of technology and economics

The content of interconnection agreements is influenced more heavily by technological considerations than other information and communication technology ('ICT') agreements, which (so far) have been hardly regulated.

There are many technological issues that not only impact regulation, but also the contentious issues surrounding interconnection agreements, such as: (1) where does interconnection occur; (2) can any point in a network be a PoC; (3) how should a PoC be configured, or (4) what services must be provided to achieve interoperability.

31 In the Netherlands, the telecommunications operator ('TO') – considered having significant market power ('SMP') on the market for fixed telecommunications networks in 2004 – is KPN Telecom B.V. (formerly fully state owned). Although it makes perhaps less sense to refer to a TO all the time, for instance on other markets, such as mobile communications or Internet, the choice was made for reasons of brevity.

32 See, e.g., Besen, Milgrom, Mitchell, Srinagesh 2001, p. 292. The approach from a specific market orientation to a more generic competition orientation can also be deducted from the Commission's Recommendation of February 11, 2003 on relevant products and services markets.


34 Technological developments for a long time overshadowed the thinking on communications regulation; see also Arnbak 1990, p. 63-64. The new regulatory framework ('NRF') was intended to cover all transmission networks and services, whether originating from the telecommunications, media or information technology sectors, in a single regulatory framework that must be applied in a "technologically neutral" manner, see Recitals (5) and (18) Framework Directive. Cf. Frieden 1996, p. 2-7.

In economic terms, it must be borne in mind that economists consider the significance of telecommunications for the economy and society as a whole in combination with network effects; although the focus as regards interconnection agreements appears to have been on controlling anti-competitive behaviour and transaction cost. Hence, there are two economic justifications for intervention in interconnection agreements.

It is safe to assume that regulators considered both technological and economic effects of interconnection (at least to some extent) and attempted to neutralize possibly negative effects and enhance their positive effects, thus impacting interconnection agreements.

1.2.2 Asymmetric regulation and freedom of contract

The law enabled the TO to create and sustain a monopoly. From the factual situation - one party controlled an essential facility, the other initially had nothing in terms of infrastructure or customer base - there was a significant market imperfection which also caused an inherent inequality between the TO and the other licensed operators ('OLOs'). Hence the emphasis on asymmetric regulation, with the imposition of heavier duties on the TO, considered to have SMP on the relevant segment of the market. The first premise was that the TO had to be coerced in providing interconnection facilities and terms. Although this premise was not unusual in other utility industries (such as gas, electricity, water), it collided with the freedom of contract.

Although asymmetric regulation continued under the NRF, another consideration to intervene in contracts emerged. Positive network effects could turn into externalities, if the stakeholders were unable to reach an

---

37 Other licensed operators ('OLO's) is the term used in this book to describe other electronic communications network ('ECN') and electronic communications services ('ECS') providers, although, strictly speaking, the operator is not always required to have a licence or registration to ask for access to another's network. See also Van Bijnen 2005, p. 101 on the dichotomy between large and smaller professionalcontract parties.
39 Some examples will be discussed in Chapter 3 paragraph 3.5. This book is less concerned with the justification for imposing a duty to contract in general, but focuses more on imposing a duty to negotiate a contract in the telecommunications industry. For a recent analysis of the statutory duty to contract in general, see Houben 2005.
agreement even though, in principle, they would value the possibility to have interconnection. This consideration becomes more evident when there are more diverse stakeholders, and includes the position of OLOs towards other OLOs and service providers.

The EC was not ignorant on the notion of freedom of contract – at least in the context of non-sector-specific regulation – as it observed:

"The principle of contractual freedom, which is the centrepiece of contract law in all Member States, enables contracting parties to conclude contracts which most suit their particular needs. This freedom is restricted by certain compulsory contract law provisions or requirements resulting from other laws. However, compulsory provisions are limited and parties to a contract do enjoy a significant degree of freedom in negotiating the contract terms and conditions they want. This is particularly important in case the parties want to conclude a contract with special features or which needs to cover a complex situation."

It remains to be seen whether market conditions, technological and economic circumstances and EC policy objectives continue requiring far-reaching intervention in the freedom to contract between professional undertakings.

1.2.3 The timing of NRA intervention

The timing of intervention proved to be an important consideration. Regulators distinguished between interventions beforehand – i.e., regulatory measures that control market behaviour proactively (in this book: *ex ante* intervention) –, and interventions afterwards – i.e., regulatory measures that occur in response to market behaviour considered to be undesirable (*ex post* intervention). *Ex ante* intervention was specific to the sector concerned. In the field of interconnection, this type of intervention included the appointment of SMP undertakings and intervention in the reference

---

40 Commission to the European Parliament and the Council on A More Coherent European Contract Law, 2003/C 63/01, paragraph 81, although the point is made in the context of promoting the elaboration of EU-wide standard contract terms and the Communication in general is concerned with non-sector-specific measures, where it can be said that the regulation in the NRF still is sector-specific.

41 Cf. note (A.T. Ottow) at District Court Rotterdam, January 31, 2003, *Mediaforum* 2003-4, p. 139 (KPN/OPTA). Ottow considers it logical that the NRA can intervene in existing (interconnection) agreements and that there is no room for the application of principles of contract law, such as good faith.

42 A difference might be merger analysis, which is applied *ex ante*. But merger analysis will take place on a case-by-case basis only and not periodically or continuously, as is the case with NRA analysis of SMP and access and interconnection obligations.
Interconnection Regulation and Contract Law

interconnection offer ('RIO'). Ex post intervention could occur at the request of the parties by the NRA, a competition authority and/or the courts. It is noteworthy that in case of ex ante intervention, the regulator must set rather detailed and sector specific rules - such as in this case the elements required in an interconnection agreement, service levels, etc. - whereas ex post intervention would enable the authorities to act more reactively, and, in particular, to decide on concrete issues whilst applying legal principles, for instance under contract and/or competition law.

Did and do electronic communications policy goals justify ex ante regulatory intervention in private interconnection negotiations and contract performance between undertakings? This sub question must be addressed within the larger context of economic planning regulation of the electronic communications markets: competition regulation versus sector-specific regulation.

The following is relevant: (1) since 1998, the TO entered into numerous interconnection agreements with OLOs; (2) OLOs entered into numerous interconnection agreements with other OLOs for different types of access and different infrastructures; (3) a great deal of interconnection transaction cost conflicts was brought before the national courts and the NRAs; (4) OLOs mostly undertook action against the TO, not against other OLOs.

The NRA was subject of much debate, including the determination of its competencies, the way in which it functions and the possible overlap and/or necessary co-operation with the competition authority. The debate regarding – conflicting – powers continues.

1.3 Interconnection and contract law

Looking at interconnection from the contractual law perspective, a number of considerations emerge: (1) how does contract law treat inequality of

---

45 In total, according to the Onafhankelijke Post- en Telecommunicatie Autoriteit's ('OPTA's') Annual Report 2002, 112 conflicts were instated in 1997-2002. Not all related to access and interconnection. Dommering et al. 2003, provide a more detailed overview. See also Chapter 8.
46 In the Netherlands this authority is called the Nederlandse Mededingingsautoriteit ('Nma').
Introduction

parties, in terms of negotiations, performance and termination; (2) what is the relevance of using standard forms for interconnection agreements and do these compare to the regulation of standard terms and conditions in contract law; and (3) what lessons can be learned from conflicts arising under interconnection agreements when interpreting their regulation and treatment under contract law.

1.3.1 Inequality of parties under contract law

For a long time, the protection of the weaker party was a guideline, both for legislators and courts, in interpreting the freedom of contract principle.\textsuperscript{47} The exception emerged as a rule that co-existed with the freedom of contract. According to some authors, inequality of parties led to inequality of bargaining power.\textsuperscript{48} This resulted in contractual imbalance. However, initially, the weaker party was understood to be the `common man': an employee, a consumer, a patient, or a traveller.

In case of interconnection, through a knight's move, a shift occurred where no longer only a private person (the end-user of ECNs or services), but also a professional undertaking (the OLO providing these services), apparently was considered to be in a weaker position than the TO.\textsuperscript{49} \textit{Prima facie}, this made sense, since interconnection agreements were `wholesale' level agreements, so that the imbalance affecting the end-users occurred at the wholesale level, whereas it impacted the consumer.\textsuperscript{50}

An important hindrance understood to exist in negotiating access was that as new entrants, aiming at offering niche and technologically advanced

\textsuperscript{47} See Hartlieb 1999/2, p. 2; Hondius 1999, p. 387.


\textsuperscript{50} See for an overview of different communications agreements and levels Chapter 6.
services, OLOs were faced with market structures that had been formed through the historical configuration of the network. The price for the level of connection was relevant to the new entrant’s business case and there was a natural difference between the offer of the TO and the wishes of the OLO; whereas the TO’s offer was not transparent. In this line of reasoning, contractual imbalance could be standard, because OLOs requesting access to the TO’s network faced similar problems, even though they possessed different levels of technical and market knowledge amongst themselves. However, often, an OLO was a TO in its home market and had already built equivalent market experience and technical experience. They were well-informed professional parties, so it is difficult to simply accept they were worse informed than TOs. A statutory duty to contract was introduced: either the parties were both required to negotiate a contract, or if a party was deemed to have SMP it could be under a duty to contract. The preliminary question arises whether these problems were large enough to consider that they could not be resolved through free negotiations between the parties, possibly under ‘light’ regulatory guidance, or self-regulation.

The Netherlands’ legal system is not altogether foreign to ex ante regulation of predominantly contractual relationships. Consider regulation to protect the interests of unequal parties with respect to unfair contract terms, employment, procurement, lease or tenancy, or agency agreements. The law then provides for rules on the protection of the weaker party. But it seldom provides for regulatory intervention beforehand. An example of ex post intervention in contractual relationships is the reasonability test sometimes applied by courts, when interpreting contractual rights and obligations, and on a different level, interference by courts or a competition authority based on abuse of dominant position, restrictive covenants or other principles of competition law. The apparent difference with other situations is that for the telecommunications sector, there was near monopolistic situation that has slowly evaporated.

---

51 The ERG Common Position 2004 confirms this assumption; see Chapters 3 and 5.
52 This is an important distinction from, for instance, contracts between enterprises and consumers, where bargaining power and gap in expertise is more evident.
53 These requirements are also called the ‘primary interconnection rule’ and the ‘secondary interconnection rule,’ see also the elaboration in Larouche 2000, p. 383ff.

As will be seen in Chapters 2 and 6, this difference is relevant from a contract regulation perspective. See Houben 2005.
1.3.2 The reference interconnection offer

Even before the various communications markets opened for competition, some TOs used a template or frame agreement, including standard terms, in preparing for interconnection agreements. This practice was formalized at the time of the implementation of the ONI framework, where the TO was required by law to publish a RIO and was prohibited to discriminate among new entrants anyway, so that the offer must be (nearly) identical to all. The TO took this obligation to mean, that it could only provide a single standard offer to the many requests by OLOs. The standard agreement was accompanied by numerous exhibits, which described in detail the technical specifications of the infrastructure and/or services on offer. These exhibits were often prepared in small working groups consisting of specialists, who did not have overall competence or understanding. And the final result hardly was tailored at the OLO's request. The starting position taken by the TO, thus led to a situation whereby presumably, there was little room for truly free negotiations between the parties.

This raised another problem. Although the use of standard contracts should reduce the duration of the negotiations, it also restricted the other party's freedom to negotiate divergences from the standard.54

The lack of transparency of the negotiations process might have added to the perceived inequality of the positions of the negotiating parties. At first sight, it is likely that the TO was able to erect many barriers to make a speedy access to its network and services and the interconnection with the new entrant as difficult as possible.55

In practice, the RIO and negotiated interconnection agreements contained major technological bottlenecks. Examples, which will be discussed more closely in this book, include the inconsistent use of technical definitions, inconsistencies between the main legal body and the extensive technical and financial annexes, the requirement of having to make binding forecasts, the (inadequate) unbundling of cost, cost accounting methods, service levels and liability.56

---

54 Cf. Girot 2001, p. 4-5.
55 In most cases, this is simply assumed, either based on economic or social considerations, see, e.g., ERG, Common Policy 2004.
56 See Chapter 7.
1.3.3 Conflicts regarding interconnection agreements

Whereas the negotiations process regarding an interconnection agreement already posed its own dynamics, in practice problems also arose once the interconnection agreement was concluded. For instance, problems could occur regarding the performance by the party on the 'giving' side of the agreement, including the observance of delivery dates, the failure to observe minimum service levels, or the interpretation of technical and business elements of the often very elaborate and complex interconnection agreements.

In an agreement between the TO and an OLO this poses the question whether contract law provided the new entrant adequate tools to stand up against the TO and demand for effective performance or other remedies. It must be borne in mind that, in the telecommunications context, the EC regulator concentrated on analysing the position of the market parties, not on the tools available under contract law. The premise was that regulatory intervention at some stage would be justified, but the EC regulator largely ignored the possible role that intervention by courts could play in terms of agreements.

1.4 Delineation of research objectives and justification of comparative approach

The objectives of this thesis require a two-step approach. First, the regulatory framework is analysed in detail where it addresses interconnection agreements. Second, contract law must be applied to interconnection agreements (paragraphs 1.4.1-1.4.2). The research objectives will be considered predominantly from an EC and a national law perspective. The justification for Netherlands' law is presented in paragraph 1.4.3. A brief overview of the legal resources is given in paragraph 1.4.4.

1.4.1 Delineation of research and normative framework

The premise of this research is that since agreements form the prerequisite for interconnection and arrangements aimed at achieving interoperability, the regulatory objectives of the EU, Member States governments and NRA's cannot be seen entirely separate from the contractual aspects surrounding such agreements.

The ONP framework introduced a two-tier model to regulate access. NRA's were created and bestowed powers to intervene in the contract formation process for interconnection, as the market needed to be opened for competition and specific duties could be imposed on SMP providers.
The imposition of a statutory duty to enter into an agreement is not foreign to most legal systems. The obligation to enter into an agreement is applied across various sectors, including the electricity, gas, postal and transport sector. But this legal obligation forms an exception to an important principle of contract law, notably the freedom to decide whether or not to enter into an agreement. It is one of the basic principles of contract law that applies also in the EC Member States: parties are free to determine the terms and conditions of their agreement through private negotiations, without government intervention beforehand or afterwards, except for judicial intervention in special circumstances.

In the context of interconnection, freedom of contract was not the prevailing norm. An exception to the contract law principle was introduced through public law, and it required a justification from the regulator.

The Commission did not consider in depth the question whether the power of the NRA to intervene in interconnection agreements, both in the contract formation process and in the contractual relationship, was justified in light of the freedom of contract where private undertakings were involved. Under the NRF, the Access Directive provided that intervention could occur, where former monopolies continued to benefit from inherited market power. In the field of interconnection, the EC regulator and the Member States did not clearly delineate the competences of the different bodies and introduced a possibility for the NRA to intervene

---

57 The notion is applied broadly in German law, where it translates as Kontrahierungszwang.
58 Houben 2005, p. 1 provides further examples and also explains that the duty to enter into a contract may result from competition law, criminal law, or equal treatment regulation.
59 Obviously, as a result of EC law, freedom of contract was not always the norm, for instance, in respect of competition law concerns; see Articles 81-82 EC Treaty. Cf. Krans 2004, who concedes that EC law has an important impact on the freedom of contract. See, as regards the Netherlands, Asser-Hartkamp 4-II 1997, p. 38 who states (ibid): “Our society, vested on a trade system of goods and services, is unthinkable without a certain freedom to enter into contractual relations. The general interest requires this freedom of contract (...)”. See also Article 1.1 UP. For further reading on freedom of contracts, see, e.g.: Hartlief, Stolker 1999, Hartlief 1999, Busch et al. 2002, Kaye 1990.
60 See, e.g., Asser-Hartkamp II 1997, nr. 38 where it is observed (translated from Dutch): “The general public interest requires this freedom of contract, but also determines, if and to what extent, this freedom must be restricted. This restriction will not be the same for all, but will depend on social circumstances.”
61 See Houben 2005, p. 348 who concludes the same.
Interconnection Regulation and Contract Law

even prior to the contract being formed, without considering first, whether contract law in itself could offer adequate remedies that would take away the necessity of broad such ex ante intervention. The NRA was empowered to order SMP parties, notably the incumbent TO to publicise a standard interconnection offer, the RIO. But, the regulator did not consider the status of such an offer; or the administrative law principles to be applied in intervention; nor did it consider the way such an offer would have to be negotiated.

The starting point in this thesis for analysing the regulatory approach to interoperability and interconnection was sculpted by three legal and policy considerations: (1) government intervention in contracts' formation and performance between undertakings should be focused on warranting competition; 65 (2) regulation of the parties' obligations in respect of interconnection must be supported by clearly formulated, unequivocal policy objectives, especially where it concerns the protection of special interests; and (3) market intervention must conform to principles of adequate regulation, such as, in the field of interconnection, effectiveness and sustainability. The analysis of contractual aspects of interconnection in this thesis was based on two considerations: (4) could contract law itself prove to be an adequate means of bringing about interconnection; (5) are there sufficient remedies available under contract law to the weaker party.

---

63 See Dommering et al. 2001, p. 91 who identifies fifteen points of criticism against the 1998 Telecommunications Act (Telecommunicatiewet, Tw), which included an unclear delineation of the role of civil courts and the NRA with respect to interconnection agreements. It is mentioned that the 1998 Tw created no competence for the NRA to apply competition law in consultation with the NMAs.

64 The notion SMP follows from the regulatory framework for ONP, cf., e.g. the Commission's Guidelines on market analysis and the calculation of significant market power, 2002, OJ C 165/6 (2003), 497 and specifically for interconnection the Notice on the Application of the Competition Rules to Access Agreements in the Telecommunications Sector, 1998, OJ C 265/2. See also for the Netherlands, OPTA Guidelines (2000). The criterion for the establishment of SMP has been subject to a thorough review at the EC level. See Article 13 Framework Directive, to be further discussed in chapter 3. See also Geradin, Kerf 2003, who provides a conceptual framework for analysing market power in telecommunications, including a comparative analysis with the United States, New Zealand, the United Kingdom, Chile and Australia.

65 Cf. the four rationales described, infra, paragraph 1.1.1.

66 Cf. Donner et al. 1998. See also Hancher, Larouche, Lavrijsen 2004, p. 4ff, who provide a set of principles for good market governance that include transparency, accountability, proportionality, consistency, predictability, flexible powers, clear legal mandate, independence and respect for competition law and policy.
**Introduction**

**Government intervention to warrant competition**

It has been stated that the regulatory intervention in interconnection agreements was aimed at the promotion of competition.\(^67\) The first consideration asserts that there exists an adequate legal level of protection to ensure and promote competition and act effectively against anti-competitive behaviour as regards the formation and performance of interconnection contracts. Sector-specific regulation may be required to (further) open up markets, where a party has control over essential facilities or in case of SMP.\(^68\) Yet often it is felt that sector-specific regulation must be as light as possible, leaving competition to market forces as well. Even if, undoubtedly, OLO's could face difficulties in trying to establish interconnection with the TO or another OLO, it can be assumed that most companies would be reasonably able to negotiate this without government help; setting aside the issue of pricing.

The contention is therefore that it is doubtful whether sector-specific regulation should serve indefinitely beyond a transition period to fence off predominantly private contract negotiations between undertakings.

**Regulation must be supported by clearly formulated, unequivocal policy objectives**

The second consideration asserts that any kind of regulatory intervention needs to be clearly explained to the addressees of the norms as well as to the public.\(^69\) This will add to transparency, consistency and predictability of regulation.\(^70\) This contention introduces two subjective requirements:

---

\(^{67}\) See Chapter 3 paragraph 3.3.

\(^{68}\) Cf. the 'essential facilities' doctrine. See also Hancher, Lugard 1999, Larouche 2000, p. 165, Houben 2005.

The commission identified three scenarios when it considered the application of EC competition law in the 1998 Access Notice: (1) a refusal to grant access for the purposes of a service where another operator has been given access by the access provider to operate on that services market; (2) a refusal to grant access for the purposes of a service where no other operator has been given access by the access provider to operate on that services market; (3) a withdrawal of access from an existing customer. But the doctrine is concerned mostly with situations where a provider denies access completely. As will be seen in chapters 3 and 6, interconnection is not a situation where the TO denies access in full.

\(^{69}\) See, e.g., Prins 1995, p. 100ff.; Prins suggests that a careful consideration of different general principles of law appears to be less critical when regulators are making law. Applying this to the regulation of interconnection, it must be considered whether the EC and the local regulators have indeed carefully considered the roles and interests of various parties. See also Van Dam 1994, p. 24-26.

(1) what is clear and who decides this; and (2) what does unequivocal mean in the context of telecommunications regulation, where the market is in constant flux?

In my view, ‘clear’ means that it follows at least from legislative history, the recitals or explanatory notes to regulation, what the legislator wishes to accomplish; and in the telecommunications sector, where different objectives and interests need to be balanced, that the legislator explains how it thinks these interests can be balanced through regulation. If the regulator needs to balance different interests, the choices made in terms of what interests prevail need to be motivated, not only to justify the intervention, but also to facilitate later judicial interpretation of the ensuing rules. If the need to force a TO to enter into an agreement with an OLO prevails, then the regulation must make clear why.

‘Unequivocal’ means that the principles as applied by the legislator should not be open for different interpretation. However, in the field of interconnection agreements a problem is that public and private law principles are merged, and their legal interpretation is left to different institutions that are not always positioned to apply these principles consistently. For example, if it is accepted by the Commission that in the field of interconnection agreements a duty to negotiate an agreement can be justified, it must also make clear why the freedom to contract should be cast aside.

**Regulation must be adequate**

In the modern era, citizens who are informed well closely monitor the role of the government. They will judge the success of the government based on the results of regulation it enacts. The third consideration argues that regulation must work. It is closely tied with the second consideration that includes an assertion that regulation with a purely instrumental character is best avoided. Again, the question whether regulation works is largely of a subjective nature and the outcome may vary according to the stakeholder: what will work for the TO, will not necessarily work for the OLO. But, public law itself provides the principles to determine whether regulation works. The regulator must consider principles of administrative law, e.g., lawfulness, effectiveness, sustainability, simplicity and proportionality when introducing and enforcing regulation in the field of telecommunications, such as the duty to negotiate an interconnection agreement or the imposition of cost oriented prices. And an important condition therefore is that there must be a clear legislative mandate.\(^{71}\)

---

‘Effectiveness’ has been recognized as a principle of EC law as regards the implementation of EC Directives.\(^2\) It can be measured through economic or competition analysis, or market consultation, but not through a unilateral consideration by the government, as there must be an independent supervision of the market.

‘Sustainability’ is probably somewhat easier to measure: it is preferred that legislation does not change that often, as this may create uncertainty with citizens and within industry sectors. The (desired) effects of the rules must be predictable.

‘Proportionality’ means that action is taken only when really necessary, that the measures chosen are appropriate.

**Could contract law principles bring about interconnection?**  
The fourth consideration expands on the first. If government regulation in the field of telecommunications is to be restrained, it must be established that self-regulation, for instance, through the conclusion of contracts, serves to promote competition, even if there are market imperfections. In the field of interconnection agreements, the main consideration is whether the TO is and continues to be in a position to prevent contract formation or stall its performance simply by refusing to deal, thereby delaying competition. If this is the case, then it must be seen whether existing principles of contract law, such as good faith negotiations and the remedies connected thereto, can serve to warrant competition; possibly with the application of some public law intervention.\(^3\) An OLO should also be able to invoke contract law principles when it wishes to enter into an agreement with an unwilling TO or another OLO, or when it needs to take action against a TO or another OLO when such party does not perform its contractual obligations, thereby warranting competition through the application of private law. The reasoning behind this consideration is to some extent coloured by political or economic beliefs: contract law may offer better protection of the weaker

\(^2\) See: Article 10 EC Treaty; ECJ 10 April 1984, Case C-14/83, [1984] ECR 1891 (Von Colson and Kamann/Land Nordrhein-Westfalen), and discussion in Andenas, Ziepltnig 2004, p. 54ff. Courts must apply national law in accordance with and while respecting the body of Community law, see: ECJ 13 November 1990, C-106/89, Jur. 1990, p. 1-4135, NJ 1993, 163 (Marketing). The principle was confirmed in the area of electronic communications law in ECJ 22 May 2003, Case C-462/99 (Connect Austria/Telekom-Control Kommission and Mobilkom Austria). In that case, it concerned the necessity of being able to appeal decisions by the Austrian NRA.

\(^3\) Since it concerns dealing between undertakings, the question whether administrative law could warrant competition is not posed in this book.
party than public law; notwithstanding that competition law remains extremely relevant in sculpting the private law considerations.

**Sufficient remedies for the weaker party under contract law**
The fifth consideration finds its basis both in public and private law. It posits that the party who controls the essential facilities is in a stronger position, and possible network externalities TO must somehow be neutralized.

The ONP framework introduced a new institution, the NRA, and one of its competencies was to facilitate contract formation. If the regulatory framework provided for a statutory duty to negotiate and to contract in case of SMP, could the civil courts enforce such a duty? Otherwise put: does contract law provide sufficient remedies to balance the divergent goals of the stakeholders?

'Sufficient' means that the weaker party not only has access to the courts, but can also obtain a judgement or measure within a reasonable time period that can be enforced against the TO to enable the OLO to reach its goal: obtain access or interconnection and ensure performance by the TO.  

1.4.2 Research objectives
This thesis focuses on the legal aspects surrounding the regulation, negotiation and performance of interconnection agreements in light of interoperability of networks. Looking at the different policy goals and different stakeholders, the first research objective is to determine whether from both the regulator and the market's perspective, freely negotiated or regulated interconnection agreements should be preferred. A sub question is how and when government and semi-governmental bodies should intervene in the process of contract formation and performance. To that effect, the effectiveness of intervention will be measured against the principles of adequate regulation.

---

74 Timing is an important issue. Many authors complain that procedures before the ordinary courts are lengthy, tedious and costly. This then provides a justification for an active role being played by an NRA. Cf. one of the conclusions of Houben 2005, pp. 350-351. But, this also requires an insight into the timing of procedures brought before the NRA. Is the NRA better and quicker able to impose the duty to contract on an unwilling TO?

75 Few literature sources deal with this question. See for an early example, Van Stralen, De Roover 1995.

76 This book does not propose to rewrite or analyze in-depth either EC law, administrative law or contract law principles, such as the freedom of contract. It can merely attempt to refer to and apply the law as concisely and accurately as possible.
Introduction

The caveat in delineating the foregoing questions is that the answers thereto might well vary dependent upon what the underlying rationale is and dependent upon market analysis of the telecommunications market. This requires a chronological treatment of the regulation and practice of interconnection. The emphasis in this thesis lies on the period 1998-2004, that is, between the time of the implementation of the ONP framework and the implementation of the NRF.

This thesis does not treat general access issues (which, following the manner in which the interconnection regime was initially given form in the Interconnection Directive is also referred to as the ‘secondary interconnection rule’) in great detail. It will rather consider the obligation to enter into reciprocal interconnection agreements as a means of establishing positive network effects (also dubbed as the ‘primary interconnection rule’). Although site access, universal services and rights of way are also relevant to the promotion of interoperability, there is less regulation of their contract formation and performance. Since the approach of this thesis is to look at interconnection as a contractual tool to establish interoperability, the regulation of the contractual side of interconnection is the focal point in considering interoperability issues.

Part I discusses the regulation of interconnection. The second chapter aims at describing the technological features of access and interconnection and the economic aspects surrounding it. In brief, interconnection questions are: where (meaning at which PoC), when (meaning against what type of timing schedule), how (meaning against what commercial, technical and legal conditions) and against what price. The economic justifications for intervention are reviewed to determine how they affect the policy objectives and whether they offer an indication as to how and when intervention is necessary. Chapter three describes the international and EU regulation of

---


78 Under the current legal framework in the Netherlands, interconnection is considered a specific type of access. Under the 1998 Tw it was more or less the other way around: special access was considered a specific form of interconnection. This created definition issues that will be discussed in Chapter 4.

79 I.e., specific services the TO is obliged by law to offer, access to grounds or ducts is not covered. Special access, meaning specific electronic communications services offered by OLOs that are contentious will be discussed at a high level.
interconnection regulation and contract law

telecommunications, with emphasis on the regulation of interconnection agreements. Furthermore, it will be investigated in this context which party (who) must provide the means for interconnection. A brief, high-level comparison is made with other regulated markets, such as the electricity and gas sectors. The fourth Chapter discusses the implementation of the NRF as regards interconnection at the national level, with emphasis on the Netherlands. Some comparisons will be made with the United Kingdom and Germany. Chapter five investigates the role of the NRA in the regulation of interconnection and access. The administrative law approach to interconnection will be juxtaposed with the civil law considerations in respect of interconnection. The NRAs role will be discussed and compared with the position of the civil court and the notion of SMP will be analysed.

Part II provides an analysis of interconnection from a contract law perspective. Chapter six investigates the contract law side of interconnection. How does an interconnection agreement come about? Notions as good faith negotiations, offer and acceptance, and the protection of weaker parties – such as in respect of the use of standard terms and conditions – and remedies will be explored in the context of an interconnection agreement to establish whether contract law forms an adequate framework in itself for access and interconnection. The seventh chapter reviews the manner in which the NRA in the Netherlands has regulated the RIO. Its decision on the TO's 2000 RIO is discussed. The KPN Telecom RIO available at the time of writing is analysed and compared with the BT RIO. Chapter eight considers a number of interconnection disputes in the Netherlands at a high level. An attempt is made to categorize the subject matter for the conflicts. The final chapter contains the conclusions and recommendations of this research.

1.4.3 Justification of Dutch law and comparative law approach

Most Member States implemented the EC Directives by means of a framework act, whereby much important further regulation is left to secondary legislation, i.e., regulation by other bodies than the legislative power. The parties to interconnection agreements, contracted under national law. Interconnection remained a national phenomenon.

---

80 See Decision RIO 2000.
81 Cited Decision 1376/2002 revising Decision 1336/97 on a series of Guidelines for trans-European telecommunications networks, 2002 OJ, L 138/1, which refers mostly to national wholesale markets, although it also acknowledged that international interconnection becomes more and more important. Otherwise: Galbi 1998. See on the determination of settlement rates, Madden, Savage 1998.
Introduction

Yet, in light of the existing ever developing and increasingly international market for telecommunications services, it was perhaps less practical to treat interconnection and the communications markets tied thereto on a national basis only.82

1.4.3.1 Dutch law and interconnection
The Netherlands poses an interesting example in the area of both regulation and interconnection practice. A fairly liberal market, both under the ONP framework and the NRF, there were significant difficulties in defining where interconnection occurred and what the difference was between a request for special access and interconnection, which may have been the result of inadequate legislative drafting,83 which in its turn led to difficulties in assessing interconnection obligations. The powers of the Dutch NRA, de Onafhankelijke Post- en Telecommunicatieautoriteit (‘OPTA’), were subject to much debate and legal scrutiny. Finally, many interconnection disputes were fought over in the Netherlands.

1.4.3.2 Comparative analysis
It cannot be expected that significant differences will emerge from the manner in which the EC Member States incorporated the regulatory framework into their national laws, but differences may emerge as regards the freedom to contract access and interconnection agreements. This analysis should offer starting points for the determination as to whether: (1) the EC framework was clear and led not only to liberalization, but also to harmonization of national regimes in terms of intervention in the formation and performance of access and interconnection; and (2) there can be fair and transparent competition among TOs and OLOs across the Member States seen not only from the regulatory perspective but also in light of the intervention in contract formation and performance. Lessons may be learned from the United Kingdom, which was one of the most liberalized markets in the EC and was at the forefront in such varied areas as unbundling and division and allocation of regulatory powers; and from Germany, like the Netherlands, and unlike the UK saw a good deal of

82 Cf. also Article 21 Framework Directive, which leaves the settlement of international disputes to one NRA only, see also Chapter 5.
interconnection disputes. Since contract law has not been harmonized yet across the EC, some comparison must be made with the contract law in the two jurisdictions.

A fairly strong reference is made to available sources of comparative contract law, such as the UNIDROIT Principles (‘UP’) and the Principles for European Contract Law (‘PECL’). These sources are not binding law. Yet, they provide insights in the important contract law principles applied in the various jurisdictions of the EU.

The comparative analysis remained somewhat concise, since the sources were rather difficult to compare with the Dutch situation.

1.4.4 Legal resources

This research does not pretend to offer an exhaustive overview of EC electronic communications regulation in the broad sense, or a comparison of competition law and sector-specific relation. The viewpoint is EC regulation of interconnection and contract law. A number of legal resources were available and used in doing the research: (1) at the macro-level preceding the first level of regulation, the economic and technical aspects that impact (the regulation of) interconnection; (2) international standards and treaties in the field of telecommunications law. Such treaties played a role in the facilitation of roaming (i.e., making it possible for subscribers to telecommunications to use their handsets in different territories), but also in providing guidelines for national states dealing with interconnection issues. However, their relevance for the questions under investigation was limited; (3) EC regulation. The process of further liberalization of the telecommunications markets was largely driven by the EC; (4) national legislation regulation of telecommunications. Legislation was often supplemented by numerous

---

84 Lloyd, Mellor 2003, p. 88 note that in the UK only a small number of disputes handled by the NRA were subject to court appeal, notwithstanding that the NRA would typically take in more than 100 disputes a year as well.

85 Note that the EC regulation of interoperability and interconnection applies in the United Kingdom, but that English law as opposed to the different systems (e.g. Scottish law) is discussed only in the contract law chapter.


87 See Council Decision (97/838/EC) of 28 November 1997 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the results of the WTO negotiations on basic telecommunications services, (1997) OJ L 347/45, 18 December 1997, also known as ‘the Fourth Protocol.’
executive measures, such as ministerial regulations and decisions; (5) decisions of the NRA. The NRA played and continues to play a major role in the interpretation and formulation of the rules surrounding the interconnection process; (6) (administrative) courts' decisions.

1.5 Different stakes and the research objectives

Broadly speaking, there are four categories of stakeholders other than the EC and the national legislator: (1) the incumbent TO, which had a monopolistic position at the time of the ONP framework. This position had eroded significantly once the NRF was implemented, although most incumbent TOs maintained a dominant position on their markets; 88 (2) the broad category of OLO's seeking access from the TO and interconnection with the TO's networks and each other; (3) the NRA; 89 (4) the end-users at every network level.

Even by 2005-2006, the Netherlands' legislator motivated the need for regulatory intervention at the national level simply by referring to the general public interest. 90

This appears a too broad policy aim, for a vibrant and hybrid sector. It will be attempted to provide a somewhat more nuanced approach to regulatory aims, in light of the normative framework described in this Chapter, by using the picture below:

On the left side of the drawing the social dynamics are depicted. They include givens such as market structure, users and standardization and goals, such as competition, access and innovation. On the right side are the available means: technology and infrastructure. The interaction between economics and technology is underlined by the connecting oval in the centre. All goals may be accomplished through policy development and that is why policy and institutions form the centre of the ellipse. The model does not, however, offer an indication as to contract formation issues and considerations. It is not immediately clear where these should be placed. What this thesis proposes to add is the use of contracts, private law, in bringing together these varied goals and interests.


89 The emerging cooperation of national regulatory authorities ('NRAs') through the European Regulators Group ('ERG') will be discussed in Chapter 5.

90 See Explanatory Memorandum to the 2004 Tw.
Interconnection Regulation and Contract Law

The above figure may help to demonstrate how the different interests are connected, since ECNs can be considered networks from an ICT perspective.91

In sum, when analyzing the regulation of interconnection and the formation of interconnection contracts the various interests identified beforehand are: (1) the need to stimulate actual and fair free competition in the electronic communications markets within the EC; (2) the enabling and facilitation of the introduction and implementation of new technology at fair prices within the EC; (3) the protection of the interests of end-users, *inter alia*, through the guarantee of a minimum service level (the universal services) and the stimulation of competitive end-user pricing; and (4) the importance of maintaining the freedom to negotiate civil law contracts.

---

91 Source: NWO, NVN Symposium 2004 ‘Network of Networks’.
I The regulation of interoperability, and of access/interconnection agreements
2. Technological and economic aspects

2.1 Introduction

Interconnection of electronic communications infrastructure is based on the fundamentals of: (i) "any-to-any" connectivity, (ii) at any network level, and (iii) fair prices (including at the wholesale level).

In a monopolistic market, any-to-any connectivity may be warranted through a single conduit technical infrastructure and the network level is irrelevant. Wholesale prices are not applicable. This situation does not benefit cost-effective pricing, since the network is not necessarily efficiently exploited and there is no competition between operators.

Gradually, the scenario transposed from one telecommunications operator ("TO") offering telecommunications services through a single conduit technical infrastructure to the evolution of numerous other licensed operators ("OLOs") wishing to offer their services an intricate network of networks.

Increasing competition at the infrastructure level led to a situation whereby different technologies – technologies that were not necessarily interoperable with the technology employed by the TO – came to co-exist. Early examples were combining fixed with mobile, cable or satellite infrastructure.

In the late nineties of the 20th century, the network infrastructure diversified immensely. For example, local transmission, once the exclusive domain of the TO, faced competition from cable television providers, electricity companies, fibre-based metropolitan area networks, wireless fixed and mobile carriers. In addition to physical carriers, digital subscriber line ("DSL") providers and Internet service providers ("ISPs") started to compete with the TO.

Interconnection in the 21st century must be seen in light of the process of on-going convergence between the different infrastructures. Infrastructure as such no longer leads the provision of electronic communications services ("ECS"). The transmission of large packets of data, e.g., using Universal

1 Competition was made difficult due to the fact that the telecommunications operator ("TO") controlled essential facilities, such as points of connection ("PoC's") and end-user connections. See on the notion of essential facilities, e.g., Larouche 2000, Doherty 2001, Hancher, Lugard 1999, Lipski, Sidak 1999 and Chapter 3.

2 For instance voice over broadband, Internet over broadcasting, etc. See for a non-exhaustive description of value-added electronic communications services, Clarkson, Smits 2003, p. 35ff.
Interconnection Regulation and Contract Law

Mobile Telecommunications Services ('UMTS') technology – consisting of elaborate ring tones or visual content – has become the prime focus to attract ECS users. The growth of new services requiring high-speed connections, such as broadband, enables further convergence.3

In terms of interconnection, perhaps the most striking development has been the move from classic telephony over the fixed infrastructure to Voice over the Internet Protocol ('VoIP').4

Whatever the technological and economic changes, new entrants are unable to successfully market their services, unless they obtain interconnection with other providers, at least with or through the TO, against competitive prices.

This Chapter discusses technological and economic aspects relevant to interconnection regulation and contracts at a high level.

2.1.1 Technological aspects

Chapter 1 discussed four possible rationales behind the regulation of interconnection.5 One reason is technological progress, requiring a neutral approach to regulation, as technology is enhanced and regulation is unlikely to keep up with the speed of innovation. The Commission has stated its preference for 'technology neutral' regulation (without increasing undue regulation). But, the notion of technology neutrality is not very clearly elaborated in regulation and is based on a difficult to sustain view that regulation must create equivalent conditions for each service, no matter the infrastructure.6

---


4 For an extensive description, see Bach, Sallet 2005. On the issue of pricing, see Valcke, Stevens, Dumortier 1999. See also press release IP/05/167, February 11, 2005 in which the ERG has expressed its support for the development of competitive Voice over the Internet Protocol ('VoIP').

5 Cf. paragraph 1.1.1.

6 See also paragraph 2.1.1 of the Communications Review and Orientations for the new Regulatory Framework (provisional text), COM (2000) 239 final ("Communications Review"), where the Commission states: 'One principle on which there was broad agreement was that regulation should aim to be technologically neutral. There was general agreement that equivalent services should be regulated in an equivalent (although not necessarily identical) manner. Thus communications services using Internet Protocol (IP)-based networks should for example be treated in the same way...
Technological and economic aspects

Information and communication technology (ICT) agreements are not regulated heavily and much is left to the discretion of the parties. Interconnection agreements, on the contrary, are regulated extensively, but the technical specifications and issues will vary from contract to contract.

Over time, the regulator became interested in evolving alternative infrastructures and technologies, such as mobile and the Internet, which sometimes led to uncertainty with market players. However the notion of technology neutrality is interpreted, the law and regulation clearly took varying views of, e.g.: (1) cable network (fixed) interconnection; (2) interconnection between new technologies and cable networks; and (3) interconnection between new technologies.

The technical side of interconnection is concerned, *inter alia*, with the questions as to what networks are connected, where networks will be connected, and how calls and data can be transmitted. The main point of reference for the parties will be the point of interconnection (often abbreviated as the ‘PoC’). PoCs are those parts of the networks (e.g. switches, local exchanges) where connection occurs. Interconnection links are the transmission facilities between networks to connect to PoCs. Defining and detailing PoCs and technical specifications are basic to an interconnection agreement.

Other technical questions that directly impact the regulation of interconnection include: (1) how a particular PoC and/or ECS needs to be configured to enable transmission; and (2) what type of services will be provided over the infrastructure.

---

7 See, e.g., Jew, Reede, Nicholls 1999.

8 Numerous examples can be given, for instance, Universal Mobile Telecommunications Services (‘UMTS’) operators with Fixed Satellite Services (‘FSS’) operators, or Asymmetric Digital Subscriber Line (‘ADSL’) operators who provide broadband access to interactive television (‘iTV’) services.

9 See Noam 2001, p. 185ff.


11 This is dealt with in Chapter 7.
Interconnection Regulation and Contract Law

A question that arose in the context of technological developments was whether new technologies – Internet access, Instant Messaging ('IM'), VoIP – should form part of a standard interconnection offer.\(^{12}\)

2.1.2 Economic aspects

In Chapter 1, the transaction cost rationale was mentioned. Like gas, water, transport and electricity, telecommunications have long been considered public utility services.\(^{13}\) Especially when it concerns economic aspects, the different interests of the stakeholders (the national regulatory authority ('NRA'), the TO, the OLO and consumers) become evident.\(^{14}\)

Traditionally, collective goods, such as infrastructure, were subject to regulation at the European Union ('EU') level, as it was felt that services of the general interest required Community regulation. Later, (de-)regulation was motivated predominantly by the desire to break down or prevent monopolistic behaviour. Once the markets gradually faced competition, the regulator had to consider different measures, and, for instance, see to prices being set for the services in a manner that would ensure efficient and competitive entry and avoid inefficient entry.

Logical interconnection was required to integrate disparate network levels. Tension arose as the TO could employ abusive pricing strategies not only to maximize its profits, but also to deter OLOs from entering the market; whereas the OLO wanted to obtain the best price and conquer the same market.\(^{15}\) In this context, the weaker bargaining position of the OLO becomes manifest.

The electronic communications sector is characterised by strong interdependencies between all market players, meaning that OLOs also depend on other OLOs to create valuable networks and services. Conversely, a new challenge was posed as to the possibility that OLOs could deny other OLOs access or could use price discussions with the TO as a means of gaining


\(^{13}\) It should be noted that most theories on the regulation of interconnection prices originate from normative literature on the tariff structures involving public utilities. See for an overview of relevant literature, Noam 2001, p. 76.

\(^{14}\) See Chapter 1, paragraph 1.5.

subsidies from the NRA. A special problem was caused by call termination monopolies, especially as regards the wholesale market for call termination on a single mobile network.¹⁶

In light of new technological developments, such as VoIP, new pricing models between different types of operators emerged.¹⁷

Consumers benefit from competitive and transparent pricing. A challenge for the new entrant was that the end-user had to be offered transparent pricing in order to be lured away from its long-standing provider, the TO, whereas wholesale prices charged by the TO were not sufficiently unbundled.

In sum, from an economic perspective, there is a marked difference between the regulation of dominant behaviour and the regulation of (other) transactional access issues, which difference impacted regulation and intervention.¹⁸

2.1.3 Scope of work

OLOs negotiating interconnection agreements must involve staff members that have a basic understanding of the terminology related to and the economics of interconnection. This Chapter discusses the technical and economic aspects of interconnection, in the following order: basic technical aspects of electronic communications relevant to interconnection (2.2), different forms of interconnection (2.3), structuring interconnection (2.4) and the economic aspects, including competition and cost accounting issues, relevant to access and interconnection (2.5). An interim conclusion is contained in chapter 2.6.

This Chapter does not describe in detail either the technological or economic aspects of telecommunications in the broad sense.¹⁹ It does not discuss issues relating to, for example, transmission levels, standardization, or spectrum management.²⁰

¹⁷ Even by 2005, communications providers have not been eager to provide transparency in terms of pricing, see Pijnacker Hordijk 2004.
¹⁸ Cf. Larouche 2000, p. 382ff. The differences as regards interconnection will be discussed, infra, paragraphs 2.5.1-2.5.2.
¹⁹ For an introduction on pricing as regards the Internet, see Knight, Bailey 1995. Re the debate on competition law reliance, see, e.g., Pitt 1999.
2.2. Technical notions

Understanding a basic electronic communications network ('ECN', 2.2.1), the network topology (2.2.2) and the hierarchy of an ECN (2.2.3) is relevant to grasp access and interconnection.

2.2.1 Basic ECN

A basic ECN consists at least of: (1) transmission links and (2) switching nodes. The main types of transmission for ECNs consist of circuit and packet switched transmission. Physical interconnection can occur at various PoCs.

Transmission links

The transmission links provide for the trafficking of voice and data over the networks. Signals are transmitted from one link to another until they reach their termination point. If the links in two interconnecting networks are technically the same, then, in principle, interconnection requires only that these networks be connected in a manner which allows error-free transmission of voice and data.

The PoC is where the network of the provider of an ECN or service is connected with another network or service provider. If the PoCs for two interconnecting points are fully compatible, then interconnection can be established simply by linking them physically. Inserting a plug can achieve this. The size of such a plug may vary, depending upon the number and size of providers establishing interconnection. From a technical perspective, however, the process is the same.

When considering interconnection, service providers need to look into the technical specifications of the transmission link which are relevant to the TO and the OLO, as they must determine their technical compatibility, or interoperability.

---

21 See also Smits 1991.

22 After networks have been connected, there will be actual transmission of signals. There are various types of transmission, including dedicated and switched services. For the purposes of this book, switched services appear in two main varieties: (1) circuit switching, commonly used for basic telephony services. Here a direct physical link is established between two points and the circuit of the link is kept open for the duration of the telephone call; and (2) packet switching, commonly used for all kinds of data transmission (see below). In this case, a message is broken down in small packets and is transmitted in small packets along different routes, but to the same final termination point, see Noam 2001, p. 185-187; Glossary Annex.
Switching nodes
The switching nodes will route the voice or data through the gateways. The connection is achieved through the interworking function (‘IWF”).

Circuit switching
Circuit-switched interconnection used to be the predominant method used for voice transmission. It resulted in a fixed and well-defined circuit, thus facilitating sound voice transmission. Setting up a physical circuit (as long as two callers are communicating) has become less common.

Put simply, if a call is made, the TO and OLOs handling the call must determine how the cost will be divided amongst them.

In addition to a call charge from the subscriber’s network operator, an inter-operator termination charge may apply, which may be based on metered usage. There lies contention in the level at which the termination charge is made. It follows from the discussion of different forms of interconnection in the succeeding pages, that, for instance, in case of indirect interconnection, several inter-operator terminating charges may apply; thus increasing traffic cost.

Packet switching
Packet switching – the basis for Internet Protocol (‘IP”) interconnection – has become more popular for its flexibility. The system automatically selects how call traffic will be directed, depending upon traffic density. The message is broken down into small packets that are transmitted separately – possibly along different routes – to the network termination point (‘NTP”), where they are reassembled in the correct order.

Packet switching used to be applied predominantly for data transmission. As the market demanded network integration, Asynchronous Transfer Mode (‘ATM”) technology was developed as a faster method of packet switching so that voice and data could integrate. At the onset of the 21st century, VoIP (which employs packet switching) posed mixed results. Users would hear each other sometimes in a slightly garbled manner. However, by the year 2006 the technology had been enhanced significantly and service provision


See also Walden, Angel 2005, p. 218ff.

and competition was considered an important growth area, thus attracting the attention of the NRAs.\footnote{This occurred, for instance, in the Netherlands. See draft decisions published on 1 July 2005, including with respect to VoIP, www.opta.nl.}

**Difference between circuit and packet switching**

In sum, the main difference between circuit and packet switching is that circuit-switched networks must have a method of setting up a connection from subscriber A to subscriber B, before any transmission can take place, whereas this is not necessary for packet-switched communications. The routing of packet-switched transmission increases not only the reliability and efficiency of a network, but also decreases overhead cost. Conversely, delays in circuit-switched communications are normally for a fixed period only; in packet-switched communications, delays can vary.\footnote{See Walden, Angel 2005, p. 6-7.}

**Physical and logical interconnection**

The connection of networks physically can take place at almost any level in the network. The interface must perform a conversion between the two different media, e.g. from a wireless to a satellite transmission mode.\footnote{See Noam 2001, p. 186.} The increased focus on, e.g., data and VoIP requires that the interface provide a logical connection, too. As a result, interconnection has become software driven. The digitalisation of signals has made it possible for intelligent networks ("INs") to be incorporated in the switching centres – which can perform many network functions. If the switches and gateways provided the physical interconnection, the software provides the compatibility of the voice and data created and transmitted over the connected networks.\footnote{Cf. Noam 2001, p. 194.}

**Point of access ("PoA") and PoC**

In order for subscriber A to communicate with subscriber B, the following simple base model for interconnection can be used.

---

**Figure 2.1 Basic notions**

![Diagram](attachment://diagram.png)
The PoA or connection line is that part of the communications network that usually runs from the main distribution frame ("MDF") in a numbering exchange to the (home) connection point of the end-user of that network. End-to-end connectivity is achieved through the incorporation of connections between the two PoAs to which subscriber A and subscriber B have access (in this model, there are four PoCs, but, this example is not the norm).

Given the layered architecture of communications networks, there are different points in a network that can serve as a PoA. In addition, each network will employ internal interfaces between the various subsystems. Under specific technical conditions, internal interfaces could serve as external PoCs. In order to keep the connection cost as low as possible, the party seeking connection may be interested in having its PoC as closely as possible to the subscriber (although there may be a trade-off, since network roll-out cost will be more expensive).

In the past, many circuit-switched communications networks were layered, both hierarchically and physically. Two fairly simple figures (Figures 2.2 and 2.3 below) demonstrate the difference.

2.2.2 Network topology
The topology of a network will depend on many factors, such as the number and location of terminal equipment, the cost and functionalities of switches, etc.

30 But there are many possible forms of access to telecommunications networks besides the Main Distribution Frame ("MDF"): the standard network connection point, the cable distribution point (often referred to as partial connection point), the local access point ("LAP"), the regional access point ("RAP") and the national access point ("NAP").

31 This layered model is a reference model that serves to clarify the complex relationships between technology, policy, regulation and the market. See Clarkson, Smits 1999, p. 3. See for an overview of different topologies Dommering et al. 1999, p. 55.
Working from the top level down, the international exchange can be connected, e.g., to a satellite earth station or to a submarine cable terminal, thus enabling cross-border traffic. The trunk exchange consists of transit switches. The local exchange will ultimately connect the network to the end-user's equipment at the hand-over point, such as a telephone, a set-top box or a computer.

At the higher level in the network there is a potential for more customers (with the international exchange having the largest potential).

### 2.2.3 Network architecture

The manner in which the specific functionality for the conveyance of signals is organized is called the architecture of an ECN.\(^{33}\)

On the physical level of network connection, many different types of networks or service providers might be connected, such as: (1) TO fixed – e.g., cable infrastructure – network and OLO fixed network; (2) TO fixed network and OLO mobile network; (3) TO mobile and OLO mobile network; (4) OLO network and other OLO network for whatever market,

---

32 This is a simplified depiction of KPN Telecom's network as of 1999, as taken from Smits 1999, p. 11.
33 The approach to the architecture will have an effect on the network's capacity. See, e.g., the cellular approach, often used for mobile electronic communications and packet switched data networks, Bekkers, Smits, 1999, pp. 89ff.; more extensively, Clarkson, Smits 2003, p. 3ff. See also Long 1995, p. 18ff.
either directly or through the infrastructure of the TO; (5) TO long-distance communications network and competing OLO sole long-distance carriers; (6) domestic and international carriers' networks; (7) closed user groups network and TO network; (8) Local Area Networks ('LAN’s') and Wide Area Networks ('WAN’s'); (9) TO network with, cable television, satellite and broadcast networks; (10) Internet backbone providers and TO networks; and (11) Internet service providers.34

The figure below shows the various infrastructure elements used in an access network.

Figure 2.3 An Access Network35

In principle, an electronic communications provider would be able only to provide those services to end-users supported by the MDF to which they were connected. Often, the services offered through one layer of the network were also aimed at end-users of another layer in the network. As the interconnection of networks became more and more specific, there was a need to define the access network in as detailed a manner as possible. Access to the MDF would enable the OLO to almost get direct access to the end-user at the local exchange level.

34 Cf. Noam 2001, p. 4. See for a description of these forms of interconnection, Bekkers, Smits 1999 p. 92-95; See also Brands, Leo 1999, p. 36-38.
35 Taken from Smits 1999, p. 11.
Thus, for instance, in special access negotiations with an OLO that used another transmission mode at the PoA, a TO could abuse this technical restriction, citing technological impossibility to refuse access. However, in a technological neutral environment, the different physical levels should not matter.

2.2.4 Standardization

The connectivity of underlying computer systems has always been at the focus of attention of standardization bodies, such as the International Telecommunications Union (ITU). Logical interconnection was considered essential for interoperability. Standardization became an increasingly important policy goal.

The International Standards Organisation (ISO) is aimed at establishing a framework for the development of standards, known as the Open Systems Interconnection (OSI) Reference Model. Until 2000, OSI was the internationally agreed model for the communication of data. It was designed to enable networking between systems worldwide. In theory, any OSI-compliant system can exchange information with any other OSI-compliant system. Each level is defined in great detail to form a framework for the development of protocols. An important consideration in defining the OSI layers was that the functions and protocols of one layer could be changed without necessitating changes to other layers. By the 21st century, the OSI Model was no longer the standard. The OSI Model was partly transposed into a number of ITU Recommendations.

---

38 See on the importance of standardization, extensively, Bekkers 2001; re mobile standards, Bekkers, Smits 1999, in particular chapter 6; on policy implications, Gandal 2002.
40 See ITU-T, in which also the former activities of the Consultatif International Télégraphique et Téléphonique (CCITT) and the Comité Consultatif International des Radiocommunications (CCIR) have been organized. The ITU-T operates through world telecommunications standardization conferences and is supported by study groups. See on International Telecommunications Union (ITU), extensively, Frieden 1996, chapter 5. See for the most recent list of ITU interconnection recommendations, www.itu.int under ITU-T.
The equivalent model for packet-switched communications networks had become the IP and the Transmission Control Protocol (TCP/IP). Although standardization remains of prime importance, it is unlikely that OLOs can rely on standardization bodies' involvement in getting interconnection at the best possible technical conditions.

### 2.3 Basic forms of interconnection

Interconnection will be reciprocal, *i.e.*, both network operators will, in principle, each take care of call termination but, in principle, will not pay each other equal amounts for that, as communications traffic flows are not necessarily symmetrical. Whereas interconnection is horizontal (networks are connected through PoCs at the same network level), access is vertical (a PoA can be at a different network level). This distinction impacts the regulatory regime.

In interconnection negotiations and conflicts, there has been a lot of discussion about where interconnection should take place. The answer to this question is relevant both from a contractual and a regulatory perspective. From a contractual perspective, it will characterize the performance of the parties through the description of the technical specifications. More importantly, from a regulatory perspective, the type of interconnection sought and by whom will determine the scope of regulatory intervention.

Broadly speaking, four basic forms of interconnection are distinguished in circuit-switched communications: simple interconnection (2.3.1), indirect or transit interconnection (2.3.2), by-pass interconnection (2.3.3), and indirect or transit by-pass interconnection (2.3.4). In the context of packet switching, peering is worth mentioning (2.3.5).

---

41 This model has not been standardized. According to Dommering, the OSI Model has not really facilitated interconnectivity of networks. The development and improvement of interconnect facilities have been driven by the use of Transmission Control Protocol/Internet Protocol (TCP/IP), Dommering *et al.* 1999, p. 115. See on the specific aspects concerning agreements, Kariyawasam 2001, p. 185ff.

42 The end-user is indifferent to this, she desires end-to-end connectivity. See, *supra*, paragraph 2.1. *Cf.* Franse 1997, p. 17, who refers to ‘ubiquity’.

43 For instance, as regards SMP undertakings, who are obliged to provide reasonable access to any third party requesting this; whereas OLOs can freely negotiate and thus also are free not to negotiate. See Chapters 3 and 4, in particular paragraph 4.4.3. See also Janssen 2004, p. 10ff.

2.3.1 Simple interconnection

This type of interconnection is restricted to two ECNs, network A and B. The operator of network A delivers calls originated by subscribers of network B. Simple interconnection agreements are complementary: a form of parallel cooperation. Network operator A needs the cooperation of network operator B and vice versa.\(^45\) At first blush, simple interconnection agreements would appear fairly easy to negotiate. However, even in the case of simple interconnection, significant market power ("SMP") of the TO could well result in an asymmetric negotiations process.

Figure 2.4 Simple interconnection\(^46\)

2.3.2 Transit interconnection

This type of interconnection involves three ECNs, networks A, B and C. The reason for this type of interconnection arrangement is that it may be more efficient or cheaper to interconnect through a transit network, for instance, from a mobile operator (A) to another mobile operator (B), either through a second mobile operator, or through a fixed telecommunications network (C). This may occur when the fixed network has a more elaborate structure and is better able to convey calls in a cost-efficient manner.

Each network is connected to the third network through separate PoCs and the third network will be used to relay networks from one network to the other.\(^47\) The third network will act as the transit and, therefore, this type of interconnection is also called *indirect* interconnection. Strictly speaking,

\(^{45}\) See, *infra*, paragraph 2.5.1. Cf. Kariyawasam, *ibid.*, who remarked that most international interconnection agreements and cable agreements were forms of simple interconnection.

\(^{46}\) Based on Kariyawasam 2001, figure 5.1, p. 142.

\(^{47}\) According to Kariyawasam, indirect or transit interconnection is customary in the United States, or where services provision is restricted. However, see also the example provided in the preceding sentence. On the distinction between direct and indirect interconnection from a Dutch regulatory perspective, see Chapter 4, paragraph 4.2.2.
translating this arrangement to an agreement, Network A and Network B could have interconnection agreements, but, it would also be essential for both networks to each have an interconnection agreement with Network C, whereby Network C was bound to convey their traffic to the other operator and vice versa.

Figure 2.5 Indirect (Transit) Interconnection

![Indirect (Transit) Interconnection Diagram]

2.3.3 By-pass interconnection

This form of interconnection is used often in carrier pre-selection (‘CPS’) situations (e.g. one operator possesses a four-digit access code, enabling its subscribers to initiate calls at usually lower rates, but does not have its own ECN). In this model network B may be a virtual network. Network A originates calls on behalf of network B’s subscribers and delivers them to the receiving subscriber (in this example, a network A customer). Technically speaking, a call that is originated by the network B customer will be conveyed over network A to a switch, where the PoC with Network B is located. The call will be handed over to network B to another PoC (this is known as ‘by-pass’). By-pass enables the operator of network B to make administrative arrangements for the settlement of the call charges with its customer. After having passed by the second PoC, the call is handed back to network A. Network A delivers the call to the receiving party, a network A subscriber. This type of interconnection arrangement is often considered to be very competitive, where network B might be competing for existing customers of network A: a type of horizontal interconnection.46

---

48 Based on Kariyawasam 2001, figure 5.1, p. 142.
49 See, infra, paragraph 2.5.3.
2.3.4 **Indirect (transit) by-pass interconnection**

Finally, there is the combination of by-pass interconnection with indirect or transit interconnection. Indirect by-pass interconnection again involves three different networks (network A, B and C). Network C originates calls on behalf of subscribers of network A. After having been handed over the call to Network A through the first PoC, network A then hands over the call through the second PoC to the terminating network, in this example network B (as the customer is a network B) customer. As with transit interconnection, both network A and network B need to have an interconnection agreement with the network C operator. This form of interconnection could become more complex, as more bypasses might be considered.

---

50 Based on Kariyawasam 2001, figure 5.2, p. 143.
51 Based on Kariyawasam 2001, figure 5.2, p. 143.
2.3.5 Peering

An example of interconnection - based on packet switching – is peering. In a peering agreement, two providers would agree to exchange traffic that originates from one end-user connected to one provider and which terminates with an end-user connected to another provider. Provided that the two networks are roughly of the same size (measured by the number of customers, backbone capacity and traffic volume), ISP's usually do not charge each other for terminating traffic in peering arrangements. Thus, peering will normally not work where the traffic flows are asymmetrical. Besides, the ISP's will normally prohibit traffic destined to or originating from a third party network. The rationale is that such third parties should not be allowed to profit from the free-of-charge transit.

A technical advantage of peering is that it should cause less latency, i.e., less loss of data resulting from transit over third party networks.

As regards VoIP, where IP to IP interconnection is concerned, peering arrangements between ISPs should suffice. However, where it concerns interconnection between IP networks (such as Skype) and the public switched telephony network ('PSTN'), more common interconnection arrangements would be required.

Opposed to this is the peering transit agreement, where one provider would pay the other provider to terminate its traffic. This arrangement is similar to simple interconnection.

2.3.6 Consequences for interconnection agreements

When looking at interconnection agreements, they usually have a number of principal characteristics in common, when the TO is involved: (1) the connection of the networks occurs at the PoCs; (2) the PoCs may be switching centres, virtual or remote switches, or points linked thereto; (3) the

---

53 The assumption here is that it concerns a private bilateral peering arrangement. Cf. Dewan, Freimer, Gundepudi 2000, p. 2. See also Petri, Göckel 2002, p. 425, who do not consider peering to be legally complex.
54 See also Walden, Angel 2005, p. 257, in particular for a description of the cost-saving elements.
56 See Kariyawasam 2001, p. 189ff, for an extensive description.
transfer of calls and messages to and from the underlying ECNs takes place over the PoCs for onward transmission; (4) there is a requirement of forecasting and the provision of appropriate capacity at PoCs; (5) the interconnection contract will oblige each party to route and convey calls and messages to their destination; (6) charges are payable by each party for the conveyance of calls and messages and other interconnection-related facilities.57

When negotiating interconnection, both the OLO and the TO should be well aware of their desired forms of interconnection, the level in the other party’s network where such interconnection should occur, and the services to be provided. For this reason, the above-referenced different forms of interconnection are relevant, as they will impact the contract negotiations, and possibly, the question whether the form of interconnection is subject to regulatory intervention. The TO’s reference interconnection offer ('RIO') contains an extensive technical description which should facilitate the interconnection of these different networks.58

2.4 Structuring interconnection

In order to understand the different positions of the stakeholders and the possibly ensuing inequality of the parties, different types of interconnection cooperation will be alluded to: parallel or cooperative interconnection (2.5.1), vertical interconnection (2.5.2), and horizontal interconnection (2.5.3).59

2.4.1 Parallel or Cooperative interconnection

This type of interconnection, which was present traditionally in monopolistic markets, meant that TOs would connect their networks with the networks of carriers that were a TO in another country or region. This relationship resembled a joint cooperation, as both parties stood to gain from the interconnection agreement. In a liberalized market, this type of arrangement may occur between OLOs having comparable interests and it remains probably to some extent applicable to international telecommunications, where, within the single European market, TOs may become jointly dominant on different national markets.60

58 See Chapter 6 for the service description, Chapter 7 for the analysis of the reference interconnection offer ('RIO').
59 See Noam 2001, p. 3-4.
60 For an early review of the price aspects relating to the international accounting rate system, see Scanlan 1996.
2.4.2 Vertical interconnection
This type of arrangement involved an ECN provider that exploited a bottleneck facility in one stage of the transmission chain, and a provider that required access to that bottleneck in order to provide its services. An example is a long-distance company requiring interconnection with a local exchange carrier (in the United States since the 1980s). This type of interconnection has long been contentious.61

2.4.3 Horizontal interconnection
This type of interconnection arrangement is central to this book: competitors for the same markets and customers link up with each other. The most current example is that which involves the TO is required to provide interconnection to new entrants, fixed to fixed, fixed to mobile or mobile to mobile. In case of wireless local loop or provides specializing in long distance traffic, there remains a vertical element.62

The issue with the three previously mentioned types of interconnection is that, although the relationship should be horizontal, for historical reasons, the TO was likely to behave as though it concerned a vertical situation, hence the asymmetric relationship; and parallel interconnection appears to be difficult to achieve.

2.5 Economic aspects
Interconnection agreements could form a desirable business both for the TO and the OLO (and OLOs amongst themselves).63 In the first place, the value of their respective network increases as the number of end-users that can communicate with end-users from other operators increase. This is referred to as ‘network effects’.64 Second, although a TO or an OLO must tolerate competition it can also generate income by charging terminating and originating access fees to the OLO.

This paragraph discusses economic aspects of interconnection and what is dubbed as ‘the primary and the secondary interconnection rules’ (2.5.1-2.5.2).

---

61 See Noam 2001, p. 4.
62 According to Noam, all three approaches to interconnection are relevant to the economics of networks, Noam 2001, p. 4.
As regards the primary interconnection rule, a look will be had at scarcity of resources and changing market needs.

As regards the secondary interconnection rule(s), monopolistic behaviour of TOs posed a challenge for regulators to establish a framework to support the main regulatory goals, such as efficiency, innovation, transparency and choice.65

The economic aspects of access and interconnection agreements can be further broken down along these two lines into two interrelated categories: (1) the financial and cost accounting aspects, and (2) the competition concerns in respect of the rates offered by the SMP undertaking.66

The regulator intervened especially in terms of pricing. Pricing aspects to be discussed are: setting the price (2.5.3), and different pricing methods applied (2.5.4). This book does not treat the market analyses in detail.67

2.5.1 The primary interconnection rule

In economic terms, the starting point for (at least) OLOs would be to freely negotiate interconnection agreements with each other and with the TO as well. In principle, it could be left to the market parties to reach a satisfactory result through free negotiations without any (ex ante) regulatory intervention.

This becomes evident when looking at the notion of network effects. Simply put: many products have no value in isolation, but generate value when combined with others.68 This holds true for ECNs and ECS: they are prime instances where positive network effects may occur. Once there is a level playing field in the sector it can be assumed that the OLOs will strive to agree on access or interconnection, as it is in their interest that the end-users

65 See Noam 2001, p. 76. Cf. ERG Common Position p. 28, which lists three kinds of problems caused by a dominant undertaking: (1) it may attempt to leverage its market power to an adjacent and vertically or horizontally related market, (2) it may engage in practices to defend its dominant position by creating entry barriers, and (3) it may engage in ‘excessive pricing, the provision of low quality services and inefficient production’ (labelled as ‘textbook monopoly behaviour’).


67 See for description, e.g., Wissmann 2003, p. 981ff. For a first, horizontal, discussion of the Dutch NRA’s analyses, see: Geus, Phoebich 2006, p. 3ff.

68 See Katz, Shapiro 1994, p. 93, citing numerous examples, including: nuts and bolts, which together provide fastening services; automatic teller machines and cards, which together provide financial transactional services.
Technological and economic aspects

can complete transactions with other OLO's end-users. This is perhaps less clear immediately for the TO, who would rather keep as many customers on its own network.

Economists recognize that market competition between different networks raises issues of expectation, coordination and compatibility. Thus, the OLOs (and the TO with them) must be in a position where they can manage expectations, for instance, as regards the number of users that a network may attract, the PoCs needed; they must coordinate how their cooperation will be effected - this can be done, for instance, by referring to specifications and cost accounting methods in the interconnection agreement; and they must achieve physical and/or logical compatibility of the networks and/or service provision.

Katz and Shapiro emphasize the consumer's expectations about networks, which, in their view, impact on the precise nature of competition equilibrium. When there is uncertainty, for instance, about technological progress, the equilibrium may be disturbed. An example might be the (slow) take-off of the market for ECS on third generation ('3G') networks: if an end-user thinks no other end-user purchases UMTS enabled equipment, then she will not purchase such equipment and will not subscribe to UMTS services either. This problem is known as positive adoption externalities and entails the risk that the underlying ECNs may be susceptible to under-utilization. However, there may also be more negative externalities. An example might be the pure lack of willingness on the side of a TO (or an OLO) to negotiate, for instance, if the other side is a relative small party. Yet, the small party might also be unwilling where it changes its business case as it becomes stuck in a situation where it is not viable to compete for high-end customers.

In sum, ECNs typically are worth more to the individual end-user, when there are more users for that network - assuming of course, that this does not adversely impact the quality and price of the ECN and/or ECS provided. Turning back to the example of 3G networks: network operators

69 See, extensively, Larouche 2000, p. 382ff. who also kindly clarified the relevance of the difference between the two notions to me; Bavasso 2003, p. 73ff. It is also mentioned in paragraph 2 of the 1999 Communications Review.

70 See, supra, paragraph 2.2. See also Katz, Shapiro 1994, p. 96-97. For a thorough theoretical analysis economic analysis in light of contract law, see Van Bijnen 2005.

71 See also Larouche 2000, p. 382.

72 Cf. Katz, Shapiro 1994, p. 100-101; Liebowitz, Margolis 1994, who refine the economic analysis by Katz, Shapiro, by also referring to negative network externalities.
are keen to increase the value of ECS provided over their (costly) networks, and they strive doing this, not only by technologically enhancing their service provision, but also by increasing network and services interoperability: enabling customers to communicate with customers of other ECN or ECS providers.73

Consequently, it may be assumed that rationally acting OLOs would be willing to engage in parallel or cooperative interconnection arrangements, to ensure that their respective customers can communicate with each other.

From a freedom of contract perspective, it may also be the case that OLOs choose not to conclude an interconnection agreement. Other than under the secondary interconnection rule (to be discussed below), economic analysis also provides plausible explanations why market parties fail in reaching an interconnection agreement.

One possible reason could be that a new entrant determines that it is better off when attempting to have a free ride on network effects and thus strive to conquer all potential users for that market, whereas it could just as well neutralize network effects through entering into an interconnection agreement; and then compete with the other OLO on that the market.74

Another reason that parties may fail to agree, could be that the transmission capacity of an ECN is not unlimited. Since the time the liberalization kicked off, the emphasis on the nature of electronic communications traffic has changed significantly, from analogue, real-time voice traffic to digitized packet-switched data traffic; from fixed-to-fixed communications to fixed-to-mobile and mobile-to-mobile; from copper-based to fibre optics cable network structures; from narrowband to broadband. These developments are interrelated and hybrid, subject to constant change. But resources have remained scarce. A network must be built, rolled-out and maintained, which means that technically and economically driven considerations lead to its design. It does not always anticipate transactional access specifications.75

The needs of end-users and retailers are subject to constant change and reconsideration. As an example, notable developments in 2005 in the Netherlands were: an increase of VoIP and voice over DSL, substitution of fixed to mobile telephony and the steady growth of broadband. Although

73 See Chapter 1, paragraph 1.1.
74 This behaviour is described by, inter alia, Larouche, as ‘competition for the market’. The ability to compete for a market may create significant dynamism, as it may constitute an incentive to innovate and take business risks.
these developments especially impact on the business scenario's of a TO, it also influences the business plans of OLOs.76

From an economic perspective, the justification to intervene in market forces by means of the primary interconnection rule, is provided by the significance of three of the rationales described in Chapter 1: transaction cost, technological progress and consumer protection, all of which should be seen in conjunction with the presence of (adverse) network effects, i.e., network externalities.77 In that case, socio-economic dynamics may prevail over other interests.78

Accordingly, in some situations, the government and/or the NRA might create regulatory instruments to ensure that all ECNs are interconnected, in order to eliminate as much as possible network externalities. Ultimately, these rationales would support intervention in interconnection negotiations in relatively limited and clearly delineated circumstances.79

The EC has translated this into the duty on all ECN providers to negotiate an agreement, which has been set forth in its regulatory framework and which will be discussed extensively in Chapter 3.80 However, the regulatory regime does not clarify where intervention under this primary rule stops.81

---

76 The TO saw significant changes in its services orders, in particular with respect to 'classic' telephone minutes, such as: (1) a decrease of small band Internet traffic in favour of broadband Internet cable access of other providers, (2) growth of CPS, (3) further substitution of circuit-switched (per minute) traffic for packet-switched traffic. Source: OPTA Annual Review 2003, p. 13. See for different economic bargaining models for peering arrangements, Besen, Milgrom, Mitchell, Srinagesh 2001, p. 292ff.

77 Cf. Liebowitz, Margolis, p. 149: some network effects can be easily neutralized through negotiations.

78 Cf. Chapter 1, Figure 1.1.

79 Another way of looking at the primary interconnection rule is offered by Larouche 2000, p. 384, who refers to Besen, Farrell 1994, p. 117. Although the Besen, Farrell analysis is given for standardization it may just as well be applied to interconnection. In a situation where parties are striving to negotiate, this may resemble the 'Battle of the Sexes' scenario: the parties want to interconnect or provide/obtain access, but disagree on the technical specifications for this, see Besen, Farrell 1994, p. 125-126. If the parties decide not to agree, this resembles the 'Tweedledum and Tweedledee' scenario: the parties compete on the same markets and combining their networks or making their services interoperable does not appear to yield them any profit. The 'Pesky Little Brother' scenario will be discussed below.

80 See Chapter 3, for instance, paragraphs 3.2.2, 3.4.3 and 3.4.4.

81 See, for an interesting example of how far intervention may extend (in this case as regards a merger in the US) the various decisions surrounding America Online, Inc. (Continued)
2.5.2 The secondary interconnection rule

To distinguish the secondary from the primary interconnection rule, the focus must be on a different stakeholder: the TO. During various phases of the opening of the markets, the TO held positions clearly different from the position taken by the new entrants. Being the provider on the performance side of the interconnection contract, when the TO was still monopolist, it was eager to defend its early lead and even to prevent third parties to enter the market.

From an economic and regulatory perspective, the TO could thus not be expected being eager to facilitate access provision to third parties. In the TO's view, new entrants would likely entice away its valuable customers and skim off the existing fairly constant and commercially interesting sources of income. In contrast, without these new entrants there would be a need to attract investments to operate a full-fledged network.82

Being the (former) monopolist was not necessarily advantageous. Most TOs operated colossal, bureaucratic enterprises, where employees benefited from compensation packages and employment rights akin to civil servants statutes.

On the other hand, the OLO wanted to pay the lowest possible compensation for getting access to that the TO's network, but at the same time wanted to have full and unhindered access to state-of-the-art facilities. It did not have incentives to invest heavily in its own technical resources. This created commercial tension.

The arrival of low-investment, low-cost carriers also posed a competitive threat. These carriers initially focused at highly profitable communications activities only, but still required logical adaptation from the TO in order to

---


---
Technological and economic aspects

offer their services to end-user customers, without wanting to invest heavily.\(^{83}\)

The clash of commercial interests between established market positions and new entrants led to the secondary interconnection rule.

From an economic perspective, the underlying issue is known more commonly as dominance, and the regulatory framework surrounding access and interconnection thoroughly refined the notion specific to the sector, by introducing the notion of SMP.\(^{84}\) The contention is that if one of the parties to an access or interconnection negotiation or agreement enjoys SMP, then the incentives to provide access or interconnection become skewed. The weaker party (the OLO) will depend on establishing interconnection with the TO to compete on the market, yet the TO might have no incentive to offer interconnection, if refusing to allow for interconnection could keep or drive the OLO from the market.

In this situation, the incentives do not match, and an agreement against reasonable terms – price being the core area of contention – or an agreement at all, is unlikely to be reached through free negotiations.\(^{85}\) In economic terms, this is also known as the ‘Pesky Little Brother’ scenario, the TO being the ‘bigger brother’ in this case.\(^{86}\)

Where the primary interconnection rule would serve to push the parties towards reaching an agreement with each other, \textit{(ex ante)} intervention might now be necessary to ensure that access or interconnection actually occurs.

A long-standing principle of EC competition law is that parties having a dominant position in a market are not free in the selection of their contract partners.\(^{87}\) Thus, for the secondary interconnection rule, the justification to

---

83 The then chief operating officer (‘CEO’) of Dutch TO KPN Telecom B.V. expressed this fear once more at a telecommunications forum in August 2003, when he fumed at a new market entrant, that all the new entrant wanted was ‘free lunch’. For an interesting view on price discrimination and market power, see Muysert 2004.

84 For an analysis of the SMP notion, see Chapter 3, in particular 3.3.2, 3.3.4 and for the application by the NRA, see Chapter 5.

85 A distinction must be made between pricing conflicts in the context of a negotiated agreement and pricing through regulatory intervention. Pricing will be discussed separately below, and although it may also be an issue under the primary interconnection rule, the emphasis will be on discussing the justification to impose pricing through the use of models.


interconnect Regulation and Contract Law

intervene is provided predominantly by the anti-monopoly rationale described in Chapter 1, although the other rationales (transaction cost, technological progress and consumer protection – network externalities) are likely to be considered as well.

If the NRA intervenes because it perceives an imbalance in market power, it can force the TO to provide access or interconnection, without leaving room to negotiate. This creates a completely different playing field, with a more active role for the NRA resembling the imposition of a duty to contract rather than a duty to negotiate. The secondary interconnection rule is embedded in various provisions of the EC regulatory regime.88

Yet, the secondary interconnection rule may also yield adverse consequences for the TO. For instance, the TO may not deny the OLO interconnection, even if the TO has valid grounds for refusal, for instance, where there are real technical or scarcity issues.

Besides, TOs by law may be considered SMP undertakings in one territory, but may be a new entrant in another territory in the EU, which significantly complicates their business strategy.

Conversely, the NRA must see to it that new entrants do not ‘abuse’ the regulatory regime.

Finally, the secondary interconnection rule could imply that the OLO’s fate is to considerable extent in the NRAs’s hands, leaving no room for free negotiations. An example is formed by the RIO.89 There may be a point, when the added value of forcing the TO to grant access and/or interconnection is reduced (there is more competition between infrastructures, greater efficiency of TO) and the regulatory regime can be rolled back, although this may be disadvantageous to later new entrants.90

2.5.3 Setting the price

Where there is competition, the TO must operate its ECN efficiently and cost-effectively. Dependent upon the technological and market conditions, the connecting with or providing access to another party did not necessarily match the short-term business aims of a TO as regards the provision of an efficient and cost-effective network infrastructure for its stakeholders.

88 See Chapter 3, in particular paragraphs 3.3.2, 3.4.3.4 and 3.4.4.4.
89 See Chapter 7.
90 The NRF set in motion the process of rolling back regulation, see also Chapters 3 and 5.
The implementation of new technologies, for instance, to remove scarcity issues, required substantial financial investments from the TO. An already existing provider that had heavily invested and had not written off these investments wanted to get a maximum return on investment, but the OLO wanted to pay nothing for cost it considered partially unnecessary or already written off. The different views on historic network cost have caused regulatory interest in the terms and conditions applied by TOs for interconnection.

First, the Commission distinguished between call origination and call termination at the wholesale level.71

According to regulators, the TO roughly charged three types of tariffs as regards interconnection over the fixed infrastructure: (1) local interconnection charges, (2) single transit cost, and (3) double transit cost.92

Ideally, the price for interconnection would come about through bargaining between the TO and the OLO.93 In parallel cooperation this would not be that difficult, especially where profits were shared, or international markets divided. In a vertical situation, the regulator had to induce the TO to offer reasonable prices.94 However, pricing was not only the most contentious aspect of interconnection, it was also difficult to assess, as interconnection prices could consist of different elements and could be established according to a host of mechanisms.95 Examples range from zero-charge, which was used for peering arrangements, lump-sum payments, average cost pricing to fully distributed costs pricing ('FDC').96

Peering serves as an example of the complexities raised in pricing. In packet-switched interconnection, the tariffs at the retail level vary among different

---

72 See also, supra, paragraph 2.3 for a description of the different types of interconnection. Referring to Figure 2.2 above, local interconnection occurs at the local exchange level when the other licensed operator's ('OLO's') network can reach the local loop. Single transit costs are charged when interconnection occurs at the regional exchange level. Double transit costs apply when the OLO has a very limited network and needs interconnection above the regional exchange level, i.e. at the first level trunk exchange.
73 Cf. Noam 2001, p. 69-75, who provides examples of prices between competitors that arise through free negotiations.
74 Cf. Madden, Savage 1998.
75 On charges applied in circuit switching and packet switching, see, supra, paragraph 2.2.1.
76 See Noam 2001, p. 77ff.
Interconnection Regulation and Contract Law

ISPs. Many ISPs use transit agreements to have their end-users communicate with end-users who subscribe to the services of other ISPs.\(^{97}\) These transit agreements in terms of structure resembled transit agreements for voice telephony and the main types of charges applied were peering and paying transit. But under a peering arrangement, traffic was not charged at the wholesale level.\(^{98}\) This raised competition concerns. Paying transit was a different method – transit providers could charge interconnection fees for traffic going in either one or both directions.\(^{99}\)

The added complexity of billing systems – whether used internally or with subscribers - increased immensely as a result of market liberalization. Therefore, it was crucial for the NRA and for OLOs to have an insight into the billing mechanism applied by a TO.

Other than the blunt refusal to deal or to grant access, competition concerns related to pricing may be grouped as follows: (1) excessive pricing, (2) excessive costs or inefficiency, (3) lack of investment, (4) margin squeeze, (5) price discrimination,\(^{100}\) (6) predation and other unfair low-pricing alternatives, and (7) tying and bundling.\(^{101}\)

Excessive, predatory, tied or discriminatory prices were well-known issues for the regulator. Excessive pricing traditionally was addressed under the rules relating to abuse of a dominant position.\(^{102}\) The margin or price squeeze occurred where the TO, in vertical situation, had to give access to its network to other providers, such as OLOs, and prevented them from becoming service competitors at the retail level by setting high access tariffs, while maintaining low end-user tariffs in the same market. In such a situation, it would be impossible for the OLO to make profits downstream.

---

\(^{97}\) Consider, e.g., volume based, time based, flat rate charges or combination. See also Giovannetti 2002.

\(^{98}\) See also Besen, Milgrom, Mitchell, Srinagesh 2001, p. 292ff.


\(^{100}\) For a recent, interesting take on price discrimination, see Lorenz, Lübbig, Russell 2005, who contend the Commission’s take on price discrimination may be too sweeping.

\(^{101}\) See Oxera 2003. They also list exclusive contracts and exclusive dealings, and unfair contract terms. Cf. this paper with the ERG Common Position, p. 35ff., which distinguishes several pricing issues.

\(^{102}\) Supra paragraph 2.1.2. See Article 82 European Community (‘EC’) Treaty and the principle formulated by the ECJ that ‘charging a price which is excessive because it has no reasonable relation to the economic value of the product supplied […] is an abuse.’ Cf. European Court of Justice (‘ECJ’) 14 February 1978, Case 27/76, [1978] ECR 207, [1978] 1 CMLR 429 [1978] (United Brands/Commission).
Price discrimination occurs when the sale of different units of the same service takes place at price differentials that do not directly correspond to differences in underlying cost. Predatory pricing could be used by a TO to foreclose other OLOs.\textsuperscript{103}

From experience in other markets, this type of behaviour involved the deliberate incurring of short-term losses in order to eliminate competition.\textsuperscript{104}

Competition concerns thus led to the substantial regulation and price control as regards access and interconnection.\textsuperscript{105}

The EC regulator faced the challenge to balance different, albeit related, objectives in terms of access and interconnection: (1) the promotion of competition between the TO and the different OLOs, (2) the preservation of incentives to the TO as the main provider of interconnection, to maintain and upgrade its networks, (3) the stimulation of the TO to provide its services efficiently, (4) the calculation of interconnection rates in a manner that would benefit consumers and thus enhance social welfare, and (5) the limitation of the cost of regulation.\textsuperscript{106} The aim was to devise a system where the market would work form an efficient pricing rule, thus leading to sufficient competition and social welfare.\textsuperscript{107}

\textsuperscript{103} Cf. Muyser 2004, who discusses the question, whether price discrimination is a reliable source for determining market power per se.

\textsuperscript{104} See also ECJ 14 November 1996, Case C-333/94P, [1996] ECR-I 5951, 6008ff. (Tetra Pak/Commission). The ECJ considered that if prices were set below average variable cost, they would be presumed to be predatory, and thus amount to an abuse of a dominant position. Prices that were set above average variable cost, but below average total cost would still be presumed to be predatory, if it could be demonstrated that they were applied to the detriment of competitors.


\textsuperscript{106} Cf. Geradin, Kerf 2003, p. 34.

\textsuperscript{107} For an analysis of the economics of interconnection charges in respect of mutual simple interconnection, model (ii), which relates to a market with a dominant TO, see Armstrong 1998. Armstrong also addressed the question whether a regulator should intervene not only when parties disagree, but also where there is an agreement. He (Continued)
did not always address the issue, it was always implicit in their treatises that intervention could be justified in case there was no cost-effective access or interconnection of networks.\textsuperscript{108}

To prevent anti-competitive behaviour by \textit{ex ante} regulation, the regulator would normally prescribe a remedy that would force the SMP undertaking to change its behaviour. Price control would be one such remedy, although it could also be applied \textit{ex post}, i.e. once the regulator had established there was anti-competitive behaviour.

An interesting example formed what is known as call termination monopolies – that is, mobile operator could charge fixed operators or the termination of calls from fixed subscribers as they deemed fit. The problem arose that fixed operators were regulated to charge at cost-oriented levels, but had no countervailing market power in their negotiations with the mobile operators for termination access.\textsuperscript{109}

\subsection*{2.5.4 Different methods for calculating interconnection charges}

Although the methods for calculating interconnection charges are not central to the questions discussed in this book, it is necessary to consider them briefly, in order to understand to some extent the scope of disputes with respect to the commercial aspects of interconnection agreements.\textsuperscript{110}

\begin{itemize}
\item considered \textit{ex post} intervention necessary in asymmetric situations. Re the economics of the internet, \textit{inter alia}: Cave, Mason 2001, p. 188ff. (for a basic description of competition law aspects, including those involving internet interconnection); Bailey 1995, who also discussed incentives for interconnection.
\item See also Chapter 8 paragraph 8.2.3.3. See De Bijl et al. 2004. According to one of the conclusions in the report: “The presence of call termination monopolies does not automatically imply that there is an overall welfare problem. On the one hand, (i) per-minute prices for F2M [fixed to mobile, SG] and off-net M2M [mobile to mobile, SG] calls are inflated, distorting the demand for these calls; and (ii) consumers who pay inflated prices subsidize consumers who benefit from handset subsidies or reduced mobile subscription fees, so that there may be over-consumption of mobile services (e.g. an inefficiently high turnover of phones by consumers). On the other hand, (i) access mark-ups may efficiently contribute to the recovery of fixed and common costs; and (ii) assuming that competition in the mobile retail market is sufficiently effective, mobile consumers benefit since overall mobile telephony becomes cheaper, an effect that contributes to fast market expansion. The net welfare effect is unknown (and hard to assess).”
\item For more details see Chapter 8. For an extensive discussion of rate regulation in Germany, see Wissmann 2003, p. 1426ff. For a discussion or price calculation economic models as regards peering arrangements, see Dewan, Freimer, Gundepudi 2000.
\end{itemize}
Technological and economic aspects

Before discussing the charging models, it is noted that interconnection prices can be made either on per minute (sometimes referred to as ‘metered interconnection’) or on a capacity basis (sometimes referred to as ‘flat rate access’).

The NRAs applied different models to consider interconnection charges. There was no consensus as to what would be the most appropriate calculation method. After the ONP framework was implemented in the Member States, the NRAs wanted to maintain maximum flexibility as regards price control, by effectively reconsidering the charges on a yearly basis. This was probably due to the common understanding that the best method for price control did not really exist.

For instance, in the UK, the TO’s (British Telecom) 1991 licence provided that it must interconnect with an OLO (Mercury). But, the licence did not provide how the interconnection charges should be applied. The UK regulator (initially the Office for Telecommunications ‘OFTEL’; later the Office for Communications (‘OFCOM’) ordered the TO through a series of cost allocation mechanisms. The UK NRA worked from a system of wholesale price cap (‘WPC’) regulation.

The Netherlands’ approach was exemplary. Several times over the years since its incorporation, the Dutch NRA organized consultations and sounding boards. It ordered investigations to develop, enhance and modify benchmarks for cost calculation to establish the best system.

Cf., e.g., Correa 2001, p. 18ff: on rate-of-return (prices should be at such a level that a fair return on capital would be allowed) and price cap (TO prices should be capped for a fixed period) regulation. See also chapter 3, infra, for methods suggested by the ITU in the context of international accounting rates: Walden, Angell 2005, p. 485-486.


See, in general on such systems: Geradin, Kerf 2003, p. 34ff; Noam 2001, p. 69-116. And see in respect of the NRA, for instance, the following consultation documents on wholesale rates, recorded until May 2005 with the source reference where found, all of which can be downloaded in Dutch from www.opta.nl: (1) OPTA 22 August 1997, Consultation Document I on cost accounting for interconnection and special access services (Consultatiedocument I over kostentoerekening voor interconnectie en bijzondere toegangsdiesten); (2) OPTA 26 March 1998, Consultation Document I on cost accounting for interconnection and special access services (Consultatiedocument II over kostentoerekening (Continued)
Interconnection Regulation and Contract Law

It falls outside the scope of this book to analyze these systems. Much depends on how they are implemented, and many variations may occur, for instance, between the NRAs applying the same systems. Without a definite cost accounting system, the Netherlands’ NRA initially did not apply benchmarks, although the EC regulator had recommended this.116

When considering cost calculation methods, the NRA did, however, to some extent, distinguish between the different infrastructures.117 There existed a significant asymmetry between the fixed and the mobile wholesale markets,


117 See OPTA, Guidelines on tariff regulation for interconnection and special access (Richtlijnen Tariefergulering interconecttie en bijzondere toegang), 13 April 2000, and Decision on internet without telephone units (Besluit over Internet zonder telefoonlijnen), 4 April 2001, Decision on broadband services (Besluit over breedbanddiensten), 16 March 2001.
where it has been suggested to either: (1) increase the countervailing negotiating power for the fixed operator in the wholesale access market; (2) change commercial agreements such that the price for receiving calls is not necessarily fixed at zero and, (3) introduce call termination by-pass.\textsuperscript{18}

Yet, there remained considerable uncertainty as to whether the NRA – and prior to it the Ministry – was able to offer clear and consistent guidelines to apply the charges.\textsuperscript{19}

Without aiming at completeness, the following systems were considered.\textsuperscript{20}

\textit{Fully Distributed Costs (‘FDC’)}\textsuperscript{121}
Under this system, the TO simply charged all direct cost made to the OLO. All costs – whether fixed or incremental – were combined and allocated to the different services provided, according to a formula. As a result, the cost attribution method could be very subjective: much was left to the discretion of the TO. The cost could relate to, \textit{inter alia}, provision of access, business cost of the TO, specific administrative cost of its carrier services unit, and all kinds of general cost, such as that which concerned marketing and overhead for the full organization of the TO.\textsuperscript{122}

\textit{Embedded Direct Costs (‘EDC’)}
In a 1997 decision, the Ministry ordered the TO to move away from the FDC method and apply the EDC method by May 1, 1998.\textsuperscript{23} This system combined a method that took into account the historical cost price of the

\textsuperscript{18} Cf. De Bijl \textit{et al.} 2004, p. iii ff.
\textsuperscript{20} See also Franse 1997, p. 19 ff.
\textsuperscript{21} This system is also known as ‘Fully Allocated Cost’, see Franse 1997, p. 19. The system was applied by OPTA in the Netherlands for the highly fragmented broadcasting market.
\textsuperscript{22} See, for the advantages and disadvantages of this system, Geradin, Kerf 2003, p. 35. Cf. Noam 2001, p. 78–80.
network with a method that took into account the replacement cost. The Ministry ordered the NRA to investigate a 'bottom-up' EDC model, which could be used to compare the systems proposed by the TO.  

**Long Run Incremental Costs ('LRIC')**

By the end of 2000 the NRA started investigating another system for calculating interconnection rates at all levels: the LRIC system. The LRIC system referred to the increase in the TO's total cost when output was expanded by a specified amount. The LRIC system then attempted to make a calculation of the cost price based on the assumption that the TO acts as a modern and efficient operator. The choice for this system was made to prevent OLOs being confronted with cost systems that relied on historical cost calculations.

**Bottom Up Long Run Incremental Costs ('BU-LRIC')**

The Bottom-Up LRIC cost allocation method was developed by the NRA in consultation with the TO. It was a refinement of the LRIC model and applied a calculation based on a theoretical network configuration of a modern and efficient operator. With respect to terminating access tariffs the NRA initially settled for a BU-LRIC allocation method. With respect to originating access tariffs an EDC system of cost allocation was used. The method was applied in the Netherlands for the mobile terminating markets. The most important difference between the BU-LRIC and the EDC system was that the cost that could be calculated into the rates that were applied for terminating access services, were based on a cost basis that would apply to an efficient operator providing in a competitive environment, whereas the cost calculated in the originating access tariffs were concerned much more...

---

124 On the economic basis for the bottom-up cost model, see Mellewigt, Thiessen 1998.
125 Cf. OPTA Connecties 2000/9. See also OPTA, Consultation document OPTA, Tariff regulation for interconnection.
127 See, for the advantages and disadvantages of this system, Geradin, Kerf 2003, p. 37.
128 See OPTA 13 April 2001, OPTA/IBT/2001/200850, Guidelines on tariff regulation interconnection and special access services (Richtlijnen tarieven interconnectie en bijzondere toegangsdiesten); for decisions applying this method, see, e.g., OPTA 29 June 2001, OPTA/IBT/2001/201828 Decision on interconnection and special access tariffs 1 July 2001 – 1 July 2002 (Bepaling tarieven interconnectie en bijzondere toegang 1 juli 2001 tot 1 juli 2002); OPTA 27 June 2002, OPTA/IBT/2002/201682, Decision on approval of cost allocation system KPN Telecom (Besluit goedkeuring kasrentoerekeningsysteem KPN Telecom).
with the actual cost basis of KPN Telecom underlying the specific service. The differentiation was caused due to the fact that terminating access, contrary to originating access, involves a call termination externality. This externality meant that, in principle, the party making the call must pay for the terminating access rate, yet the party being called should determine the rate by making its choice for the network provider. This special characteristic of terminating access prevented the independent existence of an optimal tariff level for the terminating access services offered by the TO. The system did not stimulate the TO to bring its own cost in line with the cost of an efficient operator in a competitive market.

The tariffs resulting from the BU-LRIC system were compared on a yearly basis with the ‘best current practice’ established by the EC regarding the different interconnection rates in the different Member States. This comparative investigation could lead to the downward adjustment of the tariffs. Based on its cost investigation and allocation method, the NRA yearly determined the interconnection rates to be charged by the TO in the next year (from July until June).  

Long-term wholesale tariff system (‘LWTS’) and other related systems
This system has been further developed since 2002 and stands for long-term wholesale tariff system. It incorporates elements of BU-LRIC, which the NRA has tried to combine for the different charges in the long-term.

\[129\] See, for instance: OPTA 29 June 2001, OPTA/IBT/2001/201828 Decision on interconnection and special access tariffs 1 July 2001 – 1 July 2002 (Besluit tarieven interconnectie en bijzondere toegang 1 juli 2001 tot 1 juli 2002). The interconnection rates for parties not considered to have SMP were not completely free, either. According to the Minister these rates needed to satisfy a reasonability test, which was deemed embedded in the general interconnection duty of Article 6.1 Tw. This meant that these rates could not be so high, that it could not be reasonably expected the party requesting interconnection would agree to these. According to OPTA, this reasonability test did not mean that the parties involved would always have to apply reciprocal charges. OPTA 22 September 1999, Computerrecht 1999, p. 337 (KPN Telecom vs. Energet); OPTA 15 October 2001, OPTA/IBT/2001/203129 (Energis vs. KPN); OPTA 18 December 2001 (KPN Mobile vs. Telfort Mobile), www.opta.nl.

\[130\] See, OPTA, 11 December 2002, OPTA/IBT/2002/202979, Consultation Document on the long-term system for tariff regulation of interconnection and special access services offered by KPN and a new model for tariff regulation of interconnection leased lines offered by KPN (Consultatiedocument inzake het meerjarig systeem voor de tarieveregulering van door KPN aangeboden interconnectie en bijzondere toegangsdiensten, en een nieuwe model voor de tarieveregulering van door KPN aangeboden interconnecterende huurlijnen), p. 11 ff. See also NERA 2002, which suggested there was substantial scope for increasing the efficiency of the TO’s network.
Another system not studied by the NRA was the Efficient Component Pricing Rule (‘ECPR’). This system built on the Access Deficit Charges (‘ADC’) system. The rationale behind ADC was that due to pricing regulation and numerous OLOs wanting to interconnect, the TO suffered a loss as its current end-user charges were insufficient to cover the increase in interconnection costs, hence the need for an ADC charge. This led to ECPR as it required the TO to charge interconnection tariffs that would cover actual cost of providing interconnection.

On the fixed termination market, by 2005, OPTA applied an EDC system, which amounts to an EDC system made subject to an efficiency test. But, it is different from the BU-LRIC system, because the cost of the TO are the starting point, and not the cost of an efficiently operating OLO.

2.5.5 Regulatory competition

There is a case to be made, especially in the area of electronic communications law, for competition between the regulatory regimes and dispute mechanisms applied in the different Member States. As such, preferences expressed by OLOs for certain regulatory systems – for instance, as applied in other Member States – could be implemented by NRAs in order to increase the effectiveness and sustainability of their decision making.

The economic issue at stake would be whether regulatory competition would likely to enhance economic welfare. It will be difficult to identify conclusive evidence of the potentially beneficial effects of regulatory competition, especially where there is a multiple competency, for the NRAs, the competition agencies and the courts. As regards the NRA, however, the European Regulators Group (‘ERG’) could play an important role in this respect, since it will have the regulatory overview.

2.6 Interim conclusion

Various circumstances influenced and continue to influence the regulation of access and interconnection agreements.
2.6.1 Influence of technology on regulation

The technological aspects surrounding access and interconnection developed, and the legal notions regarding the infrastructure emerged significantly following the ONP framework and the NRF. Likewise, the technological and cost accounting aspects of interconnection continue to influence the way in which interconnection is regulated creating significant impact ex ante on the regulation thereof. It remains to be seen – take the example of VoIP – whether regulatory intervention decreases as technological developments continue to shape the market.136

2.6.2 Different effects of primary and secondary interconnection rules

The primary and the secondary interconnection rules led to vastly different regulatory regimes, and have different implications for the negotiation and performance of access and interconnection agreements.

Under the first rule, interoperability of networks was to be achieved though obligatory negotiations, once there were more players on the market. The mere fact that the law provided for a duty to negotiate, should normally be sufficient to stimulate the parties towards reaching an agreement. The law did not distinguish between the position held by an OLO towards the TO and towards another OLO. If the parties did not agree, the NRA (or, alternatively, a court) could intervene as a matter of last resort only. It remains unclear how the primary rule translates to services interoperability.

Under the second rule, which was embedded more in concerns related to the special position held by the TO, the contention is that it was doubtful that negotiations would produce a speedy and acceptable solution, because of the contractual imbalance, even though economic analysis also argues that SMP will decrease, and possibly disappear over time. Thus, initially, regulatory intervention was to be heavier. From a legal perspective, merely imposing on the market parties an obligation to negotiate would not suffice. It was supplemented by an obligation for the TO with SMP to provide access, including interconnection; albeit under specific circumstances.

136 Cf. M. Monti, ‘Remarks at the European Regulators Group Hearing on Remedies’, 26 January 2004 (Speech/04/37): ‘The aim of regulatory remedies should be to allow antitrust remedies to be the only ones needed for the long term. While for those parts of the industry which can be characterized as natural monopolies, this may be difficult to achieve, as technology develops regulatory intervention will increasingly play a smaller role.’
2.6.3 Pricing

In the field of pricing, \textit{ex post} regulation of access and interconnection tariffs charged by the TO, remains the norm. In practice, this means that an OLO negotiating with a TO on an interconnection deal, not only has to have an insight into the network topology and services offered by the TO, but also in the applicable prices and charging methods.

At the outset, the TO would possibly charge excessively, but, given its weaker position and its desire to compete on the market, the OLO could not continue negotiating until the TO would decrease its prices voluntarily.
3. The international and EC regulatory framework

3.1 Introduction

The European Community ('EC') regulation has been instrumental in promoting interoperability of networks and services and has had an impact on the formation and negotiation of interconnection agreements. Over the past two decades, the regulation of the electronic communications sector at the European level, including in the field of access and interconnection, has been frenetic. A further review of the regulatory framework was expected in 2006.¹

The 2002 new regulatory framework ("NRF") resulted in an extensive overhaul of then existing regulation, in particular as regards the regime applicable to parties deemed to have significant market power ("SMP").²


² The 2002 regulatory package consisted of the following Directives:


(Continued)
The NRF was designed, inter alia, to anticipate further technical convergence, notably the continued merging of electronic communications networks ("ECNs") and services.³ As such, it supported the technological progress rationale.⁴ The NRF attempted to provide a single legal framework for all electronic communication networks, including mobile networks, cable access television ("CATV") networks and (electricity) cable systems if used for the transmission of signals, and all services. From the EC's perspective, electronic communications services ("ECS") had become just one aspect of the larger information society phenomenon.⁵


The international and EC regulatory framework

The NRF must also be seen in light of the overhaul of the EC's competition law, especially the distinction between competition law and sector-specific regulation and the ensuing considerations in terms of competent authorities and institutions.6

The emphasis in this book lies on those provisions that are relevant to access and interconnection agreements.7 Access and interconnection were regulated as part of the broader NRF. Although the preceding open network provision ('ONP') framework and the NRF dedicated a Directive to access and interconnection, several relevant provisions were embedded in other Directives, and such will also be mentioned.8

The relevance of looking at the NRF and competition law can best be summarized by referring to the three main themes arising as a result of the


7 For this reason, the Authorisations Directive, the Universal Services Directive and the Privacy Directive (see, supra, footnote 2) will not be discussed in detail. See on these Directives, for instance, Farr, Oakley 2002, Koenig, Loetz 2002.

Interconnection Regulation and Contract Law

gradual move towards more competition: (1) supplier access, (2) customer access and (3) transactional (bilateral) access. Where there may be a lighter role for the NRA in supervising those parts of the infrastructure and services still falling under its competencies, the question arises whether there are also alternatives for its intervention in interconnection contract formation.

3.1.1 Scope of work
In order to analyse the question whether freely negotiated access is to be preferred over regulated access under all circumstances (and under both the primary and the secondary interconnection rule) the policy objectives, principles and choices made at the European Union ('EU') level with respect to access and interconnection negotiations will be discussed. Likewise, it will be determined whether the public policy considerations affected the formation and negotiation of interconnection agreements at the private business level.

This Chapter first describes concisely the international framework (3.2) and the EC regulatory framework as relevant to the electronic communications sector (3.3). To map the approach taken in part II of this book, possible models for the regulation of commercial interconnection contract negotiations issued by the International Telecommunications Union ('ITU') will be summarized in paragraph 3.2 and the effect thereof on telecommunications agreements is discussed in 3.3. In paragraph 3.3, the notion of SMP will be explored, as it is central to the regulation of the obligations of the telecommunications operator ('TO') and impacts access and interconnection contract formation. In paragraph 3.4, the regulatory framework specific reference to access and interconnection will be analysed. Another concern is the regulation of other public utilities markets (as discussed in paragraph 3.5). In paragraph 3.6, the EU's choice of model of regulated or negotiated access and whether it is being followed consistently will also be inferred to.

3.2 The international regulatory framework
Although important for the regulation of telecommunications services, this book will not address the World Trade Organisation ('WTO'), the General

---

9 See Larouche 2000, who developed the notion, as summarized on p. 437/ff. See also the discussion of transactional access in Chapter 2 paragraphs 2.5.1 and 2.5.2
10 For a more extensive description of the powers of the national regulatory authority ('NRA'), see Chapter 5.
Agreement on Telecommunications Services ('GATS') and ITU's regulatory efforts in depth, since — with the exception of the GATS Annex on Telecommunications and the Fourth Protocol — these documents had little significance to the formation and performance of interconnection agreements, which were still mostly dealt with on a national basis.

### 3.2.1 The WTO and GATS
The WTO's Basic Agreement on Telecommunications was dedicated to pursue a worldwide competitive marketplace. It attempted to break down well-established (state) monopolies run by the existing national operators of a telecommunications network in countries where this had not yet occurred, but was less concerned with the details of regulating the different markets.

In 1996, the WTO negotiating group on basic telecommunications services produced a 'Reference Paper on Telecommunications', which included a principle on interconnection. The Reference Paper was not binding on the WTO members nor was it concerned with interconnection contracts per se. The principle on interconnection stated that:

(a) the interconnection principles applied where a part linked with suppliers providing public telecommunications transport networks or services in order to allow the users of one supplier to communicate with users of, and to access services provided by, another supplier (Principle 2.1);
(b) interconnection must be provided upon request at any technically feasible point in the network in a timely fashion with non-discriminatory terms, rates and quality (Principle 2.2);
(c) the procedures applicable for interconnection to a major supplier must be made publicly available (Principle 2.3);
(d) the interconnection agreements or a reference interconnection offer must be made publicly

---

14 See the Reference Paper on Telecommunications, Fourth Protocol to the General Agreement on Trade in Services 436 (WTO 1997), [1997] 36 ILM 354. The principles applied in the Reference Paper were: (1) competitive safeguards, (2) interconnection, (3) universal service, (4) public availability of licensing criteria, (5) independent regulation, and (6) the allocation and use of scarce resources.
available (Principle 2.4).\footnote{See the General Agreement on Telecommunications Services (`GATS') Annex on Telecommunications, [1994] 33 ILM p. 1192ff. See also the WTO Basic Agreement on Telecommunications Services, [1997] OJ 1997 C 267/80; cf. Koenig, Bartosch, Braun 2002, p. 11, Walden, Angel 2001, p. 375-376.} A request for interconnection at the points of connection (`PoCs') that were not offered to the majority of users should be honoured. The Fourth Protocol was not concerned with the negotiation of access and interconnection agreements.

The GATS contained an Annex on telecommunications and a Protocol establishing commitments in basic telecommunications. It comprised a number of General Obligations and Disciplines, including terms, limitations and conditions on market access, aimed at the Members vis-à-vis foreign operators.\footnote{The most contentious principle was the `most favoured nation treatment that each Member had to offer to market parties from other countries, cf. Walden, Angel 2001, p. 370ff.} The supplementary Annex on Telecommunications was concerned predominantly with the supply of value-added communications services. According to Paragraph 5 of the Annex, access should be non-discriminatory and obligations of transparency of access conditions, including tariffs, terms and conditions and specifications of technical interfaces with public networks and services were imposed on WTO members that committed themselves to the Annex.\footnote{Cf. Walden, Angel 2001, p. 372, Walden, Angel 2005, p. 491-492.} It did not define what was meant with `reasonability'. As will be seen below, the EC also applied these principles.

### 3.2.2 The ITU

The ITU is an international organization, in which the members cooperate on telecommunications matters.\footnote{The basis for the International Telecommunications Union (`ITU') is an international treaty, consisting of a convention and a constitution of the ITU. The convention and constitution are supplemented by administrative regulations, which are sub-divided into international telecommunications regulations and radio regulations. These instruments bind the Member States, cf. Walden, Angel 2005, p. 479ff., Scherer 2005, p. 126ff.} It concentrates on establishing common rules, regulations, but most of all, standards and policies in telecommunications.\footnote{The ITU stated in 1989. See also Frieden 1995, p. 59ff., Noll 1999, Koenig, Bartosch, Braun 2002, p. 21ff., Walden, Angel 2001, p. 356ff.} An area where the ITU has been traditionally active is international accounting rates, which is intended to provide for an equitable payment to the terminating operator for international calls.\footnote{See for a description, Walden, Angel 2001, p. 363ff., Walden, Angel 2005, pp. 482ff.} But these rates
The international and EC regulatory framework

were hardly used as a point of reference by National Regulatory Authorities ('NRAs') when they were establishing national accounting rates for access and interconnection. Besides, the system was designed to operate under market conditions that changed considerably since and was set to disappear in light of the liberalization of worldwide telecommunications markets.\textsuperscript{22} In particular, technological developments – also noted in Chapter 2 – resulted in alternative communications methods that the ITU did not take into account.\textsuperscript{23} The movement within the ITU therefore has been towards bringing international accounting rates to cost-based tariffing. This would be consistent with the approach taken by NRAs, albeit that it remains to be seen whether the ITU would be in a position to have its member states reach an agreement on the applicable cost methodology.\textsuperscript{24}

Within the Telecommunications unit, the ITU focused on ‘Accounting Principles & Regulatory Interconnection Issues Technical Requirements & Standard Requirement for Interconnection’. One of the study groups of the ITU approved a draft recommendation on International Internet Connection, in which member states were called upon to negotiate and agree on bi-lateral commercial arrangements to be applied on direct international Internet connections.\textsuperscript{25}

The ITU did not really address the contractual aspects of access and interconnection.\textsuperscript{26} However, it issued recommended ‘models’ with which interconnection negotiations could occur. Although these documents are merely not binding internal studies, they are worth mentioning when discussing the EC's approach to the regulation of access and interconnection contract formation.

3.2.2.1 ITU models for regulatory intervention in access and interconnection

Following a worldwide survey of regulatory regimes, the ITU established that, in approaching the issue of how efficient and fair terms to interconnection should be agreed upon, four basic types of regulatory intervention could be used: (1) the commercial negotiations model, (2) the

\textsuperscript{22} See Walden, Angel 2005, p. 483-484.
\textsuperscript{23} For instance re-origination calls, such as call-back systems; and by-pass calls, such as voice over the Internet Protocol ('VoIP').
\textsuperscript{24} See, for the alternative models suggested by the ITU: Walden, Angel 2005, p. 485-486.
\textsuperscript{25} ITU-T Study Group 3, Draft Recommendation on International Internet Connection, April 2000 (proposed by Australia) and as amended.
\textsuperscript{26} See, for instance, PT-APRII and PT-TRIS.
commercial negotiations model made subject to regulatory intervention, (3) the commercial negotiations model made subject to a regulated framework and (4) the set negotiations regime. These models were not binding on the ITU’s members.

(1) The commercial negotiations model
In this model, all issues regarding interconnection, whether they arise in respect of access, the timing of access, pricing or otherwise are left completely to negotiation between the parties. If the commercial agreement runs counter of (national) competition law, then the parties will have recourse to remedies under competition law. There would be no sanctions in the law (other than under contract law) if the parties would fail to reach an agreement. The model is fully compatible with the general principle in contract law between professional parties applied in many Western countries. It assumes that the parties are equal to some extent and that they can freely negotiate the terms of agreements amongst themselves, without any outside intervention being necessary. The Recitals to the Access Directive contain a hint that the EC would prefer this model (akin to the primary interconnection rule, but without intervention) where the electronic communications markets would have been completely liberalized:

"In an open and competitive market, there should be no restrictions that prevent undertakings from negotiating access and interconnection arrangements between themselves, in particular on cross-border agreements, subject to the competition rules of the Treaty. In the context of achieving a more efficient, truly pan-European market, with effective competition, more choice and competitive services to consumers, undertakings which receive requests for access or interconnection should in principle conclude such agreements on a commercial basis, and negotiate in good faith." (emphasised added)

(2) The commercial negotiations model made subject to regulatory intervention
As in the first model, all issues are dealt with through negotiations between the parties, but they are subject to some degree of regulatory intervention, especially in situations where the parties cannot reach an agreement.

28 See Access Directive, Recital (5).
29 Perhaps this model is less sensible for markets that are on the brink of liberalization. Apparently, New Zealand used one of these models at the time it liberalized its telecommunications market. This led to delays of two years until the first interconnection agreement between the incumbent, Telecom New Zealand, and a new
Regulatory intervention, however, is not based on a firmly established dispute resolution model and intervention will be highly informal; perhaps the ITU foresaw more of a role for a NRA as a mediator. This model would to some extent resemble to self-regulation, since it concerns regulation aimed at a specific group, consisting of rules which have been laid down for and work within the group and which can be enforced against the group members.30

(3) The commercial negotiations model made subject to a regulated framework
The agreement is formed through private negotiations between the parties. However, the NRA sets the framework for negotiations and it has to approve - formally or informally - the agreement, or it can intervene if the parties fail to reach an agreement. This model is based on the belief that at some point there may be a need for an external, objective referee, who will direct the parties, especially should negotiations fail. In a market with a dominant TO, it is felt that there is a risk that free negotiations will not lead to an acceptable result. As a consequence, there must be a system with competences for a third party to intervene, such as the NRA.

By the year 2002-2003, at the time of the NRF, the EC - apparently mixing the primary and the secondary interconnection rule - stated:

"In markets where there continue to be large differences in negotiations power between undertakings, and where some undertakings rely on infrastructure provided by others for delivery of their services, it is appropriate to establish a framework to ensure that the market functions effectively."31

The EC considered that entry barriers could become less relevant and that a dynamic approach to possible ex ante regulation was needed. The basis for intervention would be the assessment of the sufficiency of competition law in reducing or removing barriers to entry or in restoring effective

---

30 For a recent discussion on self-regulation, see Eijlander 2005, p. 2 ff.
31 See Access Directive, Recital (6), first sentence. See also Interconnection Directive, Recital (12), where the EC argued '(...) whereas negotiation of interconnection agreements can be facilitated by national regulatory authorities setting down certain conditions in advance, and identifying other areas to be covered in interconnection agreements.'
competition. Yet, especially as regards the secondary interconnection rule, the EC was convinced that there needed to be a clear competence for the NRA:

"National regulatory authorities should have the power to secure, where commercial negotiation fails, adequate access and interconnection and interoperability of services in the interest of end-users." (emphasis added)

This model allows for active intervention, especially in the negotiations process. It would fit well in the interim, where the market has been – partly or completely – liberalized, but where access and interconnection are not yet fully secured for all. The NRA role could be fulfilled according to different approaches ranging from reactive to pro-active intervention. A regulator could decide to arrange for a mix of ex ante and/or ex post competences.

(4) The set negotiations regime
In this model, specific issues will be prescribed at the outset by the NRA. The parties are free to negotiate what has not been fixed beforehand. This does not mean that all rules will be established beforehand. The regime is to delineate the scope of what can be agreed and what must be agreed upon according to the rules. Ex ante regulation will be the norm. However, the model may well contain elements of ex ante regulation and ex post regulation, with intervention by the NRA available also after an agreement has been entered into between the parties. This model would fit well in where the regulator feels that access to ECS and ECNs cannot be fully secured yet.

3.2.2.2 Summary
It will become clear that the EC opted for a mix: it applied the third model for primary interconnection (the duty to negotiate), with a wide menu for regulatory intervention using the fourth model as regards the secondary interconnection rule (where SMP was established).

Any system of negotiated access entails that the result of the prescribed negotiations are not known beforehand. Arguably, a risk of such a system could be that the OLO must in such event demonstrate that the TO did not negotiate in good faith. Whereas, in the event of set negotiations, it appears likely that the TO would bear the burden of evidence, i.e. that the OLO's
request was unreasonable, or that there would be technical problems. In both systems, there would be a timing issue, where parties cannot reach an agreement amongst themselves.\textsuperscript{34}

### 3.3 The EC regulatory framework

Traditionally, the regulation of telecommunications markets was based on the layered structure of telecommunications services.\textsuperscript{35} A more sophisticated approach of electronic communications regulation distinguished between the (regulation of) infrastructure and the telecommunication services that enabled the use of the infrastructure and their applications.

Interconnection was not only concerned with the interoperability of infrastructure; it also covered the provision of telecommunication services. Examples that garnered attention over the past years were carrier pre-selection (‘CPS’) services, Internet broadband access, VoIP and mobile virtual network operators (‘MVNOs’).\textsuperscript{36} Various market parties provided these services. These parties must collaborate, as they did not have the facilities to offer everything to everybody. The market parties entered into different types of contracts that enabled and enhanced the service provision.

According to one author, there are at least eleven basic forms of service provision in telecommunications.\textsuperscript{37} His categorization focuses on end-user service provision at the retail level.

In order to better understand the legitimacy of the regulation of interconnection agreements, an attempt is made to classify telecommunications contracts into different layers.\textsuperscript{38} It can then be seen at which layer the interconnection agreements are found and at which market level the government intervenes.\textsuperscript{39} The categorization is based on defining levels of cooperation and looking at the contracting parties. At the high end, the government acted as a contracting party, at the low end the consumer.\textsuperscript{40}

\textsuperscript{34} Cf. Houben 2005, p. 39. Chapters 5 and 6 will explore how timing issues are resolved.
\textsuperscript{35} See Chapter 2 paragraph 2.2.
\textsuperscript{36} See Glossary for description of the services.
\textsuperscript{37} See, Loos 1996.
\textsuperscript{38} These layers are different from the network layers described in Chapter 2. The hierarchical position is not relevant. The relevance lies in the characterization of the performance of the obligations under the agreement.
\textsuperscript{40} It should be borne in mind that at all levels competition law played a role. See, for instance, more extensively, Bishop, Walker 2002, Dommering 2001/1, Eccles 2002, Walden, Angel 2005.
Interconnection Regulation and Contract Law

Figure 3.1 Types of electronic communications contracts

| 1. Agreements between undertakings and governmental organizations |
| 2. Strategic alliance agreements between undertakings |
| 3. Interconnection agreements between TOs and OLOs |
| 4. Access and interconnection agreements between OLOs and other types of network agreements |
| 5. Agreements regarding services, the sale, license of networks, technology and/or content between undertakings |
| 6. Service provision agreements with end-users |

Ad (1): This level concerns agreements between ECNs or ECS providers and governmental agencies. An example is the agreement whereby a provider obtained frequencies from the government. The agreements themselves were not necessarily regulated, although the allocation of the underlying rights (i.e. the right to use radio frequencies) and obligations (i.e. the obligation to build a network) were. In some jurisdictions, for instance the UK, the interconnection regulations that required the British TO to act in accordance with EU law could be regarded as a first level agreement.41

As (2): At the next level are the strategic alliances, setting up special purpose co-operations in the field of, e.g., the provision of mobile communications services. These agreements were not susceptible to ex ante regulation, save that they would be subject to the applicable competition rules.42

Ad (3): At the third level – the wholesale level – are the agreements between TOs and OLOs, such as interconnection agreements. Other examples similar to interconnection agreements are co-location, roaming and resale agreements. These types of telecommunications agreements were heavily regulated, notably, because that was considered a pre-requisite to regulate market behaviour of the TO (cf: with the secondary interconnection rule).43

---

41 See, the 1997 Interconnection Guidelines, referenced, *inter alia*, in Chapter 4 paragraph 4.2.1. In other jurisdictions – such as the Netherlands – these obligations were implemented into the law.

42 See, more extensively, Schmitz-Morkramer 1999.

43 In addition, special rules – such as SMP – will apply to these agreements, but, also competition law in general will apply to interconnection agreements, see, for instance: Bright 1999, Brody, Polster 1998, Coudert 1995, Koenig, Loetz 2002.
The international and EC regulatory framework

Ad (4): At the next level are the commercial co-operation agreements between OLOs. These could also involve aspects of access, interconnection, co-location, but the difference is that the perception was not one of unequal parties. One may think of an interconnection agreement between two non-SMP mobile operators. These agreements were less regulated, in the first place because the obligations regarding SMP did not apply to the parties. Yet, as was seen, these agreements were also subject to regulatory intervention, as regards the duty to negotiate (cf. with the primary interconnection rule).44

Ad (5): At this level agreements regarding sale or license of equipment, technology or content – all of which were important in competitive markets – can be found. Examples are network infrastructure agreements, site-sharing agreements and equipment delivery agreements. Services agreements, such as operations and maintenance, are also included. These agreements were not subject to specific regulatory intervention, although they would again be subject to competition law. An example is the MVNO. The MVNO is an organisation that offers mobile communication services without having a license to use frequency spectrum. Normally, the MVNO would purchase capacity from a mobile network provider. Infrastructure sharing appeared in different forms. The purpose of such agreements was to decrease the cost of establishing and maintaining the network.45

Ad (6): Finally, there are the agreements with end-users at the retail level. When these end-users were consumers, these types of agreements could be subject to special regulation.46

The division into groups of agreements shows that only a limited group of telecommunications agreements was subject to regulatory intervention, other than in the field of competition law. There was a perceived need to protect the weaker party then; this can be deducted, a contrario, from the fact that, for instance, there was no specific regulation aimed at strategic alliances in the sector. It can also be deducted from the fact that agreements at the last level, between electronic communications operators or providers and end-users were also regulated; which is the level were there was a clear difference in the status of the parties.

44 See Chapter 4 and Chapter 8 paragraph 8.2.2.
45 See also Eccles 2002, pp. 108ff.
46 It falls outside the scope of this book to discuss the details of such regulation. See Houben 2005.
3.3.1 Major policy decisions and available legal instruments

According to many authors, EC regulation was characterized by a dualistic approach, consisting of the liberalization of the electronic communications market and the harmonization of some of the specific rules in the Member States applicable to the sector. The basis for regulating the electronic communications market was both in EC competition law and the establishment of the internal market.47

In analysing the development of EU's electronic communications policy, most authors distinguish three phases: (1) the liberalization of areas reserved for a monopoly provider; (2) the securing of access to communications networks and services, especially through harmonization efforts and the development of minimum standards; and, (3) the full application of competition rules to the electronic communications sector.48 From the outset, the EC combined phases one and two: liberalization and harmonization.49 The ONP framework was designed in phase one. The NRF was designed and implemented in order to achieve phase three.

Another way of looking at the regulation of the sector is through the distinction among four successive periods: (1) the starting model until 1990, (2) the regulatory model following the 1987 Green Paper (1990-1996), (3) the transition model of the 1992 review and the 1994 Green Paper (1996-1997) and finally, (4) the fully liberalized model (1998 and further).50

It falls outside the scope of this book to describe the process of EC regulation extensively; the two key frameworks, the ONP framework and the 2002 NRF will be discussed.51 Since the focus of this book is on the negotiation and the performance of interconnection agreements, by nature, the emphasis lies in the last period taking place from 1998 onwards.52

---

47 Articles 81-86 and 95 EC Treaty. See: Larouche 2000 and Scherer 2005, p. 8-11. Smits 1992, contend the framework was based on the harmonization of the national regimes. For a discussion on the regulatory challenges of the EU, see Cave, Crowther 1996; Van Cuijlenberg, Verhoest 1998.


50 See Larouche 2000.


The international and EC regulatory framework

The EC used different legal instruments to regulate electronic communications.\(^{53}\)

The major EU policy decisions were presented through a series of policy papers and resolutions. These Green Papers, prepared and published by the Commission, were consultative documents setting out basic policy goals for public debate.

The most important Green Paper in the field was the 1987 Green Paper on the development of the common market for telecommunication services and equipment.\(^{54}\) Later, major Green Papers included the 1994 Mobile and Infrastructure Green Papers, the 1996 and 1998 Green Papers on Numbering and Radio Spectrum and the 1999 Review.\(^{55}\)

The EC issued Directives the most frequently.\(^{56}\) The Commission also applied

---

\(^{53}\) In this context the most important institutions are the Commission, the Council and the ECJ in interpreting EU communications law, especially in the context of competition law. See also Nihoul, Rodford 2004, pp. 9ff.; Walden, Angel 2005, pp. 108ff. Note the power of the Commission under Article 226 EC Treaty to instate proceedings against the Member States based on the late or incorrect implementation of electronic communications directives; and, conversely, the right of Member States under Article 230 EC Treaty to instate proceedings arguing against the Commission’s right to legislate certain topics.

\(^{54}\) See: towards a dynamic European Economy - Green Paper on the development of the common market for telecommunications services and equipment, COM (1987) 290 final, discussed infra, paragraph 3.3.2.


\(^{56}\) Directives are addressed to, and binding upon, the Member States and require implementation by national law. See Article 249 (3) EC Treaty. Article 95 EC Treaty provides for the adoption, by qualified majority, of harmonization Council Directives Since November 1993, Directives based on Article 95 EC Treaty were adopted under the co-decision procedure, see Article 251 EC Treaty. The procedure strengthened the legislative powers of the European Parliament; the Parliament could prevent the entry into force of such a Directive. The legislative procedure under Article 86 EC Treaty does not provide for the involvement of the Council or the European Parliament. On the status of EC directives in national law, see Prechal 1996.
the instrument – in one case – of a Regulation\textsuperscript{57} and numerous Decisions.\textsuperscript{58} This approach was also the consequence of the distribution of the main regulatory powers between Commission and Council.\textsuperscript{59} The Commission is empowered by article 86 (3) EC Treaty to dismantle state monopolies. The Council is entitled to adopt measures aiming at the establishment of the internal market under Article 95 EC Treaty.\textsuperscript{60} Article 95 EC Treaty can be seen as a promoting factor for sector-specific regulation.\textsuperscript{61}

At the time of the NRF the use of non-binding sector-specific measures increased. These consisted, \textit{inter alia}, of Guidelines, Recommendations\textsuperscript{62} and

\textsuperscript{57} Regulations are directly applicable in all Member States. They require no implementation. See Article 249(2) EC Treaty. See the LLU Regulation.

\textsuperscript{58} Decisions are addressed to legal persons or Member States. They apply to the addressees only, \textit{cf.} Article 249 (4) EC Treaty. The Commission’s power to issue decisions is derived either directly from the EC Treaty article 86(3) or from powers conferred by the Council. See Article 86 (3) and Article 155 under 4) and Article 211 under 4) EC Treaty. See for relevant EC Decisions in the field of liberalization, e.g., Decision 28/1999 of 14 December 1998, [1999] \textit{OJ} L 17/1; Decision 1376/2002/EC of the European Parliament and of the Council of 12 July 2002 amending Decision 1336/97/EC on a series of guidelines for trans-European telecommunications networks, [2002] \textit{OJ} L 200/1.

\textsuperscript{59} \textit{Cf.} Nihoul, Rodford 2004, p. 37-40. They describe the manner in which the various measures were executed both at the EC and the Member States’ level.

\textsuperscript{60} \textit{Cf.} former Articles 90 (3) and 100a EC Treaty. The Services Directive was enacted under Article 86(3) EC Treaty, the open network provision (ONP) Framework Directives under Article 95 EC Treaty.

\textsuperscript{61} \textit{Cf.} Larouche 2002, p. 135.

The international and EC regulatory framework

Working Papers. The EC considered that these measures could be agreed upon and concluded more easily and quickly than Directives and that they could be adopted flexibly to changing technological and market conditions.

3.3.2 The 1987 Green Paper and the ONP Framework

The Commission's 1987 Green Paper proposed the introduction of more competition in the telecommunications market combined with a higher degree of harmonization and provided the core principles of the EC's telecommunications policy. In essence, the starting point was to require the Member States' cooperation in achieving the following goals: (1) abandon communications infrastructure reserved for state monopolies, while preserving network integrity; (2) liberalize all telecommunications services—except for public voice telephony, which was to remain subject to a monopoly—; (3) achieve interoperability throughout the EC by means of harmonized technical standards through the European Telecommunications Standardization Institute ('ETSI'); (4) open up the market for terminal equipment and provide for full and mutual recognition of terminal equipment; and, finally, (5) implement a framework known as ONP to regulate the relationship between TOs and competitive other licensed operators ('OLOs') for the services to be liberalized.

The first two goals led to the Services Directive. The Services Directive aimed at liberalizing the provision of telecommunications services (other


64 Arguably, the danger of this approach is that there would appear to be less democratic control over the legislative process. Legislation by 'decree' could become more common.

65 See for a description of the telecommunications market prior to the liberalization, e.g., Larouche 2000, p. 2-3, Koenig, Bartosch, Braun 2002, p. 71ff, Nihoul, Rodford 2004, p. 33ff. The Commission's policy proposals were broadly endorsed by the Council of Telecommunications Ministers, which passed a resolution giving its general support to the objectives of the Commission's planned actions. See Council Resolution of 30 June 1988 on the development of the common market for telecommunications services and equipment up to 1992 (88/C/EEC), OJ C 257/1.

66 Cf. Larouche 2000, p. 4ff. See for the process of standardization, and the most relevant actors, in extenso, Stuurman 1995, chapter 2; for the European Telecommunications Standards Institute ('ETSI'), p. 58ff. On interoperability, see, infra, paragraph 3.4.1.

than public voice telephony). The third and fourth goals to achieve interoperability led to, *inter alia*, the Commission's Terminal Equipment Directive. The fifth goal was achieved by later issue of the ONP Framework Directives. These Directives prescribed that the regulatory functions (often performed through a Ministry, whilst the government still owned the TO) and the operational functioning of TOs needed to be separated, services and infrastructure needed to be distinguished as well as services that were reserved and were not reserved to the TO.

Council Directive 91/263 of 29 April 1991 on the approximation of the laws of the Member States concerning telecommunications equipment, including the mutual recognition of their conformity, [1991] OJ L 128/1 ("Terminal Equipment Directive"), which was later consolidated and overhauled by further Directives, such as Directive 98/13 on telecommunications equipment and satellite earth station equipment, including the mutual recognition of their conformity, [1998] OJ L 74/1 ("Terminal Equipment Directive II"). Under these Directives, numerous common technical regulations were adopted, that were intended to harmonize the specifications of the various types of terminal equipment. *cf.* Larouche 2000, p. 4.

The following Directives referred to in the text formed part of the ONP Framework:


The distinction between reserved and non-reserved services was somewhat difficult to make, *cf.* Larouche 2000, p. 9-14.
Finally, access and interconnection needed to be distinguished from each other. But the 1987 Green Paper was drawn from a perspective of wanting to liberalize access. As such, not all OLOs could initially request for interconnection to the TO's network.

In order to achieve the ONP in respect of interconnection, the ONP Framework Directive worked out three main approaches.

First, the ONP conditions were not to restrict access to the public networks or services, except when this was required for: (1) the secure functioning of the ECN, (2) the maintenance of network integrity, and, in justifiable circumstances, (3) the interoperability of services, (4) the protection of data, (5) environmental protection, (6) requirements regarding city planning and the public area, and (7) the use of frequency spectrum and the avoidance of harmful interference between telecommunication and other technical systems.

As will be seen below, the interoperability of services requirement played a visible role in the manner in which interconnection was further regulated.

Second, the ONP Framework Directive promoted the harmonization of technical interfaces and service elements that complied with the demands of

---

71 As will be seen further in this book, the EU did not always used the terms access and interconnection in a consistent manner, and this in turn led to inconsistent implementation of the notions. See, *inter alia*, Chapters 2 and 4; for a recent article on the Netherlands, Schillemans 2005.

72 See also Larouche 2000, p. 15ff.

73 The other principles were: (1) to guarantee the availability of a minimum range of service, and (2) guarantee the universal service provision. See Article 1 ONP Framework Directive. Obviously, these two ONP Principles are also relevant in the establishment of interconnection. The ONP Framework Directive provided – as to their application on a case-by-case basis, harmonised measures for technical interfaces and network functions, use and delivery terms for networks and services, principles for tariffs (such as cost orientation), and the access to frequencies and numbers. See Article 2 Section 8 ONP Framework Directive.

74 Article 1 (6) ONP Framework Directive, in which the ‘essential requirements’ are defined in general as ‘non-economic reasons in the public interest that may force Member States to set the conditions for the installation and/or exploitation of telecommunications networks or the provision of telecommunications services’.

75 See Article 1 (6) ONP Framework Directive. The protection of data includes: the protection of personal data, the preservation of the confidential character of information that is transmitted or stored, and the protection of privacy.
Interconnection Regulation and Contract Law

open and efficient access, interconnection and interoperability. The development of European standards was and remains paramount to achieve the goal of interoperability. In principle, the Member States' compliance with these European norms and standards was voluntary. The Commission could decide to appoint mandatory norms and standards in cases where the voluntary compliance did not lead to the interoperability of cross-border services in several Member States.

Third, the ONP Framework Directive aimed to establish convergence between the NRAs and the activities undertaken by ECS providers. If Member States retained control over the ownership or maintained significant control over the providers of ECNs or ECS, they had to bring about an effective and structural demarcation between the regulating competences and activities related to the ownership or control of networks, services or equipment. The ONP Framework Directive defined the areas where a further harmonization of ONP conditions would be effected.

3.3.2.1 The ONP principles
The notion of ONP emerged because when the first steps to liberalize the EC's electronic communications sector were already taken, it appeared that Member States allowed for the application of divergent technical requirements and usage/delivery conditions for the provision of access to public ECNs and services. As divergence would hinder the liberalization process, harmonization of technical norms was considered desirable. In order to ensure that market positions that had been historically built would not be unduly kept, the ONP Framework worked with notions that had not been widely used previously, notably: non-discrimination, transparency, cost-orientation and accounting separation. These notions were imposed as

---

76 To promote these harmonized measures, the European Commission regularly publishes norms and specifications that may serve as a basis for technical harmonization. See, regarding technical norms and the law, e.g., Bekkers 2001, Stuurman 1995.
77 For mobile telecommunications standards, see Bekkers 2001.
78 Article 5 ONP Framework Directive.
79 See Article 5bis ONP Framework Directive.
80 But, as Jan Smits pointed out in a conversation, there was no real level playing field in regulation at the national level, thus a discrepancy existed between the level of activity at the EC level and the diverging involvement in regulation at the national level.
81 See Article 4 (2) ONP Framework Directive. As a result, the ONP Leased Lines Directive, the Interconnection Directive and the ONP Voice Telephony Directive were issued.
requirements on the TO under the secondary interconnection rule. They were enhanced under the NRF.\(^82\)

As a result, the TO was prevented from discriminating in its offer of interconnection between OLOs. Its offer had to be transparent, and the underlying cost needed to be cost-oriented, rather than aimed at making substantial profits.\(^83\)

Oddly, the Commission did not elaborate on the intended meaning of these very important, all-encompassing principles.\(^84\)

**Non-discrimination**

The proposal for the Interconnection Directive restated the principle as follows:

"[Member States shall ensure that the operators with significant market power, i.e. the incumbent TO] adhere to the principle of non-discrimination with regards to interconnection offered to [other operators of public telecommunications networks or services]. They shall apply similar conditions in similar circumstances to interconnected organizations providing similar services, and shall provide interconnection facilities and information to others under the same conditions and of the same quality as they provide for their own services, or those of their subsidiaries or partners."\(^85\)

The prohibition translated into an obligation to treat equivalent cases equally. It had always been explicitly forbidden to discriminate on grounds of nationality in Article 12 EC Treaty.\(^86\) The main prohibition on discrimination in economic terms is laid down in Article 82 (c) EC Treaty, wherein a dominant undertaking can commit an abuse of its position if it applies 'dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage.'

---

\(^82\) For a discussion of the principles applied as 'regulatory remedies' in the Access Directive, see Cawley 2004, in particular p. 8ff.

\(^83\) Article 6 (a) Interconnection Directive specified the notion of non-discrimination and will be discussed below. On ONP principles and contract law, see Chapter 6 paragraph 6.6.2.

\(^84\) See Larouche 2000, p. 77ff.


\(^86\) Article 12 EC Treaty reads: 'Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited. The Council, acting in accordance with the procedure referred to in Article 251, may adopt rules designed to prohibit such discrimination.' See on the possible justification for discrimination, e.g., Nihoul, Rodford 2004, p. 106.
Although the notion was relatively straightforward, it required further thinking to be applied in an equally straightforward manner to interconnection agreements.\(^{87}\)

The main concern of discrimination was that a TO would discriminate between its own affiliates and other parties. Specific conditions were imposed on operators who behaved in this manner.\(^{88}\) In two joint matters, the Commission issued specific duties with respect to access and interconnection for their public packet-switched data and other networks on incumbents considered to be dominant.\(^{89}\)

Nor could a dominant undertaking discriminate between its customers, and OLOs for this purpose would be considered customers of a dominant TO. The fact that certain operators might be categorized differently in reference interconnection offers ('RIOs') would not make much of a difference. Discrimination could be allowed, where there is a legitimate business purpose justification. In the decision *Worldcom/MCI*, a description was given of how interconnection agreements might come about in market where there is no dominant TO.\(^{90}\) In that case, the party being requested to provide interconnection could simply adjust prices applied for interconnection in accordance with the underlying cost and commercial considerations. Such a party would logically be inclined to offer another OLO, that had roughly the same amount of traffic, better terms than a small party seeking interconnection, which party would hardly generate any worthwhile traffic.\(^{91}\) This would not be considered a matter of discrimination.\(^{92}\) If the TO would be considered to have a dominant position, perhaps the scope of its network

\(^{87}\) Cf. Larouche 2000, p. 218ff. The notion was applied in the matter of Court of First Instance ('CFI'), 6 October 1994, Case t-83/91, [1994] ECR II-755 (*Tetra Pak/Commission*), which concerned two types of price discrimination. See also Commission Notification of the application of competition rules to agreements regarding access in the telecommunications sector, [1998] OJ C 265/02, which discusses the application of Articles 81-82 to access requests.

\(^{88}\) See for instance, Commission Notice of 11 January 1992, case IV/33.361, [1992] OJ C 7/3 (*Infonet*), which concerned the provision of leased lines against better terms regarding price, quality of service ('QoS'), usage conditions, installation and maintenance.

\(^{89}\) The complaints were filed against France Telecom, Deutsche Telekom - and in an additional matter, Sprint -. See Commission Decisions 96/546 and 96/547 of 17 July 1996, [1996] OJ L 239/23 and 57 (*Atlas and Phoenix/Global One*).


\(^{91}\) Cf. Larouche 2000, p. 76.

\(^{92}\) Cf. Larouche 2000, p. 221ff.
configuration could present a valid justification for price differentiation. But where the TO would fall under the EC regulatory framework – as was the case for most TOs with SMP –, there would be little room to adjust the prices, terms and conditions. This would limit the room to negotiate. A possible solution would be to rely on ex ante regulation, as this would provide for a better solution, e.g., in respect of technical issues.93

Interestingly, the non-discrimination requirement was slightly refined in the Unisource decision, where the Commission specified that non-discrimination in the electronic communications sector meant that service provision between a TO and its affiliates must take place:

"(...) on an arm's length basis, that is on terms and conditions similar to those offered to third parties.94"

In sum, the notion of non-discrimination in terms of the sector evolved during the liberalization process. The ONP Framework Directive included the discrimination prohibition, albeit that it extended nationally as well.95

**Transparency**

As will be discussed in detail below, any operator was under an obligation to make available to OLOs all information necessary to make business decisions (such as what services to order from the TO). In connection therewith, the TO with SMP must publish a RIO.96 The obligation of transparency could be made more specific in that case, requiring the SMP undertaking to publish additional information.97 It was left to the discretion of the NRA to decide what information must be made public.98

---

93 See Larouche 2000, p. 225.
95 Cf. Articles 8 (3) and 9 (1) Framework Directive.
96 See Article 9 (2) Access Directive. The Access Directive stipulates that the offer must be sufficiently unbundled, in order that the OLO will not order services it does not require.
97 See Article 9 (1) Access Directive.
98 This is a fairly broad competency. See Article 9 (3) Access Directive. Cf. Nihoul, Rodford 2004, p. 185-186.
Cost-orientation and accounting separation
The principle of cost-orientation entails that the SMP undertaking must make transparent its wholesale prices and internal transfer prices upon order of the NRA. The purpose of this requirement was the prevention of unfair cross-subsidies.

The principle of cost-orientation includes the right for the NRA to order that the SMP undertaking make available its accounting records, including data and revenues, and may decide to publish such information, if certain conditions are met. The basis for price control can be found in Article 11 (3) Access Directive: NRAs may order price adjustments, ‘where appropriate’. This is a rather broad discretion for NRAs.

The Commission elaborated on the principles of cost-orientation and accounting separation in the 1998 Recommendation. It provided guidelines for NRAs to require how TOs would have to separate accounting for different infrastructure provision activities, and internal cost compensation rules. However, the 1998 Recommendation left a considerable freedom to the NRAs to decide how to interpret these principles.

In a 2004 judgement, the European Court of Justice (‘ECJ’) briefly alluded to the principle of cost-orientation in the context of two pre-judicial questions raised by the Dutch Supreme Court related to universal service obligations. When the TO was asked to make available telephone guide data, it refused to offer all data to a party wanting to compete with it. At stake was not only what ‘relevant information’ meant in the ONP Voice Telephony II Directive, but also what cost-orientation meant in this respect. There may be some relevance for interconnection agreements, if

---

102 See on this issue and on excessive pricing, cross-subsidization etc., Larouche 2000, p. 231 ff.
104 See, supra, for reference. The Dutch court wanted to know how this was interpreted. The ECJ considered that the TO was not under an obligation to provide all extra data (e.g. profession or mobile telephone number, if available) in respect of telephone subscribers listed in its directories.
a court would be able to establish what services were to fall outside the standard scope.

3.3.2.2 The Full Competition Directive
In July 1993, the Council of Telecommunications Ministers decided to liberalize the EC voice telephony services markets by 1 January 1998. This important decision followed the Commission's 1992 Review of the situation in the telecommunications services sector and a subsequent Communication to the Council and the European Parliament, which proposed far-reaching liberalization measures. In its 1993 Resolution, the Council established a timetable for further action to be taken to achieve full competition.

On the basis of the 1994 Green Paper on the liberalization of telecommunications infrastructure and CATV networks, the Commission then considered that the further liberalization of electronic communications infrastructure and services would be dealt with jointly. The Commission determined a two-step timetable, specifying that the liberalization of infrastructure for ECS provision needed to be completed as of 1995; and that the liberalization for public voice telephony would be concluded not later than 1 January 1998. The 1994 Green Paper also introduced interconnection rights for OLO's that were operating networks providing


106 Cf. Council Resolution of 22 July 1993 on the review of the situation in the telecommunications sector and the need for further development in that market (93/C/EEC), OJ C 213/1. The main objectives included: (1) the liberalisation of all public voice telephony services by 1 January 1998; (2) the accelerated adoption of pending proposals concerning ONP with regard to voice telephony services and the mutual recognition of licences; and (3) the development of Community policy through publication of Green Papers in the fields of mobile and personal communications and of telecommunications infrastructure and cable networks.


108 Note that the 1994 Green Paper introduced the notion of 'alternative infrastructure'. For the interim period until full liberalization in 1998, the Commission deemed it necessary to define alternative infrastructure to encompass electronic communications infrastructure used for services that had been liberalized by 1995 (e.g. public utilities' and cable access television ('CATV') networks); cf. Larouche 2000, p. 20-21.
Interconnection Regulation and Contract Law

liberalized ECS. Following this Paper, the Council adopted a resolution setting forth the main regulatory issues to be determined.\textsuperscript{109}

The 1996 Full Competition Directive concluded the series of measures under Article 90 EC Treaty, opening segments of the electronic communications markets to competition and set forth the necessary legal parameters: it required the Member States to take the necessary steps to ensure that markets would indeed be fully open by 1 January 1998, with the possibility of transition periods of up to five years for Member States with less developed networks and up to two years for Member States with very small networks.\textsuperscript{110}

The Full Competition Directive also established basic rules on interconnection, and included a definition of the term. These rules were considered to be of crucial importance in the initial period after the abolition of the special and exclusive rights.\textsuperscript{111} The Full Competition Directive viewed interconnection primarily as a matter of negotiation between the parties, thereby appearing as early as 1996 to favour a system of free negotiations as the primary interconnection rule, which would justify intervention by the NRA as a last resort only. Notwithstanding its preference for free negotiations an ambiguous approach emerged under Article 4a of the Directive.\textsuperscript{112} In view of the imbalance in negotiating power between the new entrants and the dominant TOs, the Directive required Member States for a period of five years to ensure that: (1) the TOs provide interconnection to their voice telephony service and their public switched telecommunications network on non-discriminatory, proportional and transparent terms;\textsuperscript{113} (2) the national TOs publish, not later than 1 July 1997, the terms and conditions for interconnection to the basic functional components of their


\textsuperscript{111} Cf. Recital 13 Full Competition Directive.

\textsuperscript{112} Cf. Larouche 2000, p. 24.

\textsuperscript{113} Article 4a (1) Full Competition Directive.
The international and EC regulatory framework

voice telephony service and their public switched network;\textsuperscript{114} (3) TOs were enabled to negotiate interconnection – in other words Member States should not prohibit incumbents to negotiate with third parties;\textsuperscript{115} (4) if commercial negotiations would not lead to an interconnection agreement within a reasonable period, at the request of either party, a reasoned decision would be taken establishing the necessary operational and financial conditions and requirements for such interconnection;\textsuperscript{116} and (5) accounting systems for public voice telephony and public telecommunications networks would be implemented to assess the cost for interconnection.\textsuperscript{117} The latter objective posed a clear shift from the stated preference of relying on a system of freely negotiated access between OLOs. It had been absent in the WTO Reference Paper on Telecommunications. Hence the objectives that led to the primary and the secondary interconnection rules overlapped to some extent.

The secondary interconnection rule embedded partially in Article 4a, i.e., the imposition of specific duties on TOs required re-thinking of the notion of dominance.

The 97/51 Directive amending the ONP Framework Directive provided an amendment to the Leased Lines Directive to establish what was to be understood with the term SMP:

"For the purposes of this Directive, an organization shall be presumed to have significant market power when its share of the relevant leased-lines market in a Member State is 25\% or more. The relevant leased-lines market shall be assessed on the basis of the type(s) of leased lines offered in a particular geographical area. The geographical area may cover the whole or part of the territory of a Member State."\textsuperscript{118}

The 25\% trigger was lower than the 40\% percentage applied under general competition law to establish dominance and was subject to much criticism by the Member States, especially Germany.\textsuperscript{119}

\textsuperscript{114} Article 4a (2) Full Competition Directive.
\textsuperscript{115} Article 4a (3) Full Competition Directive.
\textsuperscript{116} Article 4a (3) second paragraph Full Competition Directive. This was before NRA's were introduced hence the Directive was aimed at Member States' government agencies.
\textsuperscript{117} Article 4a (4) Full Competition Directive. Cf. this with the WTO Reference Paper on Telecommunications, discussed supra, paragraph 3.2.1.
\textsuperscript{119} Germany refused to apply the trigger, see Tarrant 2000, p. 320-325.
The interconnection provisions of the Full Competition Directive must be read in conjunction with the Interconnection Directive and the other sectoral ONP Directives. As had been the case with the Services Directive, the regulatory approach led to a considerable amount of overlap between the Full Competition Directive and the newly adopted harmonisation directives. This duplication of rules was, at best, cumbersome for those that had to implement or to apply EC law. In some instances, provisions of the Full Competition Directive and of the harmonisation directives or their respective legal definitions differed from each other due to insufficient coordination during the legislative process.

Larouche notes that full liberalization involved a thorough change in the regulatory model used, as – just with other utility sectors – the last phase the voice telephony sector, then considered to be of prime public interest, was involved.120 But, it is not certain that such a change occurred at that time. According to Larouche, the Full Competition Directive recycled some of the notions used previously. As was seen above, where it regarded interconnection, more specific obligations were imposed on the TOs in order to warrant full competition. By 1998, the entire telecommunications sector was being opened up for competition. Specific rights and obligations, in particular, in respect of interconnection applied in respect of public voice telephony and public networks.121 It can be said that, in principle, the liberalization model applied for the electronic communications sector was intended to be progressive, in that each new step continued from its preceding step in the process.

3.3.2.3 The ONP Framework Directive and competition law

In addition to establishing a European regulatory framework for electronic communications that included a sector-specific approach to dominance, the EU aimed at developing electronic communications law through the enhanced of general European competition law.122 Both the cartel prohibition of Article 81 EC Treaty, and the prohibition of abuse of a
dominant position under Article 82 EC Treaty were thought to offer adequate recourse to establish competition rules in the electronic communications sector.\textsuperscript{123}

Already in 1996, the EC expressed its intent to rely as much as possible on general competition law.\textsuperscript{124} This approach appeared to correspond with phase three of liberalization, where the markets' intervention focused on the application of general competition law, even though the state of the market at the time did not necessarily justify such an approach.

However, it is clear from the manner in which the NRI was designed that the EC regulator did not rely solely on general competition law. Through three general and non-binding notifications, the Commission attempted to bring clarity on the application of Articles 81 and 82 EC Treaty in the telecommunications sector.\textsuperscript{125} In these notifications, the relationship between the competition rules (that would normally be applied \textit{ex post}) and the ONP framework that was partly based on EU competition law, was analysed.

However, there have been few decisions under Article 81 EC Treaty in the telecommunications sector, and these related to strategic alliances mostly, so they are of less relevance for the current topic.\textsuperscript{126}

Significant importance was attributed to the role of the Commission in exerting a supervisory role in the process of joint ventures and acquisitions in the electronic communications sector.\textsuperscript{127} In many cases, the Commission made its approval subject to the agreement with a number of special measures. Initially, these measures were related to the liberalization of the home markets of the enterprises concerned and the compliance with rules


\textsuperscript{124} This did not mean that the Commission would from then on rely solely on \textit{ex post} intervention. See, \textit{infra}, paragraph 3.3.3.1.


\textsuperscript{126} For further reading, see Larouche 2000, p. 112-283. See also the case overview provided by Jones, Carlin 2005, p. 88-89.

\textsuperscript{127} See the Merger Regulation 4064/89 of the Council, [1989] \textit{OJ} L 385/89.
relating to transparency and non-discrimination. Concessions were demanded from the Member States that were involved in the joint venture. Further, these cases were of great importance in establishing geographical and product markets. An example was where the Commission had to deal with the mobile telecommunications sector. In those matters, the Commission noted that the markets for mobile telecommunications in principle were national by nature and included both the Global System for Mobile Communications (‘GSM’) and the Digital Communications Systems (‘DCS’) 1800 networks and services.

In the Access Notice, the Commission defined specifically for the telecommunications sector what constituted dominance on the basis of what was an essential facility. In this respect, the issue whether the infrastructure to which a party requested access constituted a market in itself needed to be analyzed; and the issue whether the infrastructure really was essential for a party to enter a down-stream services market. Refusal to provide access – or interconnection of networks – could, following an analogy with the Bronner case constitute an abuse if: (1) the refusal to provide access would be likely to eliminate all competition in the down-stream market; (2) the refusal was not objectively justified; and (3) the facility to which access was requested was indispensable to the business of the requesting party.

Under Article 82 EC Treaty, there have been specific decisions relevant to interconnection (where the focus was on price abuse) but the remedies were

---


129 Sometimes indirectly of countries that are not (yet) member of the EU, such as Switzerland in the Unisource decision and Norway in the case of the aborted merger between Telia and Telenor; M.1439, [2001] OJ L 040/01 (Telia/Telenor).

130 See European Commission 12 April 2000, matter M.1795, [2000] OJ C141/19 (Vodafone Airtouch/Mannesmann), in which the Commission defined a not yet existent market for ‘Pan-European seamless services’. Such a market could come into existence by means of co-operation between cross-border mobile networks. Since Vodafone was thought to have a very strong position on such a market it was ordered far-reaching obligations to enable third party access on non-discriminatory terms for a period of three years.


specified further under the NRF, rather than under case law pursuant to Article 82.133
The 2002 Commission guidelines on market analysis and the assessment of SMP were to provide further guidance on the Commission’s approach in dealing with SMP parties.134

Applying general competition law principles to the reciprocal situation of interconnection, it would have to be determined whether refusal to enter into interconnection negotiations would stifle competition, was not objectively justified (the same criterion) and was indispensable not to the business of the requesting party necessarily, but to ensure interoperability.

Both regulatory systems – competition law and sector-specific regulation – to some extent were applied interdependently, but were bound to mutually influence one another. The reason was that the two systems regulated the same markets, enterprises and behaviour, albeit through varying mechanisms.

3.3.3 The NRF
Following a public consultation on the 1998 Convergence Green Paper and the implementation of the ONP framework by the Member States, the Commission began with an evaluation of the package of rules for the communications sector (at the time ‘the ONP review’ referred here as ‘the Communications Review’). The summary of the public consultation on the 1998 Convergence Green Paper listed a number of areas for further reflection by the Commission.135 The respondents confirmed the continuing role of sector-specific regulation, although, at the same time, they requested a lighter regulatory regime.136 The Commission concluded that it needed to find a better balance between general competition rules and sector-specific regulation.137 The Working Document meanwhile confirmed that access – including access to set-top boxes – remained among the key regulatory

134 See Chapter 5 paragraph 5.3.1.1.
Interconnection Regulation and Contract Law

issues; the Commission registered broad support for a continuing framework to guarantee interconnection between public ECNs.138

The Commission then proceeded with its ONP review,139 and set the stage for the 2002 NRI in its Communications Review published in 2000.140 The Communications Review listed a broad range of issues that were to be further regulated, including the rules for defining markets dynamically when considering obligations for access and interconnection.141

The discussion focused on the revision of the determination of SMP. In addition, opinions were divided on the extent to which asymmetric (secondary) obligations in respect of interconnection remained necessary. Some incumbent TOs argued that the incentives to interconnect were the

139 See the EU Consultation Document, towards a new Framework for electronic communications infrastructure and associated services, COM [1999] 539. See also Walden, Angel 2005, Farr, Oakley 2002 ('Consultation Document').
141 Other issues were: (1) maintaining sector specific ex ante regulation that was in parallel with competition rules, with ex ante rules being rolled back where the objectives are met by the market; (2) establishing in Community legislation those regulatory objectives and principles detailed in the Communications Review to guide NRAs in their decision-making at national level; (3) covering all communications infrastructure and associated services in the scope of the new framework, while ensuring it can take account of the continuing links between transmission and content; (4) introducing institutional mechanisms to achieve greater harmonisation of regulation in Member States, while allowing flexibility; there was no support for a European Regulatory Authority; (5) extending the use of general authorisations for the provision of communications services and networks, while ensuring appropriate mechanisms are put in place to manage the use of frequencies, numbers and rights of way; (6) ensuring efficient management of radio spectrum, and establishing a group on radio spectrum policy; (7) maintaining the current scope of universal service, while ensuring that its scope could be extended where appropriate to keep pace with market and technological developments; (8) ensuring the availability of local loop unbundling in all Member States; respondents supported the Commission’s short term intention to use Recommendations and its powers under competition rules of the Treaty to encourage local loop unbundling throughout the EU and called for this action to be reinforced by introducing a legal obligation in the new framework; (9) maintaining the current framework for standardisation (industry-led voluntary standardisation with the possibility to make standards mandatory in the public interest); (10) updating the current Telecoms Data Protection directive; (11) withdrawing the leased lines Directive once there was adequate competitive supply of leased lines for all users; (12) providing for strong and independent NRAs, with effective co-operation arrangements with national competition authorities and the Commission.
same for all market players, and therefore equivalent obligations should apply to all. New entrants and NRAs disagreed, arguing that the incentives, especially in call termination, remained fundamentally different because of the ubiquity of the TO’s network. There was also disagreement over the criteria for applying cost-orientation and non-discrimination obligations to SMP operators. NRAs and new entrants generally argued in favour of retaining an obligation to provide interconnection at cost-oriented prices for all SMP operators. Incumbents and other larger operators supported the proposal to impose such obligation only on operators who were dominant on the relevant market. Interestingly, some of the respondents – especially cable operators - argued against the imposition of a secondary obligation to negotiate access for SMP undertakings, as the Commission proposed for the NRF. They contended that such would effectively entail an obligation to provide access and consequently result in price fixing by the NRAs.\footnote{In contrast, there was broad consensus that the primary interconnection rule of the ONP framework remained valid.}

The Commission then set a very detailed framework for further regulation, including in the field of access and interconnection.\footnote{The policy objectives had to be clear; the Commission wanted to issue a minimum set of rules, enhance the legal certainty in the market, be aimed at issuing technologically neutral rules and ensure that these rules be enforced as strongly as possible. Farr, Oakley 2002, p. 6-7.} A new Discussion Document established the regulatory objectives.\footnote{See DGXIII Discussion Document, the 1999 review: regulatory principles, Brussels, 31 May 1999, XIII/A/1.} The EC’s expressed policy objectives were to promote an open and competitive European market, to benefit consumers and to consolidate the internal market in an environment of increasing convergence.\footnote{See Communications Review, paragraph 3.3, to be discussed, infra.} Thus, it seems \textit{prima facie}, that the EC was intent at moving towards the full application of competition rules to the electronic

\footnote{See, e.g., the following statement: “There was also much criticism of the proposal to impose an obligation to negotiate access on SMP operators. New entrants argued in favour of maintaining an obligation to provide access, and considered an obligation to negotiate would not be taken seriously by operators with SMP, and therefore be ineffective. Others - including cable operators - argued that the prospect of regulatory intervention where negotiations broke down meant that an obligation to negotiate access would in practice have the same effect as an obligation to provide access, since service providers would not negotiate seriously, but wait for the regulator to impose a price.” Source: The results of the public consultation on the 1999 Communications Review and Orientations for the new Regulatory Framework, paragraph 2.3, http://europa.eu.int/ISPO/infosoc/telecompolicy/ review99/ com2000-239en.htm.}
communications sector, albeit again step-by-step. By contrast, consensus emerged that the Commission needed to place emphasis more on sector-specific or *ex ante* regulation. It was considered that it would not be sustainable to impose obligations on TOs based on their historical market power in the long run. Rather, TOs would be judged according to the criterion as to whether they held SMP.

Thus, the result of the Communications Review was a compromise. This was also due to the fact that the Commission had received conflicting feedback, including as regards the manner in which the primary interconnection rule, the duty to negotiate, was imposed on SMP undertakings.

After it had held numerous public consultations held during 2000, the Commission issued new drafts for European regulation of the communications sector. On 24 April, 2002, four new EC directives entered into force. These directives needed to be implemented in the national law of the Member States not later than fifteen months after said date, i.e., 24 July 2003. The Commission also adopted a consolidating Directive that repealed all previous Commission Directives in the field and announced related regulatory initiatives.

The NRF again reflected a dual regulatory approach: The new Framework, Access, Authorisations, Universal service and Privacy and Electronic Communications Directives were based on the Council’s regulatory powers under Article 95 EC Treaty, while the Commission adopted the new Communications Competition Directive under Article 86(3) EC Treaty.

---

146 See for an extensive analysis of the new approach to economic and non-economic regulation of the electronic communications sector, Larouche 2000, p. 359ff. For a comparison of the most striking differences between the ONP Framework and the NRF as regards the SMP regime, see De Streeck, p. 6.


149 Dutch legislation needed to be amended in various areas, see Chapter 4. These amendments will be discussed in as far as relevant in the context of access and interconnection. See for the different consequences Dommering 2001, p. 4-10.

150 See, in particular, the Privacy and Electronic Communications Directive. In addition, a new Communications Competition Directive was foreseen (see draft Directive of the Commission regarding Competition on the market for electronic communications services, OJ EC 2001 C 96/2). The Unbundled Access Regulation is also viewed as part of the NRF.
3.3.3.1 From *ex ante* to *ex post* intervention

Nowithstanding the apparent compromise, the EC aimed to shift its focus to move away not only from sector-specific regulation to the application of competition law, but also from *ex ante* to *ex post* intervention.

Before elaborating on this, it must be agreed with Larouche that competition law is not per se *ex post* intervention, since the EC Treaty allows for broad discretion of the Commission to intervene beforehand in the event competition is at stake. The terms *ex ante* and *ex post* should be used separately from competition law and sector-specific regulation. When used in combination with these terms, in fact they further delineate the scope of intervention. Hence, when applying the term *ex post* competition law intervention, reference is not made to large mergers in the telecommunications industry, but to the policy objectives formulated in the NRF and to policies that are made in response to anti-competitive behaviour, for instance upon complaint of a market party, rather than by way of an autonomous, independent policy instrument.

It was felt at the same time that the market by no means justified the simple application of competition rules yet. As a consequence of the market dynamics, the NRF contained a combination of sector specific legislation and non-binding measures aimed at flexibly responding to ever changing market developments, whilst emphasizing preference for reliance on the competition rules in the EC Treaty. Even though the NRF articulated in various explanatory notes the attempt to move away from specific regulation to a simpler overall regulatory framework, sector specific rules were still interspersed among the various Directives that formed the heart of the NRF. The rationale for this may have been that competition law was effective in clear-cut cases of anti-competitive behaviour; whereas was thought to be more difficult to apply effectively against less evident actions, for instance, in the field of interconnection, negotiations delaying tactics.

---

151 See Larouche 2002, p. 131ff. Next to finding that in fact EC *ex ante* competition law intervention has been quite effective, Larouche also provides theoretical foundations for the distinction, based on epistemology, procedure and legitimacy, p. 132. See also De Streele 2003 who applies the three steps taken under the NRF to establish SMP with general competition law.

152 For an example of *ex ante* regulation prior to the NRF, see the Access Notice.

3.3.3.2 EC regulatory objectives with the NRF

The Communications Review had been aimed predominantly at simplification and generalization of the often very specific European rules.\(^{154}\) The main difference with the ONP framework was that electronic transmissions were treated alike, whatever sector they were related to previously.

The new provisions provided the EC's institutions with broad powers of intervention in the Member States' legislation to enhance EU policy objectives. The emphasis shifted somewhat in that the rules relating to telecommunications markets would now be applied to broadcasting as well – hence the change to the term 'electronic communications'.\(^{155}\) The NRF explicitly provided that the Member States and the NRAs had to comply with basic regulatory principles when further assessing the development of the electronic communications markets. Rather than stimulating the application of competition law, the purport of the NRF was to rein in NRAs by introducing constraints in terms of the type of action they could take.\(^{156}\) The basic regulatory principles applied aimed at improving how intervention should develop at the national level. To retain the principal objectives, it was determined that NRAs would have to comply with the principles of proportionality, non-discrimination and technological neutrality. To further realize the objectives seen as acceptable at the EU level, any measures adopted by the NRA would have to be useful, necessary, and should not produce negative effects.\(^{157}\)

In sum, the Council and the Commission attempted to draft directives that: (1) would simplify and consolidate the existing framework; (2) were – even more than the existing Directives – independent from the technology that is used and 'future proof'; (3) would enhance sector-specific regulation, but only in markets that were deemed not to be sufficiently competitive; and (4) would strengthen the Commission's power on supervision in promoting competition while at the same time encouraging investment in infrastructure and promoting innovation.

---

\(^{154}\) See Consultation Document, p. 19.


\(^{156}\) Cf. Nihoul, Rodford, p. 95ff. The six Directives jointly comprising the NRF do not need to be discussed completely, since the emphasis of this research lies on access and interconnection. For this reason, the Universal Services Directive, the Authorisation Directive and the Privacy Directive will not be discussed at length.

\(^{157}\) Cf. Nihoul, Rodford 2004, p. 110-111. For more detail on the role of the NRA, see also Chapter 5.
However, no particular attention was given in this context to the important question as to how the NRA could intervene in the process of contract formation under the primary interconnection rule.

(1) Simplification and consolidation
The number of legislative measures was reduced from twenty to six directives and one decision. Yet, this did not necessarily lead to a more transparent or user-friendly body of law for the electronic communications sector. The Framework Directive and the sector specific directives were characterized by a multitude of cross-references and contained numerous provisions allowing for the adoption of further guidelines, recommendations and decisions, thus paving the way for 'legislating by decree'. The 'clean-up' made the scope and extent regulation less accessible.

(2) Neutrality with respect to technology
The attempt to regulate the legal norms in a technology independent manner must ensure that the rules would be flexible in respect of the swift development of technology and economic circumstances. There were limits to the establishment of a single regulatory framework for the different communications network platforms that were thought to converge. Consequently, the NRI contained, e.g., a number of provisions addressing the specificities of mobile and CATV networks and services, without addressing them in much detail, or addressing other technologies and emerging markets, such as broadband. Besides, the scope of the NRI was likely to be further specified in accordance with the development of the various communications systems in the course of the market definition and market analysis procedures. Thus, regulation merely shifted from directives to other legal instruments, rather than being technologically neutral.

159 Cf. Article 8 (1) Framework Directive: “Member States shall ensure that in carrying out the regulatory tasks specified in this Directive and the Specific Directives, in particular those designed to ensure effective competition, national regulatory authorities take the utmost account of the desirability of making regulations technologically neutral”. See Nihoul, Rodford 2004, p. 108-109, who interpreted this to mean that the NRA must behave in a technologically neutral manner. The regulation of the content of telecommunications, broadcasting or other information services (such as e-commerce or e-banking) remained outside the scope of the regulatory domain. These subjects also remain outside the scope of this book.
Interconnection Regulation and Contract Law

(3) **Enhancement of sector-specific rules**

In order to achieve a more flexible application of regulatory instruments, the NRF established a new set of rules for the *ex ante* regulation of undertakings with SMP.\(^{161}\)

The directives established a formalized procedure aimed at determining whether a given market is effectively competitive or whether an undertaking shall be deemed to have SMP because, 'either individually or jointly with others, it enjoys a position equivalent to dominance'.\(^{162}\) The NRA decided on the existence or non-existence of SMP, but the decision must be based on Commission guidelines and recommendations and was subject to – albeit limited – veto rights of the Commission.\(^{163}\) The NRA was given broad discretion in the selection of the regulatory remedies to be imposed upon SMP undertakings.\(^{164}\)

(4) **Strengthen the power of supervision by the Commission**

The NRF established a broad discretion of the NRAs in selecting reasonable and proportioned remedies and new and strengthened Commission powers to monitor and harmonize national regulatory measures.\(^{165}\) The strengthening of the NRA's powers, according to the EC required: 'a counterbalance in the form of greater co-ordination of NRA decisions and positions at EU level'.\(^{166}\) The impact of this objective cannot be underestimated. It clearly influenced the functioning of the NRAs since these had to communicate forthwith more intensively with the Commission.

---

\(^{161}\) See Recitals (25) and (27) Framework Directive; see also Consultation Document, p. 7, 14, 57-59. For an analysis of the further need of sector-specific regulation or not, see, extensively, Larouche 2000, p. 322ff.

\(^{162}\) See Article 14 (2) Framework Directive.

\(^{163}\) See Article 7 Framework Directive. The Commission’s veto power extends to a decision requiring a NRA to withdraw a draft measure, but not to replace a NRAs draft measure with a Commission measure.

\(^{164}\) See Article 8 (2) Access Directive and the discretionary powers of the NRAs under Articles 9-13 Access Directive. See on the European level, European Regulators Group (‘ERG’) Common Position on the approach to appropriate remedies in the new regulatory framework, ERG (03) 30rev1, 2 April 2004 (‘Common Position’); to be discussed in Chapter 5.

\(^{165}\) See also Recital 16, Articles 1 (1) and 1 (2) Framework Directive. This approach was consistent with the reformed competition law framework pursuant to the Council Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, [2003] OJ L 1/1.

\(^{166}\) See Consultation Document, p. 51.
3.3.3.3 Interconnection and services of general interest
There can be debate whether the provision of interconnection, and in particular between ECS providers and the public telephony switched network (‘PSTN’) to some extent involves services of general interest, as the notion is being developed by the EU in its 2003 Green paper on services of general interest (although it is concerned mainly with regulated network industries). The Green paper deals with concerns raised by operators that are entrusted with public service tasks, such as, in the field of telecommunications, universal services obligations. Its relevance may be that, if the notion is developed further, the question needs to be asked what interconnection services (at the wholesale level) could qualify as services of general interest (at the retail level). If such services qualify, then presumably regulatory intervention would be based on the regime of Article 86 (2) EC Treaty, rather than Article 82.

3.3.4 The Framework Directive
The principal aim of the Framework Directive was to obtain more harmonization within the Member States (akin to the second phase of liberalization) and between the specifics of communications law and general competition law (pointing at going towards phase three of liberalization).

The Framework Directive defined the scope of applicability of the NRF and its most important legal terms. It obliged the Member States to guarantee the independence of the NRAs and the effective structural separation of their regulatory functions from activities associated with ownership or control of undertakings providing ECNs and/or ECS. It established the policy objectives and regulatory principles for the NRAs regulatory tasks described in the previous paragraph and provided for a consolidation procedure under which the NRAs were obliged to cooperate with each other and the

---


168 Cf. the broader term of ‘services of general economic interest’ in Article 86 (2) EC Treaty: “Undertakings entrusted with the operation of services of general economic interest … shall be subject to the rules contained in this Treaty, in particular to the rules on competition, insofar as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community.” A universal service obligation means that one operator fulfills certain services and includes the provision of a minimum quality at an affordable price, cf. Article 3 (1) Universal Services Directive.

169 See, supra, paragraph 3.3.3.

Interconnection Regulation and Contract Law

Commission in a transparent manner to ensure the consistent application of the rules in all Member States. With respect to the activities of undertakings providing public ECNs or ECS which had special or exclusive rights for the provision of services in other sectors in the same or another Member State, the Directive obliged Member States to ensure accounting separation and structural separation for the activities associated with the provision of ECNs and ECS.

At the core of the Framework Directive were rules regarding the determination of SMP on the basis of a market definition procedure and a market analysis procedure to be initiated and conducted by the respective NRA in accordance with Community law.

3.3.4.1 Compromise
The harmonization of the application of the rules within the Member States was heavily fought over at the time of the drafting of the Framework Directive. This can be inferred from Articles 6 and 7 Framework Directive. These provisions required that a national consultation be held prior to the implementation of measures that have a significant effect on the relevant market. The national supervisory authorities (these are not necessarily the NRAs in all Member States) were ordered to consider the functioning of the European internal market. The supervisory authorities must co-operate with each other and with the Commission in a transparent manner. For certain decisions (such as market definitions and analyses) a consultation between the supervisory authorities was prescribed. Any divergence from a delineation of the markets as prescribed by the Commission in a recommendation must be motivated. The compromise thus reached was that the supervisory authorities did not formally need to reach agreement with the Commission or other supervisory authorities regarding these delineations, but that divergences of a common position must be motivated.

3.3.4.2 New criterion for SMP
The originally applicable threshold of 25% to establish a SMP position was replaced with a new criterion. More in line with (although not exactly the

174 For the powers and obligations of the NRAs, see Chapter 5.
same as) general competition case law, the criterion became that of individual or collective dominance (in line with Article 82 EC Treaty). The Commission simply stated that the previous definition of SMP in the Interconnection Directive, which provided for a rebuttable presumption of SMP cases of market shares of more than 25%, needed ‘to be adapted to suit more complex and dynamic markets’. By transposing the competition law concept of ‘dominant market power’ into the NRI, the EC aimed at a — albeit gradual — replacement of sector specific regulation by competition law.

Thus, Article 14 (2) Framework Directive provided:

"An undertaking shall be deemed to have significant market power if, either individually or jointly with others, it enjoys a position equivalent to dominance, that is to say a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers."

The possibility of establishing collective dominance was the result of the perceived typical nature of electronic communications infrastructures, especially in the mobile industry. The concept had not yet been fully developed in the jurisprudence of the ECJ. The Framework Directive empowered the NRAs to determine SMP and to decide on whether there was a joint dominant position between two or more undertakings — the notion dominant position was presumably the same as SMP — based on a set

176 See Larouche 2002, p. 137ff., who contends that the application of the notion of market definition is already quite different under the NRI: See also De Streel 2004, p. 489ff.; Bavasso 2003, who considers market power in light of the public interest.


179 See also Consultation Document, p. vi.


Interconnection Regulation and Contract Law

of criteria set out in Annex II. Thus, the NRAs were afforded broad discretion on their national markets to perform an SMP test and apply *ex ante* regulation, such as in respect of the review of the RIO.

In addition, Article 14 (3) Framework Directive provided the NRA with a presumption of SMP on a closely related market (example: a TO that had SMP in an upstream market that was able to leverage it in a downstream market). The existence of structural links among the undertakings concerned was not considered a prerequisite for a finding of collective dominance. If there were fringe competitors, collective dominance could only be assumed if these competitors were not able to counteract the results expected from the common position; the important criteria to be considered in this context were the existence of high barriers to entry, differences in cost structures, and demand elasticity.

However, if an undertaking would be designated as having SMP on an upstream wholesale or access market, the NRAs would normally be in a position to prevent likely spill-over or leverage effects downstream into the

182 Annex II provided the following criteria: (1) mature market, (2) stagnant or moderate growth on the demand side, (3) low elasticity of demand, (4) homogenous products, (5) similar cost structures, (6) similar cost shares, (7) lack of technological innovation, mature technology, (8) absence of excess capacity, (9) high barriers to entry, (10) lack of countervailing buying power, (11) lack of potential competition, (12) various kinds of informal or other links between the undertakings concerned, (13) regulatory mechanisms and (14) lack or reduced scope for price competition.

183 There were three arguments for this freedom to assess, next to a competition law analysis in light of Articles 81-82 EC Treaty: (1) there are forms of economic market structure not addressed by competition law (e.g. leverage of historical incumbents), (2) if competition law deals with economics structures, the tests are complex and limit the NRAs, and (3) the NRAs would like or should have a discretionary power to intervene where appropriate. Despite criticism, cf. Tarrant 2000, p. 321, this flexibility for NRAs has been preserved, see, e.g., Article 5 (4) Access Directive.

184 The Commission considered that "(...) it may also be deemed to have significant market power on a closely related market, where the links between the two markets are such as to allow the market power held in one market to be leveraged into the other market, thereby strengthening the market power of the undertaking." Cf. Article 14 (3) Framework Directive. See also ECJ Judgment of 14 November 1996, Case C-333/94P, [1996] ECR-I 5951, 6008ff; (Tetra Pak/Commission); Scherer 2005, p. 33; Farr, Oakley 2002, p. 70-71.

185 See Commission Guidelines on market analysis, paragraphs 87, 90 - 94.

The international and EC regulatory framework

retail or services market by imposing on that undertaking specific obligations provided for in the Directives to avoid such effects.  

NRAs must also give due regard to guidelines from the Commission when establishing a dominant position in the electronic communications industry. For instance, the Commission had looked at service provision under access agreements and considered that these would normally fall outside the scope of the Merger Regulation. It proposed that a party faced with a TO refusing to grant access or a restrictive access covenant, could file a complaint, but not with the Commission exclusively.

Articles 15 and 16 Framework Directive also contained an elaborate procedure for the establishment of SMP within the context of an analysis of trans-national markets. The starting point was that NRAs were responsible for analysing and defining markets in accordance with the applicable competition law rules.

The overlap of competencies between the NRA and the competition authorities sometimes created confusion as regards the distribution of the competencies. The EC introduced some adjustments to the way competition authorities applied the notion of market dominance ex post, to

---

187 The Commission provided: “Therefore, it is only where the imposition of ex-ante obligations on an undertaking which is dominant in the (access) upstream market would not result in effective competition on the (retail) downstream market that NRAs should examine whether article 14(3) may apply.” See Commission guidelines on market analysis, paragraph 84.


189 See also Farr, Oakley 2002, diagram on page 72.

190 Cf. Article 15 (3) Framework Directive. See also Scherer 2005, p. 31ff. A dominant position could derive from a combination of these and other criteria, as indicators of SMP where the market share of an undertaking was lower than 50%. Very large market shares – in excess of 50% – were in themselves evidence of the existence of a dominant position; undertakings with market shares of between 25 and 50% would likely be considered to enjoy a dominant position if additional criteria confirmed that the undertaking could behave to an appreciable extend independently of its competitors, customers and consumers. Undertakings with market shares less than 25% were not likely to enjoy a dominant position on their market. In general, the development of market shares would be more meaningful than a snapshot picture of market shares at a given time: the persistence of high market shares over time could indicate dominance, while declining shares might be a sign of increasing competition; fluctuating market shares over time could be indicative of a lack of market power in the relevant market.

facilitate this form of *ex ante* intervention by the NRA.\textsuperscript{192} According to Article 16 Framework Directive, measures could be employed by NRAs, but only if it appeared after a thorough analysis that no effective competition existed on the relevant market. If that was not the case, then specific obligations would be imposed.

An important difference with the old regime was that even if a party was established to have SMP this did not mean that the full range of *ex ante* obligations would apply.\textsuperscript{193}

The Commission's powers to ensure the harmonized application of the NRF was expanded to include the initiation of standardization procedures and the power to make technical standards or specifications compulsory if these standards or specifications were not adequately implemented.\textsuperscript{194}

The Commission also bestowed itself with the power to issue recommendations to Member States on the harmonized application of the provisions in the NRF directives.\textsuperscript{195} Such recommendations were to be issued on the basis of an advisory procedure.\textsuperscript{196} If an NRA would not follow a recommendation, it would be obliged to inform the Commission and give the reasons for its position.\textsuperscript{197} Besides, should an NRA intend to deviate from the market definitions set forth in the Commission's recommendation, it would have to: (1) give interested parties the opportunity to comment;\textsuperscript{198} and

\textsuperscript{192} The NRA had to measure the *ex ante* assessment of SMP by reference to the power of the undertaking concerned to raise prices by restricting output without incurring a significant loss of sales or revenues. In addition to the market share of an undertaking, the criteria upon which the forward-looking market analysis could be based included: (1) the overall size of the undertaking, (2) control of infrastructure not easily duplicated, (3) technological advantages or superiority, (4) absence of or low countervailing buying power, (5) easy or privileged access to capital markets/financial resources, (6) product/services diversification (e.g. bundled products or services), (7) economies of scale or economies of scope, (8) vertical integration, (9) a highly developed distribution and sales network, (10) absence of potential competition, (11) barriers to extension.

\textsuperscript{193} See also Walden, Angel 2005, p. 128ff.

\textsuperscript{194} Article 17 (3) Framework Directive. See also Article 5 ONP Framework Directive.

\textsuperscript{195} Cf. Article 19 Framework Directive.

\textsuperscript{196} See Article 22 (2) Framework Directive. The first decision was issued 25 July 2003: Commission Recommendation on the processing of caller location information in electronic communication networks for the purpose of location-enhanced emergency call services, OJ L 189/49.

\textsuperscript{197} See Article 19 (1) sentence 2 Framework Directive.

\textsuperscript{198} Cf. Article 6 Framework Directive.
The international and EC regulatory framework

(2) follow the consultation procedure. If the Commission held the opinion that the definition of a relevant market which differed from those defined in the recommendation would affect trade between Member States or if it had serious doubts as to its compatibility with EC law, the Commission could require the NRA to withdraw the proposed market definition in accordance with article 7 (4) Framework Directive.

Finally, the NRAs must cooperate closely with the Commission and the Commission needed to receive, from Member States and NRAs, all information necessary for the exercise of its duties. To this end, the Commission had the right to obtain from Member States all information ‘necessary for it to carry out its tasks under the Treaty’. In addition, the NRF established a number of specific information and cooperation obligations.

In view of the attempt to harmonize the application of market definition in the field, the Commission announced both a Recommendation regarding the relevant product- and services market, and Guidelines for the market analysis and the review of SMP.

---


200 See Article 5 (2) Framework Directive.

201 See Scherer 2005, p. 33ff. Particularly relevant are the obligations of the NRA to notify the Commission of decisions to impose, amend or withdraw obligations on market players not deemed to have SMP in order to comply with international commitments, Article 8 (5) Access Directive, and the obligation of the Member States to provide the Commission with information on the specific obligations imposed on undertakings under the Access Directive.

202 Commission Recommendation on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communication networks and services, 0/J C 114/45. The Recommendation was issued pursuant to Article 15 (3) Framework Directive. The criteria to be considered were: (1) the presence of high and non-transitory entry barriers; (2) the dynamic state of competitiveness behind entry barriers; and (3) the sufficiency of competition in the absence of ex ante regulation. As discussed, supra, paragraph 3.3.2.3, the Commission had previously issued guidelines on the application of competition law to access agreements, basing itself on issues that arose in the first phase of liberalization. See Guidelines on the Application of EEC Competition Rules in the Telecommunications Sector, 0/J C 233/2, 6 August 1991.
3.3.4.3 Intervention by the NRA

Chapter III Framework Directive was concerned with the tasks of NRAs. The Access Directive contained specific provisions as to the role the NRA must play in access and interconnection disputes. The EC stated its intention to move away to a lighter role for the NRA, as the market developed, which was evident also from Recital 13 Access Directive. The regulatory practice was different from the stated intentions.

Article 5 Access Directive set out general objectives to be pursued by the NRAs exercising their responsibilities with respect to access and interconnection. In the exercise of their regulatory powers, the NRAs were bound by the principles of objectivity, transparency, proportionality and non-discrimination; all obligations and conditions imposed on the basis of Article 5 Access Directive were made subject to the consultation procedure according to Article 6 Framework Directive and the consolidation procedure under Article 7 Framework Directive.

Article 5(1) Access Directive established three specific tasks for the NRAs, which affected both the primary and the secondary interconnection rule. They were obliged to encourage and, where appropriate, ensure: (1) adequate access, (2) adequate interconnection, and (3) interoperability of services. These very broad obligations were to be fulfilled in pursuit of the more general objectives set out in Article 8 Framework Directive. The multitude of regulatory objectives encapsulated in Article 5(1) Access Directive, thus allowed for an extraordinary broad discretion of the NRAs in their selection of the appropriate regulatory measures when regulating undertakings regardless of their market position. If there had ever been a distinction between the two notions, then Article 5(1) Access Directive blurred it.

Article 9 Interconnection Directive was not maintained. Article 9 Access Directive was broader in scope than Article 9 Interconnection Directive in

---

203 This will be discussed in detail in Chapter 5.
204 The allocation of enforcement duties to NRAs has been subject to a substantial amount of ECJ jurisprudence; see, inter alia, the overview provided by Walden, Angel 2005, p. 132ff. By the time of the implementation of the NRF, the issue of whether NRAs were sufficiently independent from their government had become less urgent in the pre-2004 EU Member States.
205 See on the Netherlands NRAs new policy, OPTA, Regulatory Policy Note, Imposing Access Obligations, August 2004; to be discussed in Chapter 5.
206 See Recital (12) and Article 7 Access Directive.
that it no longer restricted the intervention by the NRA to a number of topics that had been delineated in an exhibit to the Interconnection Directive. According to Article 9 (2) Access Directive, the NRA remained entitled to impose changes to a RIO, 'to give effect to obligations imposed under this Directive.'

This raises another question, notably to whom those obligations were addressed. The Access Directive was rather vague, since it imposed obligations on Member States, NRAs, TOs and third parties. It should be assumed that Article 9 (2) Access Directive referred to obligations that could be imposed on the TOs.207

This provision effectively enhanced the secondary interconnection rule. Also note that the Framework Directive provided that Member States must have effective appeals mechanisms – including the requirement that the appellate body should be sufficiently expert –, although it did not oppose appeals being handled in the courts.208 Contrary to some jurisdictions, a decision in first instance will stand pending the appeal.

### 3.3.5 The Communications Competition Directive

The Communications Competition Directive recasted and repealed the Full Competition Directive and its amendments and was intended to reflect the latest technological developments in the telecommunications field and take into account the convergence phenomenon.209

The Communications Competition Directive introduced the new definition of ECNs meant to broaden the scope of access to the communications markets, particularly to CATV companies.210 It is not clear whether the provision extended to the broad range of service providers for Internet.

---

207 In any event this was already provided for in the Interconnection Directive; see below.

208 See Recital (12) and Article 4 (1) Framework Directive.


210 See Article 1 (1) Competition Communications Directive. Somewhat confusingly, the Directive provided here that Member States, which considered that there was sufficient competition in the local loop, must advise the Commission accordingly. Given its context, this provision related to CATV networks, not to cable infrastructure based communications networks.
Interconnection Regulation and Contract Law

Article 2 (3) Communications Competition Directive reiterated that Member States were not allowed to restrict the provision of ECS either over networks established by the providers of such services, or third party infrastructures. The Communications Competition Directive’s main concern was that the Member States did not introduce new special rights for ECN providers.21

3.3.6 Other NRF Directives
The other Directives forming part of the NRF were of less relevance to the topic of this book – albeit that they had the same objectives, such as when concerned with improving end-to-end connectivity. They will be discussed briefly only.

3.3.6.1 The Universal Services Directive
The new Universal Services Directive comprised both universal services212 (such as access to the fixed telephony network, public payphones, guides and information services),213 and rules regarding the minimum package for leased lines,214 CPS,215 digital television216, number portability217 and the ‘must carry’ obligations for broadcasting organizations.218 In order to implement these various rules, the Directive contained provisions with respect to agreements, the transparency of offers and the quality of services as these could be found, for instance, in the Netherlands in the Decision ONP leased lines and telephony.219

211 See Article 2 Competition Communications Directive.
212 Universal services are services that are in the common and general interest. For a description of what these are see Commission Greenbook on universal services, COM (2003) 270 final. The notion is applied in different utility sectors.
213 Articles 3-15 Universal Services Directive; see also Article 2 Decision on Universal Service (Besluit universele dienstverlening), Sbh. 1998, 637 in connection with Chapter 9 1998 Tw.
214 Article 18 Universal Services Directive.
215 Article 19 Universal Services Directive; see also Article 44 Decision ONP Leased Lines and Telephony (Besluit ONP huurlijnen en telefoon) (Sbh. 1998, 639).
216 Article 24 Universal Services Directive; see also Articles 8.4a and 10.1a 1998 Tw.
217 Article 30 Universal Services Directive; see also Decision on Number Portability (Besluit nummerportabilitie) (Sbh. 1998, 635).
218 Article 31 Universal Services Directive; see also Article 8.1ff. 1998 Tw.
219 The Member States may impose further obligations on the providers that are subject to the ONP obligations. If they do, they must first follow the consultation procedure and they are prevented from imposing obligations that provide for the making of financial contributions.
The international and EC regulatory framework

The Universal Services Directive did not define interconnection as a universal service or as a service of general interest. The notion of universal services' obligations likewise entailed that the party that was subject to such obligations was under a duty to negotiate, or even a duty to contract with its customers to provide services. Note that at the TO/end-user level the notion of duty to contract is perhaps more common and it has been applied in other utility sectors.

3.3.6.2 The Authorizations Directive

The Authorisations Directive was relevant for access and interconnection in that, in order to qualify for interconnection duties, arguably an operator must have some sort of license or registration in a Member State to provide public ECN or ECS, although this did not seem to be decisive overall. The Netherlands' fairly relaxed system of registrations appears to have been used in the Directive as the point of focus.

According to Recital (10) an authorisation means that the holder thereof is entitled to negotiate access and interconnection pursuant to the Access Directive. An undertaking that holds no authorisation must have recourse to commercial negotiations only, which implies it is dependent on the willingness of the TO or other OLOs.

The Authorisations Directive also provided that access and interconnection obligations as regards the use of radio frequencies should be imposed 'legally separate' from the (other) rights and obligations under the general authorisation. The purpose of this requirement was to ensure

---

220 Cf., supra, paragraph 3.3.2.4.
221 Cf. Houben 2005, p. 41. See also, infra, paragraph 3.5 for the duty to negotiate in other utility sectors.
222 See also Recital (7) Authorisations Directive. The Directive mentions a 'general authorisation' (see Article 3). Re an early view on licensing: Xavier 1998.
223 See Article 4 (2) sub a Authorisations Directive, which provides: "When such undertakings provide electronic communications networks and services to the public the general authorization shall also give them the right to: (a) negotiate interconnection with and where applicable obtain access to or interconnection from other providers of publicly available communications networks and services covered by a general authorisation anywhere in the Community under the conditions of and in accordance with Directive 2002/19/EC (Access Directive); (...)"
224 Cf. Chapter 4 re the UK where there is no requirement of an authorisation or licence in order to be entitled to hold commercial negotiations.
225 See Article 6 (2) Authorisations Directive.
transparency. The Directive further contained requirements as regards the provision of information by the holder of an authorisation in respect of access and interconnection.\textsuperscript{226}

Finally, an extensive annex to the Authorisations Directive contained an overview of those restrictions and obligations that could be attached to an authorisation to provide ECN and ECS. It included conditions in conformity with the Access Directive as regards: `interoperability of services and interconnection of networks',\textsuperscript{227} and `access obligations other than those provided for in Article 6 (2) of this Directive applying to undertakings providing electronic communications networks or services'.\textsuperscript{228} This provision enables governments on NRAs to impose such obligations by way of a licence, as is done, for instance, in the UK.

3.3.6.3 The Privacy and Electronic Communications Directive

There has been discussion on the use of traffic data in the context of interconnection agreements. These discussions led to explicit recognition that a provider can use traffic data of its subscribers in as far as what was necessary for the calculation of interconnection rates due to other operators. The Privacy and Electronic Communications Directive contained specific provisions dealing with this issue. Article 6(3) provided that traffic data may be processed for interconnection purposes, but only for the period during which payment of invoices can be obtained from the subscriber. Besides, a provider was always free to submit traffic data to an NRA that would settle an interconnection dispute.

3.4 EC specific regulation of access and interconnection

Before discussing the specifics of the framework, the notion of interoperability will be discussed, since it is the overriding principle applied in the Access Directive and interacts with the notions of access and interconnection (to be discussed in paragraph 3.4.2\textsuperscript{fi}).\textsuperscript{229}

\textsuperscript{226} See, e.g., Articles 10 (4) and 11 (1) sub f Authorisation Directive.

\textsuperscript{227} See Authorisations Directive, Annex A. no. 3.

\textsuperscript{228} See Authorisations Directive, Annex A. no. 14. Cf. Chapter 4 paragraph 4.3.2 on the licence conditions imposed on British Telecom in the UK. The UK NRA opted to regulate interconnection obligations by means of the licence conditions, whereas the Netherlands' NRA had to rely on what was provided by law or special decree.

\textsuperscript{229} Cf. Article 5 Access Directive, to be discussed, \textit{infra}, paragraph 3.4.3.
3.4.1 Interoperability

Interoperability of national networks, and access to these networks (telecommunications, but also energy and transport) is mentioned explicitly in Article 154 (2) EC Treaty.\(^{230}\)

Already in 1994, the Bangemann report referred to interoperability in the context of telecommunications in two meanings: the seamless interconnection of networks and the ability of services and applications to work together.\(^{231}\) The Bangemann report asserted that interconnection of networks would be a prerequisite for interoperability of telecommunications services: end-users would get access to different service providers, even though they subscribed to one network only.\(^{232}\)

The Interconnection Directive referred to interoperability in the provision aimed at Member States having to take care of adequate and efficient interconnection.\(^{233}\)

The Access Directive stated that interoperability was to the benefit of end-users and that it was one of the objectives of the NRF, however, without further detailing what it meant by the term interoperability in the context of ECNs. Yet it clarified that network operators were obliged to negotiate interconnection 'to warrant interoperability of services throughout the EC'.\(^{234}\) Rather surprisingly, the Access Directive then also provided that NRAs should encourage and ensure adequate access and interconnection and interoperability of services, again without qualifying what it meant.\(^{235}\)

For instance, if interconnection of networks was required, then this could

\(^{230}\) The provision was added through the 1992 Treaty of Maastricht. Article 155 EC Treaty provided a basis for issuing measures aimed at achieving interoperability of networks, especially through the harmonization of technical norms. See on the latter topic, extensively, Stuurman 1995.


\(^{232}\) Cf. Article 4 (1) Access Directive. A new feature of the NRF was that the Commission was intent on ensuring interoperability of interactive television services ('iTV'). See, infra, paragraph 3.4.3.4. Cf., e.g., Article 18 (1) Framework Directive, referring to interoperability in the context of application programming interfaces ('APIs').

\(^{233}\) Cf. Recital (2) and Article 3 (2) Interconnection Directive, to be discussed, infra, paragraph 3.4.2. See also Article 9 (5) Interconnection Directive, ordering NRAs to take into account 'the need to maintain (...) the interoperability of services'.

\(^{234}\) Cf. Recitals (9) and (16), and Article 4 (1) Access Directive, to be discussed, infra, paragraph 3.4.3.

Interconnection Regulation and Contract Law

be established on a reciprocal basis for OLOs entering into terminating access interconnection agreements. It was not immediately clear whether the obligation to provide call termination services extended automatically to the obligation to provide call origination services.236

Consequently, the implementation of the policy objective of achieving interoperability in national law impacted at least the primary interconnection rule: the duty to negotiate.237 This implored the NRAs, for instance in the Netherlands, to consider what interoperability was to mean in practice and what it meant in the context of infrastructure and services.238

It is also clear that, whatever the notion of interoperability as it evolved over the years, specific obligations attached to SI undertakings (following the secondary interconnection rule) as regards interoperability.

Interoperability occurs at the physical level where the traffic is handed over.239 Interoperability of services in the telecommunications environment refers to the logical parts of a network and it will be discussed how this is regulated.240

Interoperability of, for instance, software, was prescribed by the EC Software Directive, where the recitals provided for functional interoperability, logical and physical interconnection.241 In the context of

236 See Chapter 2 paragraph 2.4.
237 See, infra, paragraphs 3.42 and 3.4.3, and Chapter 4 paragraph 4.4.3.
238 See, e.g., OPTA 1 October 2004, OPTA/IBT/2004/201834, Consultation Document on Interoperability (Consultation document Interoperability). It was subsequently withdrawn.
239 As was seen in Chapter 2 paragraph 2.2.1 physical interconnection can take place at any level of an electronic communications network.
240 See Chapter 2 paragraph 2.2. Cf. this with a statement on the Commission’s website, europa.eu.int/information_society/today’s framework/interconnection and interoperability: “Interconnection of networks does not guarantee interoperability of services provided over those networks. Interoperability of services requires the use of common standards and protocols, or else the use of a conversion function that can map between the different services.” This text appeared in a statement telling the Member States to encourage the use of standards. For an interesting view on desired regulation of interoperability in the US in the context of instant messaging, see Goldberg 2004.
241 Cf. the following recitals: “(…) Whereas the function of a computer program is to communicate and work together with other components of a computer system and with users and, for this purpose, a logical and, where appropriate, physical interconnection and interaction is required to permit all elements of software and hardware to work with other software and hardware and with users in all the ways in which they are intended to function. (…) Whereas the parts of the program which provide for such interconnection and interaction between elements of software and
harmonization of software protection, interoperability referred predominantly to interface information, necessary to have all elements of software and hardware to work with other software and hardware. This then led to a controversial provision, which was implemented into national law, that enabled the rightful user of a computer program to decompile source code ‘to achieve interoperability of an independently created computer program with other programs’, if certain conditions were met.\textsuperscript{242}

The notion of interoperability was at the heart of the 2004 Microsoft decision, when Sun Microsystems filed a complaint with the EC Commission, alleging that Microsoft withheld interoperability information necessary to viably compete, \textit{inter alia}, on the market of server computer systems.\textsuperscript{243} The Commission’s Statement of Objections focused on the interoperability issues raised by Sun and the Commission organized a market enquiry to get other competitors’ input on the issue. In its decision, the Commission acknowledged that the term interoperability could have different meanings. Microsoft had argued that the Commission employed too broad a notion. The Commission considered that interoperability was ‘a matter of degree’ and provided an in-depth analysis of interoperability considerations in the context of computer programs, without referring, however, to the notion as applied in telecommunications regulation.\textsuperscript{244}

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{242} Cf. Article 6 of the Software Directive. See, extensively, Czarnota, Hart 1991, p. 33\textsuperscript{ff}. They considered interoperability to mean ‘multi-vendor interoperability’, but also anticipated the notion would be subject to court interpretation, p. 78.
  \item \textsuperscript{244} See Microsoft Decision, paragraph (33)\textsuperscript{ff}.
\end{itemize}
\end{footnotesize}
Interconnection Regulation and Contract Law

Common ground with the current topic was found in the Microsoft decision in that the Commission considered that the withholding of interoperability information could act as a barrier to market entry and that the disclosure of interoperability information was useful under circumstances.\textsuperscript{245}

In sum, the notion (and perhaps the policy objective) blurred as the EC used the term in two different meanings: it considered that not only network interoperability, but also interoperability of ICT products and services benefits end-users.\textsuperscript{246} Referring back to the Bangemann report, it appears that interoperability refers predominantly to the 'seamless connection of networks'.

3.4.2 Access and interconnection
As a matter of policy, interconnection was defined in the ONP framework, but there continued to be uncertainty as to what the term encompassed, and in particular, as to the different forms of interconnection arrangements used in practice.\textsuperscript{247}

3.4.2.1 ECN and ECS
The starting point for defining interconnection and access is the definition of what constitutes an ECN, as this will form the basis of the interconnection arrangement from the regulator's perspective. The legal definition evolved from telecommunications network into ECN as a conveniently broad notion, in order to address the perceived need to have technologically neutral regulation. Both transmission systems and routing equipment were considered ECNs. The technical means for transmission was irrelevant, while the content did not play any role in the definition and was not covered by telecommunications regulation.\textsuperscript{248}

\textsuperscript{245} See Microsoft Decision, paragraph (524) and (736). This is also embedded in Article 12 (1) sub (e) Access Directive which applies the notion of interoperability in this respect: "Operators may be required, inter alia, (...) (e) to grant open access to technical interfaces, protocols, or other key technologies that are indispensable for the interoperability of services or virtual network services."

\textsuperscript{246} Cf. the goals mentioned in paragraph 3.3.2 under (3) with Article 1 (6) ONP Framework Directive.

\textsuperscript{247} In the Netherlands, for example, there was discussion as to whether a request for interconnection actually concerned interconnection or not and if it resulted in obligations for the party facing the request. See also Schillemans 2005 and for recent case law, CBB 24 November 2004, AWB 04/651 and 04/727, Mediarum 2005/3, no. 12 (Yarosa/T-Mobile).

\textsuperscript{248} See for an overview in a number of countries of broadband policy and regulation, which addresses the issue of enhancing competition through the increased availability of both infrastructure and content: Brandenburger, Janssens 2004.
Finally, the reference to conveyance of signals included transfer, transmission and reception. No exception was made for an incomplete transfer or reception, meaning again that each transfer of signals was considered as electronic communications.  

On the other hand, the term ‘electronic’ implied that there must be an electromagnetic component present in the infrastructure. This could result in a more restrictive interpretation of what constituted a communications network, since the communications mode formed part of the definition. Such mode was subject to constant technological change and it remains to be seen if the component involving the term ‘electronic’ remains accurate for future reference.

Another oddity in the new definition was that it provided ample examples, but did not state that the list was non-exhaustive. Telephony, data communications, Internet and broadcasting were obviously considered electronic communications. Short message service (‘SMS’) was not specified.

The question whether new services would be considered under the regulatory heading or not arose with regularity. For example, regulators did not consider VoIP to constitute voice telephony, until certain conditions

---

249 “Electronic communications network’ means transmission systems and, where applicable, switching or routing equipment and other resources which permit the conveyance of signals by wire, by radio, by optical or by other electromagnetic means, including satellite networks, fixed (circuit- and packet-switched, including Internet) and mobile terrestrial networks, electricity cable systems, to the extent that they are used for the purpose of transmitting signals, networks used for radio and television broadcasting, and cable television networks, irrespective of the type of information conveyed.” See Article 2 (a) Framework Directive and Article 1 (1) Full Competition Directive. The previous definition of telecommunications network does not mention switching or routing equipment.

Also relevant was the definition of electronic communications services: “A service normally provided for remuneration which consists wholly or mainly in the conveyance of signals on electronic communications networks, including telecommunications services and transmission services in networks used for broadcasting, but exclude services providing, or exercising editorial control over, content transmitted using electronic communications networks and services; it does not include information society services, as defined in Article 1 of Directive 98/34/EC, which do not consist wholly or mainly in the conveyance of signals on electronic communications networks.” See Article 2 (c) Framework Directive and Article 1 (3) Full Competition Directive. It was not entirely clear why the law required that the service be provided against remuneration. Would this exclude the free of charge provision of VoIP?
Interconnection Regulation and Contract Law

would be met. The starting point is that computer-to-computer voice communication that does not 'touch' the PSTN does not fall under the regulatory framework as a result. However, the question that was not yet solved, was whether VoIP providers wishing to terminate traffic over the PSTN should fall in some way under the NRC. The Commission has opted for a flexible approach and leave it to the individual VoIP providers to select the available regulation.351

Conversely, other forms of communications that in essence did not depend on the conveyance over an electromagnetic network, such as mail, or printed media, were specifically not considered ECS.352

In principle, the regulatory domain of electronic communications was restricted to public providers only. But the legislative history of communications regulation did not provide an unambiguous insight into what the term 'public' meant.353 At best, a public ECN or ECS was thus

---

250 Cf. Kariyawasam 2001, p. 207-208. The conditions were listed already in the Services Directive: (1) the service must be provide to the public; (2) the service must involve direct transport and switching of speech in real time; (3) the communications must be subject to a commercial offer; (4) the services must be provided between network termination points ('NTPs') over public electronic communications networks. See also Bach, Sallet 2005, p. 12ff.


252 Under Dutch law, as a result of the broad definitions, the description of detail in the contractual relationship between the provider and the subscriber would be decisive to define whether there was an ECS. The providers of fixed and mobile communications services were probably the clearest examples of service providers within the meaning of the law. On the other hand, it was by no means evident that all ISPs should be subject to the regulation intended by the 2004 Telecommunications Act (Telecommunicatiewet, 'Tw'). Article 1.1 (c) 2004 Tw defines ECS as: 'a service normally provided for remuneration which consists wholly or mainly in the conveyance of signals through electronic communications networks' Conversely, article 1 (1) sub e 1998 Tw defined telecommunications service as: 'a service that in whole or in part consists of the transfer or routing of signals over a telecommunications network'. Many policy documents and discussion papers pleaded for a careful approach. See for instance the Note on Legislation for the Electronic Highway (Nota Wijziging voor de Elektronische snelweg (WES)), Kamerstukken II 1997-1998 25880. See also Farr, Oakley 2002, p. 51. Cf. Huisjes 1998. Dommering 1999, p. 281, criticised Huisjes' qualification of internet service provider (ISP) under the scope of telecommunications regulation. Cf. Chapter 4.

253 In Article 2 (d) Framework Directive and Article 1 (2) Full Competition Directive, the notion of public communications network was defined as: "an electronic communications network used wholly or mainly for the provision of publicly available electronic communications services."

122
characterized by its availability to the public.254

Finally, somewhat confusingly, the EU regulatory framework provided no
definition of PoC and PoA, although it provided a definition of NTP.255

3.4.2.2 Definitions of access and interconnection
Access had a broader meaning than interconnection.256 The description was
intentionally broad and non-exhaustive; as a result, it potentially covered
many types of activities, such as forms of site sharing, (cable) duct sharing,
special forms of access (for instance to provide SMS), and conditional access
to (public) broadcasting networks. Access to end-users was not covered, only
access to the local loop.257

At the EU level, interconnection had been first defined in the
Interconnection Directive, and the definition was (more or less) retained in
the Access Directive. It included physical and logical linking of networks and
extended to the direction in which signals were conveyed over switching
nodes, i.e., terminating and originating traffic.258 At the centre of the

254 Services that are restricted to a closed user group are not considered public services.
Networks used solely for the public provision of simple transport, such as leased lines
and carrier-to-carrier services will be considered public. Virtual Private Networks and
intranets, that are usually used within an organization only, are not likely to be
considered public. See, for the notion of the public nature of networks and services
under the 1998 Tw: Dries, Gijrath, Knol 2003/1 and with reference to the NRF: Dries,
Gijrath, Knol 2003/2. See, for implementation in the Netherlands, the Explanatory
Memorandum to the 1998 Tw, p. 72.

255 See Article 2 (3) Universal Services Directive: “The physical point at which a subscriber
is provided with access to a public communications network; in the case of networks
involving switching or routing, the NTP is identified by means of a specific network
address, which may be linked to a subscriber of number or name.”

256 Under the NRF, Article 2 (a) Access Directive, access was defined as: “The making
available of facilities and/or services, to another undertaking, under defined conditions,
on either an exclusive or non-exclusive basis, for the purpose of providing electronic
communications services. It covers inter alia: access to network elements and associated
facilities, which may involve the connection of equipment, by fixed or non-fixed means
(in particular this includes access to the local loop and to facilities and services necessary
to provide services over the local loop), access to physical infrastructure including
buildings, ducts and masts; access to relevant software systems, including operational
support systems, access to number translation systems or systems offering equivalent
functionality, access to fixed and mobile networks, in particular for roaming, access to
conditional access systems for digital television services; access to virtual network
services.”

257 The examples of access to the local loop was not included in the original Commission
proposal, g. COM (2000), 384.

258 See Chapter 2 paragraph 2.2.1.
definition of interconnection was that it would enable users from different operators to communicate with each other. The last two sentences aimed to clarify that interconnection was to be considered a species of access, and not the other way around.\textsuperscript{259}

The notion of ‘special access’, which in the Netherlands resulted in confusion as to the scope of regulation, under the NRF was brought under the heading of ‘access’\textsuperscript{260}. According to Article 2 sub (a) and (b) Access Directive, interconnection was a form of access, even though it was technically different from access and the players could differ. Notwithstanding the clarification that interconnection should be considered a subset of access the terms were used intermittently throughout the Access Directive, which use did not promote a single interpretation of the notions and underlying rights and obligations.

Other definitions of interconnection applied in international regulation put more emphasis on another element than on the control of end-to-end connections. Within the ITU, the WTO and the Organization of Economic Cooperation and Development (‘OECD’) frameworks, for instance, the notion focused on the arrangements made between operators rather than on end-user connectivity.\textsuperscript{261}

\textsuperscript{259} See Article 2 (b) Access Directive: “The physical and logical linking of public communications networks used by the same or a different undertaking in order to allow the users of one undertaking to communicate with the users of another undertaking, or to access services provided by another undertaking. Services may be provided by the parties involved or other parties who have access to the network. Interconnection is a specific type of access implemented between public network operators.”

\textsuperscript{260} Cf. Article 4 (2) Interconnection Directive, meaning access to be provided by TOs with significant market power (‘SMP’) to fixed or mobile networks operators; and Article 16 Voice Telephony II Directive, where ‘special network access’ was to be provided by operators of fixed telecommunications networks with SMP.

\textsuperscript{261} The ITU defined interconnection as: “(...) Arrangements under which service providers connect their equipment, networks and services to enable customers to have access to the customers, services and networks of other service providers”, the WTO as: “the linking with suppliers providing public telecommunications transport or services in order to allow the users of one supplier to communicate with the users of another supplier to access services provided by another supplier.” The Organization of Economic Cooperation and Development (‘OECD’) defined interconnection as: “the way in which different networks are connected to allow traffic to pass between them including the conveyance of traffic on the network of one carrier on behalf of another carrier or service provider.”


124
3.4.3 The Interconnection Directive


3.4.3.1 Purpose and scope

The Interconnection Directive was designed to ensure fair and non-discriminatory interconnection for all operators and service providers in the EU. Although the Directive did not clearly distinguish between two different regulatory objectives in terms of interconnection (described in Chapter 2 as the primary and the secondary interconnection rule), its priority was to regulate the commercial negotiation of interconnection agreements. It can be deduced from Article 3 of the Interconnection Directive that technical and commercial arrangements for interconnection were a matter for agreement between the parties involved, subject to the provisions of the Directive and the competition rules of the EC Treaty.\(^{263}\)

But it also addressed access issues, which led to the secondary interconnection rule. One of the reasons for regulating access in a market that had not been fully liberalized in light of the anti-monopoly rationale was that an OLO should not have to duplicate an expensive telecommunications infrastructure, but would rather be able to obtain access from a TO to certain network elements.\(^{264}\) It was also obvious from the start that there would be little incentive for a TO to enter into an interconnection agreement with an OLO wanting to compete for customers in the same market.\(^{265}\)

---

\(^{262}\) See Article 3 (1) Interconnection Directive.

\(^{263}\) See Walden, Angel 2005, p. 216.

\(^{264}\) See also Chapter 1 and Chapter 2, paragraphs 2.5.1 and 2.5.2.
Interconnection Regulation and Contract Law

The interconnection regime established by the Interconnection Directive applied only to the interconnection of networks used for the commercial provision of publicly available telecommunications services. Included in the scope of the Interconnection Directive, as set out in its Annex I, were fixed public telephone networks, leased lines services as well as public mobile telephone networks.

3.4.3.2 The duty to negotiate interconnection

The obligation to negotiate interconnection applied to organisations which provided fixed and/or mobile switched telecommunications networks and/or publicly available telecommunications services and, in so doing, controlled the means of access to one or more network termination points ('NTPs'). It furthermore applied to other organisations, which were able to control access of the customers, such as providers of leased lines to customers or organisations controlling international circuits.

Article 4 (1) Interconnection Directive provided:

"Organizations authorized to provide public telecommunications networks and/or publicly available telecommunications services as set out in Annex II shall have a right and, when requested by organizations in that category, an obligation to negotiate interconnection with each other for the purpose of providing the services in question, in order to ensure provision of these networks and services throughout the Community. On a case-by-case basis, the national regulatory authority may agree to limit this obligation on a temporary basis and on the grounds that there are technically and commercially viable alternatives to the interconnection requested, and that the requested interconnection is inappropriate in relation to the resources available to meet the request. Any such limitation imposed by a national regulatory authority shall be fully reasoned and made public in accordance with Article 14 (2)."

---

266 See on the notion of public telecommunications in Dutch law, Dries, Gijrath, Knol 2003/1.
267 See Article 3 (2) Interconnection Directive. Consequently, networks for the provision of telecommunications services that were available only to a specific end-user or to a closed user group were not subject to the provisions of the Interconnection Directive. The interconnection regime applied both to telecommunications networks owned by the interconnecting parties and to networks based on leased lines and/or other transmission capacity owned by third parties (cf. Recital 4). See also Koenig, Bartosch, Braun 2002, p. 392ff.
268 The organisations with rights and obligations to negotiate interconnection with each other were defined in Annex II, cf. Article 4 (1) Interconnection Directive.
269 Annex II specified the following categories: (1) organizations which provide fixed and/or mobile public switched telecommunications networks and/or publicly available
The clause established whether or not there was SMP: (1) a right, and/or (2) an obligation for the organisations concerned if so requested by a public network or service provider, (3) to negotiate interconnection with each other, (4) in order that the provision of networks and services could be secured throughout the Community. The exception to obligation to negotiate was that an NRA could determine that there was no obligation because (a) there were technically and commercially viable alternatives, and (b) the requested interconnection was ‘inappropriate’ in relation to the resources available.

**Primary rule: duty and right to negotiate interconnection**

From the wording of Article 4 (1) Interconnection Directive it was not evident that the Commission wished to protect the position of the weaker party (supposedly the OLO), as the clause was formulated reciprocally. Moreover, the first mention was of ‘a right’ to negotiate, which presumably extended to the TO being entitled to negotiate just as much with any other public provider. The mirror image obligation to negotiate would likely be more onerous on the TO; it being confronted with various requests for interconnection from different OLOs. Notwithstanding the wording, the provision pointed at a duty to negotiate.

Was it not pushing things rather far to actually impose on companies an obligation to negotiate an agreement? This had not before been often imposed on professional private parties. Moreover, it was not immediately clear what the parties had to achieve. Could they decide in the end not to reach an interconnection agreement, e.g., because the terms were commercially not agreeable?

The obligation, notably to negotiate, did seem to point only at a reasonable efforts obligation to reach an agreement. Indeed, the wording refers to ‘negotiate’ and not to ‘reach an agreement’ or ‘to provide’. It would appear

---

services, and which controlled the means of access to network termination points (‘NTPs’) identified by numbers in the national numbering plan; (2) organizations which provided leased lines into users’ premises; (3) organizations which were authorized in a Member State to provide interconnection telecommunication circuits between the Community and third countries, for which purpose they had special or exclusive rights; (4) organizations which provided telecommunications services which were permitted to interconnect in accordance with relevant national licensing or authorization schemes.

270 *Cf.* Article 4 (1) Interconnection Directive.

271 An example might be a compulsory patent licence.

272 This question was answered in the Access Directive, see *infra*.

273 See, *infra*, Chapter 4, for the interpretation of this obligation in the 1998 Tw.
that if a TO were to demonstrate it had offered reasonable terms that were unacceptable to the OLO, it could argue to have fulfilled its obligation to negotiate. However, the remainder of the first sentence contained a clear reference to a duty to ensure, – perhaps even guarantee – service provision, and, hence, interconnection. Adding this part of Article 4 (1) seems to point towards a best efforts obligation on the part of the parties, with stricter obligations applying to the TO with SMP. The fact that this clause specifically referred to service provision in the EU – a possible reference to the interoperability requirement – does not change the foregoing observation.

Arguably, the manner in which the regulatory powers were bestowed on the NRAs in national law, in particular, their powers to resolve interconnection disputes and to order interconnection, it can be concluded that the duty to negotiate, effectively almost resulted in a right / obligation to interconnect (which was more akin to the secondary interconnection rule). The duty to negotiate extended to parties that must be authorized to provide a public ECN or ECS - i.e. because they were registered as a provider, or had a license. This could mean that parties not having a registration or licence were not entitled to negotiate interconnection. In practice, this could pose a problem for OLOs not having completed the licensing procedure nationally, as the TO would formally require a proof of licence or registration.

The escape from having to negotiate interconnection would be to pose an argument that there were commercially and technically viable alternatives, and that the request was inappropriate in relation to the resources available. This would offer a temporary relief for the TO, who was not too eager to discuss interconnection with many parties simultaneously. The provision did not stipulate which party would have the burden of evidence of this double argument, the TO or the OLO. It would seem appropriate to leave the

274 More explicitly, Koenig, Bartosch Braun 2002, p. 393: “Although the provision does not express this intent assertively, it is clearly derived from a systematic interpretation of the directive that the obligation “to negotiate interconnection” does not mean the mere process of negotiation, but the result of it, i.e., an interconnection agreement.” The author likewise derives this from the interventionist powers bestowed in this context on the NRA.

275 Cf. Article 3 (2) Interconnection Directive: “Member States shall ensure the adequate and efficient interconnection of the public telecommunications networks set out in Annex 1, to the extent necessary to ensure interoperability of these services for all users within the Community.”

276 Cf. Articles 9 (3) and 9 (6) Interconnection Directive. See also Chapter 6.
burden with the TO, as it would use the argument and would have better means of demonstrating the request was inappropriate.\footnote{See also Chapter 8, where it will be seen that the Dutch telecommunications operator ("TO") used the argument occasionally when confronted with special access requests.}

In sum, this provision, which is very relevant for the questions asked throughout this book, left substantial room for interpretation.

3.4.3.3 Dispute resolution regarding primary interconnection rule

When juxtaposed with the EC's regulatory approach, the ITU models described above aptly illustrate what choices the regulator had in regulating the process of interconnection contract negotiations.\footnote{See Kariyawasam 2001, p. 136-223.}

The EC opted to stay close with the third ITU model: commercial negotiations made subject to a regulatory framework. It provided for fairly elaborate dispute resolution mechanisms and for interconnection orders of the NRAs as a last resort. To achieve this, the Interconnection Directive introduced a mix of \textit{ex ante} and \textit{ex post} intervention.\footnote{For a more economic approach to regulatory intervention, less related to commercial negotiations, see Larouche 2000, p. 382 ff.}

The most poignant considerations were: (1) the allocation of regulatory powers for NRAs in intervening in the negotiations process, (2) the ability for the NRAs to fix timelines, and, in the worst case, (3) the right to set the terms for access and interconnection instead of the TO (and the OLO).

The authority conveyed on the NRA led to an unprecedented intervention in the process of negotiating a contract: a third party, a regulatory authority, was enabled to order the negotiating parties to enter into an agreement.

There was no reference to the civil courts of the Member States playing a role in disputes regarding contract formation or performance.

\textbf{(1) Regulatory powers for NRAs}

Under the Interconnection Directive, the Member States were required to grant far-reaching regulatory powers to their NRAs: To ensure adequate interconnection, NRAs could intervene on their own initiative at any time in ongoing interconnection negotiations in order to specify issues which must be covered in an interconnection agreement, or to lay down specific conditions to be observed by one or more parties to such agreement. At the request of either party, the NRA would have to intervene and set a term for reaching an agreement.\footnote{Cf. Article 9 (3) (1) Interconnection Directive. See also Chapter 5.}
Interconnection Regulation and Contract Law

(2) Fixing timelines
In order to avoid delaying tactics, which were still – and arguably are – employed in interconnection negotiations (particularly by dominant TOs), the Interconnection Directive empowered the NRAs to set time limits within which negotiations on interconnection were to be completed; this could be done at the NRA’s own initiative or at the request of either party.\(^{281}\) If an interconnection agreement was not reached within the time period specified, the NRA was required to bring about an agreement in accordance with its own procedures under national laws. According to the EC regulator, it was meant to provide the parties an incentive to reach an agreement amongst them.

(3) Setting terms for special access and interconnection
In the event of an interconnection dispute between organisations in a single Member State, the NRA of that Member State would be under an obligation to take steps to resolve the dispute, at the request of either party, within six months of the request.\(^{282}\)

The Interconnection Directive established a lengthy list of objectives that an NRA would have to take into account in the preparation of the dispute resolution decision. The decision was to be published and the parties (not necessarily the public) were to be given a full statement of the reasons on which the decision was based. The NRA was ordered to take into account and balance various rationales including: ‘the user interest’, ‘the desirability of stimulating innovative market offerings, and of providing users with a wide range of telecommunications services at a national and at a Community level’, ‘the need to maintain (...) the interoperability of services’, and ‘the promotion of competition’.\(^{283}\)

The NRA that granted the authorisation to the party against which the complaint was made could refer interconnection disputes between organisations operating under authorisations provided by different Member States.\(^{284}\)

As a last resort, and in compliance with the principle of proportionality, NRAs could require TOs to interconnect their facilities, and set the terms of interconnection, if and when organisations which are authorised to provide

\(^{281}\) Cf. Article 9 (3) (3) Interconnection Directive.

\(^{282}\) Cf. Article 9 (5) (1) Interconnection Directive.

\(^{283}\) Cf. Article 9 (5) Interconnection Directive.

\(^{284}\) See Article 17 Interconnection Directive.
public telecommunications networks and/or publicly available telecommunications services had not interconnected their facilities. Such interconnection orders must be necessary to protect essential public interests. This competence (which to some extent included the secondary interconnection rule) was the most poignant feature of NRA intervention in the (failed) contract formation process. Even courts would normally not take the initiative to set the terms of an agreement independently from the desires of the parties.

The intervention by NRAs was accompanied by guidelines to which the NRAs must adhere. These included some of the rationales mentioned in Chapter 1, such as consumer protection and technological progress.

3.4.3.4 Additional obligations for operators with SMP
The Interconnection Directive attempted to strike a balance between the rights and the obligations of TOs in accordance with their relative positions in the markets by introducing a secondary interconnection rule.

In order to compensate for an imbalance in negotiating power, in particular between the TOs and new entrants, the Interconnection Directive established specific obligations for public TOs and public telecommunications service providers (as defined in an Annex to the Interconnection Directive), which had been determined to have SMP. The NRA must advise the Commission of such determination and, at its request, of the reasons underlying it. If the Commission disagreed with an NRAs

---

285 See Article 9 (6) Interconnection Directive.
286 Cf. Article 9 (1) Interconnection Directive, which required NRAs to encourage and secure adequate interconnection in the interests of all users, exercising their responsibility in a way that provides maximum economic efficiency and gives the maximum benefit to end-users. In particular, NRAs were to take into account the following needs: ensuring satisfactory end-to-end communications for users, stimulating a competitive market, ensuring the fair and proper development of a harmonized European telecommunication market, cooperating with their counterparts in other Member States, promoting the establishment and development of trans-European networks and services, and the interconnection of national networks and interoperability of services, as well as access to such networks and services, the principles of non-discrimination (including equal access) and proportionality, the maintaining and developing of universal service.
287 Cf. Annex I, which states, "The public telecommunications networks and publicly available telecommunications services whose providers are subject to specific obligations if and when they have significant market power are: the fixed public telephone network; the leased lines service; the public mobile telephone network; and public mobile telephone services."
288 See Article 18 Interconnection Directive.
determination, it could request the Member State to reconsider and, if necessary, an infraction procedure could be brought against the Member State before the ECJ.\textsuperscript{289}

The main obligation was contained in Article 4 (2) Interconnection Directive: SMP operators had to meet all reasonable requests for access to the network including access at points other than the NTPs offered to the majority of end-users, which went further than the duty to negotiate on a reciprocal basis.

This clause was translated in some Member States, like the Netherlands, as the special access clause. Contention often arose over whether the request was reasonable.\textsuperscript{290}

3.4.3.5 ONP related obligations

The ONP principles of non-discrimination, transparency, cost-orientation and accounting separation were reiterated in Articles 6ff. Interconnection Directive.\textsuperscript{291}

Non-discrimination

As discussed above, TO's were required to apply similar conditions in similar circumstances to OLOs providing similar services and to provide interconnection facilities and information to others under the same conditions and of the same quality as they provide for their own services, or those of their subsidiaries or partners.\textsuperscript{292}

\textsuperscript{289} Pursuant to Article 226 (formerly 169) EC Treaty.

\textsuperscript{290} See Chapter 4.

\textsuperscript{291} The following provisions of the Interconnection Directive are not discussed for the purpose of this book: Article 5, which dealt with universal service contributions made by TOs; Article 10 on essential requirements, which was directed at the Member States and contained obligations, \textit{i.e.}, to maintain network security and integrity, interoperability of services and protection of data; Article 11, which dealt with co-location and facilities sharing; Article 12 on numbering; Article 15, Advisory Committee procedure; Article 16 Regulatory Committee procedure; Article 17, procedure for resolving disputes between organizations operating under authorizations provided by different Member States; Article 18, Notification of Commission by the Member States on the status of NRAs; Article 19, technical adjustments; Article 20, deferment; Article 21, interconnection with third country organizations; Article 22, review; Article 23, transposition; Article 24, entry into force; and Article 25, Addressees.

\textsuperscript{292} See, supra, paragraph 3.3.2.1 and Article 6 (a) Interconnection Directive.
The international and EC regulatory framework

Transparency

The parties to an interconnection agreement were to communicate the terms to the NRA, which could make the terms available on request to interested parties, in accordance with Article 14 (2) Interconnection Directive. NRAs could also inspect interconnection agreements in their entirety. There was an exception for those parts, which dealt with the commercial strategy of the parties. It was, however, left to the NRA to determine which parts were considered a commercial strategy.

Details of interconnection charges, terms and conditions and any contributions to universal service obligations had to be made available on request to interested parties.294

Article 7(3) Interconnection Directive aimed at generally relaying a competence with the NRA to intervene at will in the RIO. It provided that the RIO must include a description of the interconnection offerings broken down in components according to market needs, and the associated terms including tariffs. This provision allowed for differentiation in the RIO, where such differences could be objectively justified on the basis of the type of interconnection provided. Article 9 (2) Interconnection Directive provided that the NRA could determine ‘general terms and conditions’ beforehand. The NRAs interpreted this power broadly. NRAs set (and publish) standard conditions on interconnection terms, such as requirements for the provision of equal access and number portability, requirements to provide facility sharing, including collocation, or requirements concerning the maintenance of end-to-end quality of service.297

Pursuant to the Interconnection Directive, the Commission issued an Indicative Reference Interconnection Offer. In this recommendation, the Commission set forth a minimal set of items which should reasonably be

---

293 See Article 9 (4) Interconnection Directive.
294 Cf. Article 6 (c) Interconnection Directive.
295 Cf. Article 14 (1) Interconnection Directive obligating the NRAs to ensure that up-to-date information should be published in an appropriate manner, such as by means of the Official Gazette.
296 The aim was to ensure transparency and non-discrimination. See Chapter 3 paragraph 3.3.2.1 and 3.4.
297 For a complete list see Annex VII, part 1.
covered in reference interconnection offers and examples of the elements to be included under each item.\textsuperscript{299}

Furthermore, the NRAs were to encourage coverage in interconnection agreements of issues such as terms of payment, location of PoCs, technical standards interoperability tests and others.\textsuperscript{300}

Additional publication requirements applied to the terms and tariffs of interconnection agreements concluded by certain TOs with SMP will be discussed in the next paragraph.

\textbf{Cost-orientation}

The Interconnection Directive also established the principles for interconnection charges and cost accounting systems, which applied exclusively to undertakings with SMP.\textsuperscript{301}

The organisation providing interconnection to its facilities carried the burden of proof that charges were derived from actual costs including a reasonable rate of return on investment.\textsuperscript{302} The NRAs could request an organisation to provide full justification for its interconnection charges, and, where appropriate, require charges to be adjusted. These obligations applied primarily to organisations having SMP in the fixed public telephone networks or leased lines sectors. As regards operators of public mobile telephone networks and services, the principle of cost-orientated interconnection charges applied only if and when such operators would be deemed, by the respective NRA, to have SMP on the national market for interconnection (as those markets were perceived to be more competitive already). Yet, the national market for interconnection encompassed both the fixed and mobile telephone market in a Member State.\textsuperscript{303} As a consequence,

\begin{footnotesize}
\begin{enumerate}
\item The Commission observed: "The reference interconnection offer is a general publication of terms and conditions for interconnection services. Interconnection agreements cover a wider range of items than those listed in the reference interconnection offer, including items identified in Annex VII of the Interconnection Directive 97/33/EC." See Indicative Reference Interconnection Offer, version 3, 22 June 1998.
\item Cf. Annex VII, part 2.
\item Article 7(1) Interconnection Directive.
\item Article 7 (2) Interconnection Directive.
\item To promote transparency on interconnection charges applied, the Commission regularly published overviews of interconnection rates charged nationally, e.g., Interconnection in Member States as of 1 January 1999, see http://europa.eu.int/ISPO/infosoc/telecompolicy/en/comm-en.htm#misc.
\end{enumerate}
\end{footnotesize}
the operators of mobile telephone networks and services initially enjoyed the privilege that their respective market position was assessed with reference to the (broad) market for interconnection (and not with reference to the — narrower — mobile market), whereas the market position of providers of fixed telephone networks and services, as well as providers of leased lines services, was determined with reference to their respective markets. The rationale for this privilege, which was proposed by the European Parliament and accepted by the Council during the conciliation procedure, was to enable mobile operators to strengthen their market positions as competitors of the incumbent fixed network operators.

The principle of cost orientation had to be backed by a set of harmonised rules as to how costs were determined. Article 7(5) Interconnection Directive stipulated that the NRAs would ensure that the cost accounting systems used by the organisations concerned were suitable for the implementation of the ONP tariff principles. Thus, the EC held initially that interconnection charges should neither be below a limit calculated by the use of long-run incremental costs, and cost allocation and attribution methods based on actual cost causation, nor above a limit set by the stand-alone-costs of providing the interconnection in question.304 Annex V of the Interconnection Directive provided for some elements, such as the cost standards used, which could be included in the accounting systems of the organisations so that these show a sufficient level of detail. Similarly, compliance with the cost accounting system had to be verified by the NRA or another independent body on a national level.305 The burden of proof that charges were derived from actual costs including a reasonable rate of return on investment rested on the TOs.306

305 On 15 October 1997, the Commission published a Recommendation on the prices for interconnection. This Recommendation set out the then best current practice prices for interconnection. In it, Commission recommended the use of forward-looking long run incremental costs as the basis for interconnection pricing. On the basis of this concept, and taking into consideration the prices of the three Member States with the lowest interconnection prices, the Recommendation spelt out prices for local travel, single transit (up to one million customers) and double transit (national network) interconnection. The second part of this Recommendation addressed separate accounting and bookkeeping. See Recommendation C(97) 3148, Brussels, 15 October 1997; Commission Notification regarding interconnection pricing in a liberalized telecommunications market, 19 March 1998, OJ 98/C 84/03, which provided an overview of different cost accounting systems used in the Member States.
306 Cf. Article 7 (2) Interconnection Directive, strictly speaking it refers to: “the organization (Continued)
Interconnection Regulation and Contract Law

**Accounting separation**

In the interest of transparency and fair competition, Article 8 of the Interconnection Directive had set out separate accounting obligations, mainly with respect to two types of undertakings: first, organisations providing public telecommunications networks and/or services which had special or exclusive rights in other, non-communications sectors in the same or another Member State either had to undertake a complete structural separation of their telecommunications activities, or they had to at least keep separate accounts for those activities to the extent that would be required if the activities were carried out by legally independent companies. Second, SMP undertakings, which operated public telecommunications networks and services (except for those organisations that merely provided public mobile telephone networks and services according to Annex I, part 3 of the Interconnection Directive), and which offered interconnection services to other organisations, had to keep separate accounts for their interconnection activities and their other activities. Exceptions to these two separate accounting requirements were permitted if the telecommunications turnover of the respective organisations concerned was below a threshold of 50 million or 20 million ECU, respectively.

3.4.4 The Access Directive

In principle, those provisions in the Interconnection Directive not specifically mentioned in the Access Directive to remain in force were deemed to be overtaken by the new specific provisions of the Access Directive. Some provisions of the Interconnection Directive were to remain in force, until such time when the NRAs, in consultation with the Commission, would decide that there was adequate competition. Article 7 of the Access

---


308 See Article 8 (2) Interconnection Directive.


The international and EC regulatory framework

Directive provided for the continuing applicability of a number of provisions in the Interconnection Directive, with the exception of the existing definitions.\(^\text{311}\)

As discussed in Chapter 2, the Commission wanted to define the term access in the broadest sense, thereby also bringing site access under its scope.\(^\text{312}\) Pursuant to the Access Directive, interconnection was now considered a form of access.\(^\text{313}\) This approach created considerable confusion and legal uncertainty both at the Member States level and for market parties, especially as it was not always clear why some provisions seemed to be overtaken, and some not and whether this had an impact as well on the primary duty to negotiate interconnection.

The EC still felt it appropriate to intervene in market, including nine wholesale products and service markets defined by it, where the structure of the market would be such that the Commission would consider justified \textit{ex ante} intervention to impose specific obligations on the TOs. The Commission focused on identifying markets where intervention, for instance regarding pricing, would be necessary.\(^\text{314}\)

\(^\text{311}\) According to Article 7 Access Directive the following obligations survived: Article 4, obligations to negotiate interconnection and to meet reasonable requests for access; Article 6, obligations to adhere to the principle of non-discrimination and transparency; Article 7, obligations to follow the principles of transparency and cost orientation in relation to interconnection charges; Article 8, obligations to keep separate accounts; Article 11, obligations relating to facility and/or property sharing arrangements; Article 12, obligations concerning number portability; Article 14, obligations to publish up-to-date information concerning interconnection issues. The Universal Service obligations under Article 16 Universal Service Directive, to be maintained for the transition period and relevant to access and interconnection are relating to carrier selection and pre-selection according to Article 12(6) Interconnection Directive as amended by Directive 98/61/EC.

Besides, Article 16 of Directive 98/10/EC and Articles 7 and 8 of Directive 92/44/EC will remain in place, but only until such time as these obligations have been reviewed and a determination been made under the Access Directive.

\(^\text{312}\) See Chapter 2 paragraph 2.4.2.

\(^\text{313}\) \textit{Cf.} Nihoul, Rodford 2004, p.175ff, who do not address this issue; Walden, Angel 2005, p. 234.

\(^\text{314}\) The nine markets defined at the wholesale level were: call origination on the public telephone network provided at a fixed location; call termination on individual public telephone networks provided at a fixed location; transit services in the fixed public telephone network; wholesale unbundled access (including shared access) to metallic loops and sub loops for the purpose of providing broadband and voice services; wholesale broadband access; wholesale terminating segments of leased lines; wholesale

(Continued)
3.4.4.1 Purpose and scope
The Access Directive aimed at further harmonization of access and interconnection. The Commission stated that secondary ex ante interconnection rules should form the exception. They should apply solely in the event of an apparent market failure.

3.4.4.2 The duty to negotiate interconnection
Article 9 of the Interconnection Directive had provided for the role of an NRA, for instance as regards intervention in case interconnection negotiations failed. This Article was not mentioned specifically as a surviving clause in Article 7 of the Access Directive, nor were the obligations of the NRA transposed to Article 8 Framework Directive, which concerned the NRA's obligations under the NRF. The Commission emphasized the duty to negotiate and added a good faith element:

"In an open and competitive market, there should be no restrictions that prevent undertakings from negotiating access and interconnection arrangements between themselves, in particular on cross-border agreements, subject to the competition rules of the Treaty. In the context of achieving a more efficient, truly pan-European market, with effective competition, more choice and competitive services to consumers, undertakings which receive requests for access or interconnection should in principle conclude such agreements on a commercial basis, and negotiate in good faith."

trunk segments of leased lines; access and call origination on public mobile telephone networks; voice call termination on individual mobile networks, the wholesale national market for international roaming on public mobile networks and broadcasting transmission services, to deliver broadcast content to end users.

316 This was specified in Recital (13) of the Access Directive. See also the Commission Recommendation infra, Chapter 5 paragraph 5.3.1. Explicit mention was made of possible problems with international roaming on mobile networks and access to broadband networks. These topics played a role in the last political discussions at the time the Directive was drafted and have been explicitly mentioned therein – by way of a compromise between topics that need to be explicitly regulated and topics that are left to future regulation –, which illustrates how time sensitive the political decision-making process can be.
317 See, supra, paragraph 3.4.2.2.
318 The Interconnection Directive had still provided that negotiations on interconnection agreements could be facilitated by NRAs if they would determine 'certain conditions in accordance with Community law and take into account the recommendations issued by the Commission to facilitate the development of a true European home market and appoint other areas that must be dealt with in interconnection agreements.' See Recital (12) Interconnection Directive, p. 34.
In the recitals to the Access Directive, the Commission articulated its preference for commercial negotiations taking priority over regulatory intervention.\(^{319}\)

In the first place, the Access Directive obliged the Member States to ensure that undertakings were not prevented to negotiate between themselves agreements on technical and commercial arrangements for access and/or interconnection either in the same Member States or in different Member States. In particular, undertakings requesting access or interconnection should not be required to obtain an authorization to operate in the Member State where access or interconnection was requested and this pointed at a priority afforded to negotiations.\(^{320}\)

On the other hand, NRAs should retain the power to secure, 'where commercial negotiation failed', adequate access and interconnection and interoperability of services in the interest of end-users; although it is clear that this duty applied only where it concerned ECN operators and not ECS providers that did not operate an ECN.\(^{321}\)

According to Article 4 (1) Access Directive, the norm stayed that there was a right for OLOs and a corresponding obligation for TOs to negotiate interconnection:

> "Operators of public communications networks shall have a right and, when requested by other undertakings so authorised, an obligation to negotiate interconnection with each other for the purpose of providing publicly available electronic communications services, in order to ensure provision and interoperability of services throughout the Community." (...)

The purpose of this provision was described more broadly, in that it aimed at ensuring interoperability throughout the EU.\(^{322}\) The word 'ensure' points at a

\(^{319}\) "Undertakings which receive requests for access or interconnection should in principle conclude such agreements on a commercial basis, and negotiate in good faith," Article 5 (4) Access Directive.

\(^{320}\) "Member States shall ensure that there are no restrictions which prevent undertakings in the same Member State or in different Member States from negotiating between themselves agreements on technical and commercial arrangements for access and/or interconnection, in accordance with Community law. (...)" Article 3 (1) Access Directive. See also Chapter 4, on the United Kingdom.

\(^{321}\) Recital (5), second sentence and Recital (6) Access Directive; but see also Article 5(4) Framework Directive on the authorisation of the NRA to take action ex officio.

\(^{322}\) This does not mean that the obligation to negotiate existed only in the case of cross-border interconnection. This follows both from the definition of 'interconnection' in (Continued)
results obligation to establish end-to-end connectivity (at least of voice telephony) and is difficult to posit with an efforts obligation to negotiate interconnection agreement. If the parties to the commercial negotiations would be unable to agree on their contract terms, this would necessarily prevent the ensuring of interoperability.

Article 5 Access Directive was a stripped down version of Article 9 Interconnection Directive. Enigmatically (especially since it was not entirely clear whether the Commission referred to the primary and/or the secondary interconnection rule), it provided for — apparently ex post — intervention by the NRA where it stated that the NRA may impose obligations on undertakings that control access to end-users, but only to the extent that was necessary to ensure end-to-end connectivity. This provision — also seen in light of Article 20 Access Directive — was more limited than Article 9 Interconnection Directive, which not only provided ex ante general terms and conditions for interconnection but also provided for a dispute mechanism in case the parties did not agree and the interests that the NRA should take into account. Yet, in general terms, Article 12 Access Directive offered the NRA means to intervene at its own initiative. However, this intervention was not accompanied by a directive as to how the States should ensure that such intervention be legally effective, e.g., by imposing fines. In 2005 the Commission issued a ‘serious doubts’ letter against a notification from the German NRA (RegT) where it took two different approaches on the duty to negotiate. These doubts led to a decision ordering the

---

324 Article 9 (5) Interconnection Directive. Article 20 Access Directive (on dispute resolution) referred to applying policy principles of Article 8 Framework Directive. These were less specific on interoperability than Article 9 (5) Interconnection Directive.
326 Commission, Letter of 11 March 2005, Case DE/2005/0144 (Call termination on individual public telephone networks provided at a fixed location). RegT distinguished between the ‘strict Greenfield approach’: absent any sector specific regulation on SMP, the German TO would not be obliged to negotiate interconnection with OLOs (referred to as ‘ANO’); and the ‘modified Greenfield approach’: according to RegT, this obligation would be based on Article 5 Access Directive and would oblige the German
RegTP to withdraw most of its measures subsequently. \(^{327}\)

Note that the provisions on confidentiality were also modified, but, this did not impact on the duty to negotiate. \(^{328}\)

In sum, although the wording was modified, the regulatory scope of the obligation to negotiate did not appear to have changed remarkably and still left room for interpretation.

### 3.4.4.3 Additional obligations for operators with SMP

In addition to the enhancement of the ONP principles to be discussed below, the Access Directive introduced more detailed secondary obligations for SMP undertakings as regards access to and use of specific network facilities, local loop unbundling ("LLU") and the distribution of interactive television ("iTV") services.

**Access to and use of specific network facilities**

Article 12 Access Directive mentioned a great number of forms of access that could be imposed in situations where the NRA would determine that the refusal to grant access would hamper sustainable competition in the end-user market or where such refusal would not be in the interest of end-users. Besides access to specific network elements, this involved the resale of

---


\(^{328}\) See Article 4 (3) Access Directive. TOs acquiring information from OLOs before, during or after the process of negotiating access or interconnection arrangements could use that information solely for the purpose for which it was supplied. The renewed provision applied reciprocally. Member States were obliged to ensure the effectiveness of this confidentiality obligation which applies with respect to 'any other party', including 'other departments, subsidiaries or partners' of the undertaking. Cf. Article 3 (3) Interconnection Directive, which was directed at the Member States and had read: 'Member States shall ensure that organizations which interconnect their facilities to public telecommunications networks and/or publicly available telecommunications services respect at all times the confidentiality of information transmitted or stored.' Article 6 (d) Interconnection Directive had contained a similar provision as Article 4 (3) Access Directive.
services, open access to technical interfaces, protocols or other fundamental
technologies, co-location (and other forms of the sharing of cable ducts,
buildings and antennae masts), access to intelligent network systems
necessary for 'end-to-end interoperability' of end-user services, roaming on
mobile networks and access to supporting operational systems. \(^{329}\)

When imposing these access obligations, the NRAs could attach conditions
ensuring 'fairness, reasonableness and timeliness.' \(^{330}\) It was unclear whether
these principles were referred to as principles of administrative or of
contract law. \(^{331}\)

In imposing the obligations with respect to these types of access an NRA
must take into account – by means of non-inclusive examples: the technical
and economical possibilities to build alternative facilities, the available
capacity, the investments made, the safeguard of sustainable competition,
the provision of international services and (where applicable) intellectual
property rights. \(^{332}\) The recitals pointed out that mandating access to
network infrastructures could be justified as a means of increasing
competition, but that the imposition by NRAs of mandated access that
increased competition in the short term should not reduce incentives for

\(^{329}\) Or, more completely: (1) giving access to specified network elements and/or facilities,
including unbundled access to the local loop, (2) negotiating in good faith with
undertakings requesting access, (3) not withdrawing access to facilities already granted,
(4) providing specified services on a wholesale basis for resale by third parties, (5)
granting open access to technical interfaces, protocols or other key technologies that
were indispensable for the interoperability of services or virtual network services, (6)
providing co-location or other forms of facility sharing, including duct or mast sharing,
(7) providing specific services required to ensure interoperability of end-to-end services
to users, including facilities for intelligent network services or roaming on mobile
networks, (8) providing access to operational support systems or similar software
systems necessary to ensure fair competition in the provision of services and (9)
interconnecting networks or network facilities.

\(^{330}\) Cf. Article 12(1) sub paragraph 3 Access Directive.

\(^{331}\) See Article 8 (1) Framework Directive. Articles 8(4) and 12 (2) Access Directive re-
iterated that regulatory decisions regarding the imposition of access obligations must be
justified in the light of the objectives laid down in Article 8 Framework Directive and
comply with the principle of proportionality.

\(^{332}\) See also Walden, Angel 2005, p. 238. These examples were based by and large on the
essential facilities doctrine. See, in particular, European Commission: Decision (IV
34.174- Be\textsuperscript{3} Line PLC v Ceiling Harbours Ltd) Bull EC No 6, 1992, paragraph 1.3.30;
Decision 94/19/EC of 21 December 1993 (IV/34.689 – Sea Containers v Stena Sealink -
Interim measures), Of L 15/8, 18 January 1994; Decision 94/119/EC of 21 December
1993, Of L 55/52 (Port of Rodby). See also ECJ 6 April 1995, Joined Cases C-241/91 P
competitors to invest in alternative facilities that would secure more competition in the long term.\footnote{See Recital (19), Access Directive.}

Regrettably, this description of the conflicting interests of infrastructure providers and service providers (or the Commission's notice on the application of the competition rules to access agreements in the telecommunications sector), did not serve to balance, in each individual case, the rights of an infrastructure owner to exploit its infrastructure for its own benefit, and the rights of OLOs to access facilities essential for the provision of competing services.\footnote{Cf. the reference made in Recital (19) Access Directive to Commission's notice on the application of the competition rules to access agreements in the telecommunications sector - framework, relevant markets and principles, OJ C 265/2, 22 August 1998.}

**LLU**

Under Article 9(4) Access Directive, NRAs were obliged to ensure the publication of a reference offer by operators which are obliged to provide unbundled access to the twisted metallic pair local loop. Given that in most EU Member States the local loop was controlled by one operator – usually the TO – and for new entrants to have access to the local loop, the Commission issued a Regulation on Unbundling of the Local Loop ('LLU Regulation').\footnote{See Council Regulation (EC) nr. 2887/2000 18 December 2000 regarding the unbundled access to the local loop, [2000] OJ L 336/4. On the issue of LLU, cf. Ryan 2003, p. 241-242.}

According to the LLU Regulation, the RIO was to contain at least the elements set out in Annex II to the Access Directive, which corresponded to the requirements set forth in LLU Regulation. This intransparent system of legislative cross-references ensured presumably that the reference offers which had to be published by the SMP undertakings under the LLU could be imposed upon SMP undertakings in the future.

Based on the LLU Regulation, the providers of fixed telecommunications networks with SMP on the market for 'appointed providers' – must comply with all reasonable requests for unbundled access to the local loop and accompanying facilities.\footnote{It comes as not surprise that in the Netherlands only KPN has been appointed under the Regulation, based on its SMP on the market for public fixed telecommunications networks.} This included co-location, connection cables and
relevant ICT systems to which a provider must have access under fair and transparent conditions. The LLU Regulation distinguished between completely unbundled access and shared access to the local loop. According to the LLU Regulation, the appointed providers must: (1) publish an adequately unbundled RIO for unbundled access and accompanying facilities, (2) offer unbundled access and accompanying facilities under transparent, fair and non-discriminatory conditions, whereby a request for unbundled access may be denied only on objective criteria that relate to the technical feasibility and the protection of the integrity of the network, and (3) offer unbundled access and accompanying facilities at cost oriented rates.

Obligation to enable distribution of wide-screen television and iTV services
In response to requests from market parties, the Access Directive contained special provisions aimed at iTV services. These may become more relevant as the different markets converge further.\(^{337}\) A new feature was that the Access Directive aimed at ensuring accessibility for end-users to digital radio and television broadcasting. The Directive specified which obligations the operators must conform with.\(^{338}\) New obligations were imposed on operators of conditional access systems ('CAS').\(^{339}\) Article 6(1) Access Directive restated the obligations already set forth in the Television Standards Directive.\(^{340}\) According to this set of conditions for access to digital television and radio services, CAS operated on the market in the EC were to have the necessary technical capability for cost-effective control allowing the possibility for full control by network operators at local or

---

337 An example from the Netherlands might be the new strategy announced by fixed infrastructure provider Versatel in the beginning of 2005. As it had acquired the rights to broadcast major league football games in the Netherlands, it also announced its intention to put these behind a decoder and work towards offering a special digital television channel over its network.

338 This is a fine example of the Commission issuing technologically dependent rules again. It can be expected that digital services will expand to other media. See article 5 (1) (b) and Annex I, part II Access Directive.

339 Article 6 Access Directive. The scope of applicability of the Directives (and, as a consequence, the regulatory powers of the NRAs, see Article 8 (2) Access Directive) is expanded by the inclusion of associated facilities. These are facilities associated with an ECN and/or an ECS, which enable and/or support the provision of services via that network and/or service, see Article 2 (c) Framework Directive. This includes, among other things, conditional access systems ('CAS') and Electronic Programme Guides ('EPG').

340 These were now contained in Annex I Part I Access Directive.
The international and EC regulatory framework

regional level of the services using such CAS.\textsuperscript{341} Operators of CAS who provided access services to digital television and radio services and whose access services broadcasters depended upon to reach any group of potential viewers or listeners were obligated to offer their services on fair, reasonable and non-discriminatory terms.\textsuperscript{342} The owners of the industrial property rights to CAS were not subject to the granting of licenses to conditions prohibiting, deterring or discouraging the inclusion in the same product of a common interface allowing connection with several other access systems.\textsuperscript{343}

Thus, the category of operators with rights and obligations to negotiate interconnection was extended to all providers of public ECNs, including broadcasters.\textsuperscript{344}

Article 4(2) Access Directive established specific access obligations reflecting the Community's policy decision to introduce wide-screen television services: public ECNs established for the distribution of digital television services must be capable of distributing wide-screen television services and programs. Network operators of wide-screen television services or programs were obliged to maintain the wide-screen format.

Another new feature of the obligations and conditions for access to digital television and radio services was that they could be adapted to economic and technical developments under the regulatory procedure set forth in the Comitolog{e}y Decision.\textsuperscript{345}

Although not regulated under the Access Directive, the NRF contained provisions relating to Application Programming Interfaces (APIs'). In the interest of the speedy creation of open APIs, Article 18(1) Framework Directive obliged the Member States to encourage providers of digital interactive television services and providers of enhanced digital television equipment to use and to comply with APIs. If this encouragement would not lead to interoperability and freedom of choice for users within one year after the transposition of the directive, the EC was empowered to impose


\textsuperscript{342} Cf. Annex I, Part I (b) Access Directive.

\textsuperscript{343} Cf. Annex I, Part I (c) Access Directive.


Interconnection Regulation and Contract Law

the mandatory use of an open API which complied with the standards and specifications adopted by the European standardization bodies, such as ETSI.346

3.4.4.4 Enhanced ONP related obligations

As under the Interconnection Directive, the secondary obligation to contract applied only to those SMP undertakings upon which the NRA imposed specific obligations.347 These undertakings were required to meet all reasonable requests for access to the network including access at points other than the NTPs offered to the majority of end-users.

The Access Directive reiterated the obligations of transparency, non-discrimination and accounting separation, price control and cost accounting in a general manner.348 Under the new regime, an NRA was to indicate which obligations applied for a provider that was appointed to have SMP.349 As an exception and provided this would be sanctioned by the Commission, obligations could be imposed in addition to the obligations already formulated in the Access Directive.350

Non-discrimination

Undertakings with SMP could still become subjected to stringent non-discrimination requirements with regard to their interconnection offerings.351

346 A possible standard considered was the Multimedia Home Platform Standard ('MHP'). This MHP standard was adopted by ETSI and aimed at the creation of harmonised network architecture for interactive television services. See Article 18(3) Framework Directive, Recital (31). On the MHP-Standard see the Digital Video Broadcasting Project's (DVB) website, http://www.mhp.org; on ETSI-standard TS 101 812 see ETSI's homepage, http://www.etsi.org/.


348 According to Article 7 Access Directive these obligations would lapse only once a review had taken place. The new regime did not pose a direct rift with the existing framework.

349 Cf. Article 8 (3) Access Directive. The additional obligations were set forth in Articles 9-13 Access Directive. These obligations may be compared with specific obligations imposed on SMP undertakings in the retail markets in Articles 17-19 of the Universal Services Directive.

350 This meant applying equivalent conditions in equivalent circumstances to other undertakings that provided similar services. Additionally, it involved providing services
However, the obligation of non-discrimination imposed on SMP undertakings was not to apply automatically. The NRA would have to order the undertaking not to discriminate. 352

The scope of applicability of these obligations to vertically integrated SMP undertakings was quite broad. 353 The Access Directive merely required that the non-discrimination obligations pertain to 'interconnection and/or access,' and serve the general objectives set forth in Article 8 Access Directive. 354

Transparency

Article 9 Access Directive was more specific in comparison with the Interconnection Directive. According to Article 9 (1) Access Directive, in order to counterbalance the stronger negotiations position, NRAs could impose upon SMP undertakings obligations for transparency in relation to interconnection and/or access. 355

These obligations were thought to serve to speed up negotiation, avoid disputes and give confidence to market players that a service would not be

---

352 Article 10 Access Directive.


354 In practice, as will be seen in chapter 6, the non-discrimination principle might have given the TO an important tool to argue that the circumstances were not equivalent for each OLO. The TO could thus diversify its interconnection call origination and call termination rates, based on (estimated) call traffic; or it could defend price differences based on technical differences in the offer of the new entrant. Another important argument often advanced by the TO in interconnection negotiations was that, precisely because of its non-discrimination obligation, the contractual terms for interconnection were cast in stone and no divergence from the standard terms could be offered. And it did, see Chapter 8.

355 The Interconnection Directive had already required SMP undertakings to make available, to organisations considering interconnection, at their request, all necessary information and specifications in order to facilitate the conclusion of an agreement. See also the 1999 Publication of and access to information in Member States concerning interconnection in telecommunications (1999/C 112/02).
Interconnection Regulation and Contract Law

provided on discriminatory terms.\(^{356}\) The object of transparency could be information in relation to access or interconnection of public ECNs.\(^{357}\) The Directive mentioned, in a non-inclusive list: accounting information, technical specifications, network characteristics, terms and conditions for supply and use, and prices.\(^{358}\)

The NRA's discretion extended not only to the object of the transparency obligation, but also to the modalities of bringing about transparency. The NRAs could 'specify the precise information to be made available, the level of detail required and the manner of publication.'\(^{359}\) This included a determination as to whether or not the information has to be provided free of charge.\(^{360}\)

Moreover, the Access Directive specified that the obligation to publish a RIO applied to an operator that had obligations of non-discrimination and by defining the requirements for the terms to be published should be sufficiently unbundled in order that undertakings were not required to pay for the facilities they did not need.\(^{361}\)

The Access Directive did not impose an obligation on the NRA to hold consultations in this respect.\(^{362}\)


\(^{357}\) Cf. Articles 2(a) and 2(b) Access Directive.


\(^{360}\) Article 12 Access Directive enabled the NRA to impose obligations on TOs to meet reasonable requests for access to, and use of, specific network elements and associated facilities. The provision did not specify the conditions for this type of \textit{ex ante} intervention. It provided examples, stating that the NRA may intervene \textit{‘inter alia’} in situations where it considers that denial of access or unreasonable terms and conditions having a similar effect would hinder the emergence of a sustainable competitive market at the retail level, or would not be in the interest of the end-user. Cf. Recital (16) Access Directive. A material obligation that a reference offer must be published where an OLO would seek access to the twisted metallic pair, was added.

\(^{361}\) Article 9 (2) Access Directive read: “In particular where an operator has obligations of non-discrimination, national regulatory authorities may require that operator to publish a reference offer, which shall be sufficiently unbundled to ensure that undertakings are not required to pay for facilities which are not necessary for the service requested, giving a description of the relevant offerings broken down into components according to market needs, and the associate terms and conditions, including prices.”

\(^{362}\) Cf. Chapter 5 paragraph 5.3.1.
According to Article 9 (3) Access Directive, NRAs could specify the precise information to be made available, the level of detail required and the manner of publication, thus leaving much freedom to decide how the publicised RIO should be structured.

The NRA was awarded a broad and general right to intervene in case unbundled access was sought. The Directive allowed for intervention in case of denial of access - without referring to an obligation to negotiate - or an act having a similar effect. Given the reference to Article 8 of the Access Directive, it may be assumed that this provision was aimed at TOs with SMP. Annex II to the Access Directive contained an additional set of minimum elements that must be contained in the specific RIO.

Nowwithstanding the obligation to publish a RIO, the Access Directive no longer provided for mechanisms to standardize the interconnection offer. Conversely, the NRA could impose administrative sanctions if the TO did not comply with its obligation to amend the RIO after an order of the NRA. Arguably, this meant that for the future use of such RIO, the NRA could establish \textit{ex ante} conditions. The Interconnection Directive had been somewhat restricted in that it explicitly mentioned those conditions, which could be fixed \textit{ex ante} by the NRA.

\textit{Cost orientation interconnection and network access charges} 

In practice, there had been significant obscurity and legal uncertainty as to how the criterion of cost orientation should be filled in and this had been the most contentious principle fought between the TO and the OLOs. Under the NRF, cost orientation remained the leading principle, and the manner in which this principle would be filled in was a matter of decision for the NRA.

\footnote{Article 12 Access Directive provides that the NRA may impose the obligations it deems necessary ‘in accordance with the provisions of Article 8.’ Article 8 (2) Access Directive conferred the right to intervene under the condition that it must concern a TO with SMP, whilst simultaneously keeping maximum freedom in analysing SMP by referring to the procedure for market analysis pursuant to Article 16 Framework Directive.}

\footnote{In Germany, for instance, DTAG published several standard offers, including a standard offer for access services. See: \textit{Standardangebot für Zugangsleistungen}, see Steinwärder 2005, overview on p. 84.}

\footnote{See Article 9 (2) Interconnection Directive.}

\footnote{See Chapters 2 and 8.}

\footnote{See Article 13 Access Directive, in particular Article 13 (2) that in general provides that a cost mechanism must promote efficiency and sustainable competition and maximise consumer benefits. These principles are not very objective and leave a lot of room for debate by the TO.}
Interconnection Regulation and Contract Law

Article 13(1) Access Directive provided for a broad variety of regulatory measures, ranging from relatively light, such as an obligation that prices for carrier selection shall be reasonable, to relatively stringent, such as the obligation that the prices must be cost-oriented, culminating in the \textit{ex ante} regulation of prices.\footnote{See Recital (20) Access Directive. \textit{Cf.} Article 7(3) in conjunction with Annex IV Interconnection Directive. \textit{Cf.} Common Position (EC) No 36/2001, \textit{OJ} C 337/1, 30 November 2001.} Pursuant to the Access Directive, NRAs could impose upon SMP undertakings obligations relating to cost recovery and price controls, and obligations for cost orientation of prices in relation to the provision of specific types of interconnection and/or access.\footnote{\textit{Cf.} Article 13(1) Access Directive.} These price control measures were predicated on indications, based on a market analysis under Article 16 Framework Directive, which stipulated `that the operator concerned might sustain excessively high price levels, or apply a price squeeze, to the detriment of end-users'. The Framework Directive did not require any proof of excessive prices or of price squeezing; rather, a mere `indication' that a lack of effective competition might lead to these results, was deemed sufficient.

In determining cost-oriented prices, the NRAs would have to take into account the investment made by the operator and allow him a reasonable rate of return on adequate capital employed, taking into account the risks involved.\footnote{\textit{Cf.} Article 13(1) Access Directive.} The burden of proof that charges were derived from costs including a reasonable rate of return on investment lied with the TO with SMP.\footnote{\textit{Cf.} Article 13(3) Access Directive.} At the NRA's request, the TO must justify its prices. Where necessary, the NRA could order the TO to adjust such prices.\footnote{\textit{Cf.} Article 13(3) Access Directive.}

The Directive also stated that cost-orientation of prices meant `cost of efficient provision of services' and allowed NRAs to use cost-accounting methods independent of those used by the TO in order to calculate the cost of efficient provision of services.

When regulating cost recovery mechanisms or pricing methodologies, the NRAs were bound by the triple objectives to promote efficiency, sustainable competition and to maximise consumer benefits. In pursuing these objectives, the NRAs could take account of prices available in comparable


\footnotesize{\textsuperscript{369} \textit{Cf.} Article 13(1) Access Directive.}

\footnotesize{\textsuperscript{370} \textit{Cf.} Article 13(1) Access Directive.}

\footnotesize{\textsuperscript{371} \textit{Cf.} Article 13(3) Access Directive.}

\footnotesize{\textsuperscript{372} \textit{Cf.} Article 13(3) Access Directive.}
competitive markets.\textsuperscript{373} The term 'may also take account of', which was based on the Council’s Common Position on the power to mandate cost recovery mechanisms or pricing methodologies, suggested that the NRAs could use comparative market studies also when examining the cost-orientation of prices.\textsuperscript{374}

If an NRA were to mandate the implementation of a specific cost-accounting system in order to support price controls, the description of the cost-accounting system must be made publicly available, showing at least the main categories under which costs were grouped and the rules used for the allocation of costs.\textsuperscript{375} The cost-accounting system imposed upon an SMP undertaking, was to be verified by a qualified independent body, which besides the NRA, and could be an independent third party.\textsuperscript{376}

One of the most important ONP tariffing principles – the principle that tariffs must be sufficiently unbundled where technologically feasible, in order to leave users a choice among the individual service elements – was maintained in Article 12 (1) (a) Access Directive.\textsuperscript{377}

**Accounting separation**

The obligation of accounting separation did not really change, although the internal transfer prices mechanisms now had to be made public by the TO.\textsuperscript{378}

Article 11 Access Directive established broad powers to impose obligations for accounting separation and empowered NRAs to request, in particular, vertically integrated companies to make transparent their whole-sale prices and their internal transfer prices. The main purpose of this specific accounting obligation was to ensure compliance with non-discrimination

\textsuperscript{373} Cf. Article 13(2) Access Directive.


\textsuperscript{375} Cf. Article 13(4) sentence 1 Access Directive.

\textsuperscript{376} See clarification in Recital (21) Access Directive.

\textsuperscript{377} This principle was previously laid down in Article 7(4) of the Interconnection Directive, which required Member States to ensure that interconnection charges be sufficiently unbundled so that the applicant would not be required to pay for anything not related to the service requested. The principle that tariffs had to be unbundled was also contained in Article 17(4) of the ONP Voice Telephony Directive for the provision of connection to the fixed public telephone network and services, which supplemented the provision of Article 16(3) of the Interconnection Directive stating that special network access charges, too, were to respect the principles of cost orientation set out in the Annex to the ONP Framework Directive.

\textsuperscript{378} See Article 11 (1) Access Directive.
obligations under Article 10 Access Directive and to prevent unfair cross-subsidization practices. The NRAs were empowered to specify the format and the accounting methodology to be used.

In order to facilitate the verification of compliance with both transparency obligations and non-discrimination obligations, the NRAs could require that accounting records, including data on revenues received from third parties, be provided on request. This information could be published, subject to national and EC rules and commercial confidentiality, provided that the publication would contribute to an open and competitive market.

3.4.4.5 Transitional measures
In order to ensure the transition from access and interconnection rules that were adopted under ONP framework, Article 7 Access Directive provided for detailed transition rules which complemented the general transitional measures set forth in article 27 Framework Directive. According to Article 7 Access Directive, Member States had to maintain all obligations regarding access and interconnection that were in force prior to the date of entering into force of the Access Directive until such time as these obligations had been reviewed and a determination had been made, on the basis of a market analysis, whether to maintain, amend or withdraw these obligations with respect to SMP undertakings.

3.4.5 Summary
Both the ONP framework and the NRF provided for rules surrounding interconnection and access contract negotiations. However, the emphasis of regulation was in defining the scope of the ONP principles and in imposing additional requirements on SMP undertakings under the secondary interconnection rule.

It is also evident that the regulation of access and interconnection focused not on the civil law aspects of interconnection agreement; rather, the approach was based on a combination of general competition law and sector-specific regulation. The purpose, in line with the regulatory objectives, was to provide guidelines for numerous access and interconnection issues perceived to threaten the opening of markets, whilst taking into account the administrative law principles enshrined in Community law. For this reason,

379 This power was in addition to the information rights bestowed on the NRAs under Article 5 Framework Directive.
the scope of regulation was generic, aimed not so much at the market as a whole, but rather at the Member States and NRAs and containing various rules that were onerous on dominant TOs, SMP undertakings. This Chapter did not discuss whether these rules were justified in light of contract formation and performance issues as these were not subject of the regulation. It is *communis opinio* that at least towards SMP undertakings the approach was justified – if not always watertight.381

### 3.5 Other regulated markets382

The duty to negotiate, or rather the duty to enter into an agreement, is applied across many different public utility sectors, since fair access to networks will often be a prerequisite to operating successfully on the downstream consumer markets. The example that first comes to mind is the public transport sector, where the transporter must enter into an agreement with the passenger.383 However, this is an example of a duty to contract at the retail level and this book focuses at the wholesale level.

The EC Commission has addressed access to networks in four manners: (1) retaining a vertically integrated incumbent with an exclusive right to operate services; (2) retaining a vertically integrated incumbent, which must open its infrastructure to competitors; (3) enabling vertically integrated competitors to create their own duplicate infrastructure; and (4) separating the functions of operator and infrastructure manager.384 Different approaches were applied across the different network sectors, as will depend on the specificities of the industries concerned.385

It is difficult to bring in other utility sectors when discussing the EC regulatory framework for access and interconnection in respect of contract formation and performance issues, as a very extensive discussion of

---


382 The duty to contract is not restricted to public utility sector; see Houben 2005, p. 3ff. However, the discussion in this book is restricted to those sectors given that the telecommunications sector is one.


regulatory principles applied in these other sectors and their relevance for possible contracts at the wholesale level would necessarily precede a thorough comparison of the service scope with the electronic communications sector. At first blush, the services differ, not only due to their different subject (telecommunications, gas, water, transport), but also as regards the extent of service provision and the distribution methods used.

Indeed, when looking at contracts at the wholesale level – in the gas and energy sector these would be access type arrangements between providers and/or distributors of gas or energy; in the transport sector, these could be agreements providing access to service providers wishing, e.g., to use the rails network – there is a difficulty already in that both the markets and the underlying contractual arrangements will differ significantly. Moreover, notwithstanding the EC Procurement Directive, the differences in the regulation of utility sectors and their implementation into national law abound. For example, it is notable that the gas industry used to be subject more of self-regulation than active government regulatory intervention, in spite of sector specific regulation introduced in 1998. It is even more difficult to establish a comparison with the water industry.

This paragraph focuses on duty to contract obligations at the wholesale level, akin to the secondary interconnection rule. The comparable rationales for regulation discussed in the context of electronic communications in Chapter 1 also apply to other utility sectors: (1) essential facilities, (2) transaction cost, (3) technological progress, (4) consumer protection; and the possibly overlapping regulatory objectives discussed in this chapter.

A brief look must also be given at whether harmonization of contract terms generally bore any relevance to interconnection negotiations.

\[\text{386 For an overview of the deregulation of network industries at a high level, see Robinson 2004. On the (history of) regulation of the energy industry, e.g., Cameron 2002, p. 97ff. The period of regulation ran more or less counter with the liberalization phases for the electronic communications sector. Cf. also re the Netherlands Van Damme, Hancher 2000.}


\[\text{389 The essential facilities doctrine can be seen as an equivalent to the doctrine of a 'natural monopoly'. See Lipsky, Sidak, 1999, Doherty 2001.}

154
3.5.1 Brief comparison with energy, gas, transport and postal market regulation

3.5.1.1 The electricity sector

The 1996 Electricity Directive provided the basis for liberalization of the energy market.\(^390\) As this was a market with a natural monopoly, the EC issued a Directive aimed at opening the market and that included the introduction of provider selection for end-users. The general aim of the Directive was to establish common rules for the generation, transmission, and distribution of electricity. Article 1 of the Electricity Directive set forth that the Directive contained rules for the organization and functioning of the electricity sector, access to the market, criteria and procedures applicable to calls for tender, the granting of authorizations, and the operation of systems.

Contrary to the telecommunications sector, the network operation was not (fully) liberalized: operation of the electricity network and transport of electricity stayed in one hand, production of electricity was free.\(^391\) As a result of the opening of the market, tools were needed to warrant that all energy companies would offer electricity at fair and reasonable charges.\(^392\) This entailed that in most Member States – including the Netherlands – rules needed to be put in place to regulate third party access to electricity networks.\(^393\) At a high level, the EC premise was not dissimilar from the premise in ensuring interoperability of ECNs through interconnection.

A non-exhaustive overview of the tools devised to achieved interoperability of electricity networks is provided herein.

Similar to interconnection, electricity networks are connected through the use of devices known as interconnectors.\(^394\) Interconnectors were considered essential facilities.\(^395\) It was an industry practice to reserve capacity on

---


\(^{391}\) This activity was in the hands of what the EC regulatory framework labeled as the network operator.

\(^{392}\) See Hancher, Lavrijsen 2000, p. 43.

\(^{393}\) See also De Rijke 2004.

\(^{394}\) It falls outside the scope of this chapter to discuss the technical details. See also Goes, Koster 2004, p. 60ff. An overall discussion of interconnection in network industries can be found in Carter, Wright 1999.

\(^{395}\) See Hancher, Lavrijsen 2000, p. 51.
Interconnection Regulation and Contract Law

interconnectors for a prolonged period of time. The Commission closely monitored this and tested such reservations against articles 81-82 EC Treaty.396

In line with the principle of non-discrimination, network operators were required to offer access or interconnection to third parties, unless it did not reasonably have the requested transport capacity. Hence at the wholesale level, a duty to contract applied in the relationship between the network operator and the party requiring access to that network – for production purposes. The burden of proof if such capacity was not available lied with the network operator.397

However, contrary to the EC regulatory framework for electronic communications, Member States were given a choice on how to establish access for third parties: negotiated, regulated or through a single buyer system.398

Besides this, to promote transparency, transmission systems operators had to publish an indicative range of prices for use of the transmission and distribution systems; but this constituted a more relaxed publication requirement than the requirement aimed at SMP undertakings under telecommunications regulation.

In the Netherlands, a system of regulated third party access was introduced.399 It provided for: (1) a duty on the network operator to connect a party requesting this to its network against the tariff and conditions set forth in the Act, and (2) a duty to make an offer with respect to transport of electricity against the tariff and conditions set forth in the Act.400 This obligation was comparable to the access requirement imposed as part of the secondary interconnection rule.401

400 See Articles 23 and 24 Electriciteitswet. See also the exception under Article 24 (2): insufficient capacity.
401 Although Article 23 Electriciteitswet also contained provisions similar to the telecommunications sector, such as regards transparency - the duty to provide a type of reference offer, Article 23 (1), the duty of non-discrimination, Article 23 (2) Electriciteitswet.
A national regulatory authority was instated (in the Netherlands, the Dutch Electricity Regulatory Service — Dienst Uitvoering en Toezicht Elektriciteitswet, ‘DTe’) to set and supervise the terms and conditions applied by network operators.\textsuperscript{402} Disputes on, for instance, tariffs were settled through the Dutch competition authority, the NMa; again a system which differed from the electronic communications example. An important element of the conditions that the joint network operators could propose to the DTe after having established these amongst themselves — again contrary to the regulation of access and interconnection — was technical conditions; a relevant example being the specifications to be applied by the network operator for the allocation of transport capacity on the interconnectors for import contracts. Similar to the Framework Directive, the premise was that all technical rules had to be aimed at ensuring systems interoperability.\textsuperscript{403}

Tariffs were also proposed jointly by the network operators, and established by the DTe based on a price cap method. Contrary to the NRA, the DTe in the Netherlands was part of the NMa.

Akin to interconnection regulation, network operators had to unbundle their offering.

3.5.1.2 The gas sector

This Gas Directive leaned heavily on the Electricity Directive and was adopted fairly soon thereafter.\textsuperscript{404} In spite of the somewhat different aim of the Gas Directive, the manner in which the rules were expanded, was very similar to the Electricity Directive.\textsuperscript{405}

Market access was one of the controversial areas. Like the Electricity Directive, the Gas Directive offered the choice between negotiated and regulated access.

Some Member States, including the Netherlands, applied a combined system: negotiated access at the transmission level, and regulated access at

\textsuperscript{402} The powers of the DTe are not entirely comparable with the powers bestowed on NRAs. For a concise overview of the DTe’s powers, see Hancker, Lavrijsen 2000, p. 44ff. For a more general discussion on supervision and regulation of the network industries: De Ru, Peters 2000.


\textsuperscript{405} Cf. Cameron 2002, pp. 166ff. The aim of the Gas Directive was to diversify the distribution networks, rather than stimulate competition in generation.
Interconnection Regulation and Contract Law

the distribution level. For example, the Netherlands Gas Act provided that the network operator had to make an offer to the party requesting this for the transport of gas en supporting services.\(^{406}\) Interestingly, the 1998 regulation signalled a move from negotiated access to a more results oriented obligation to provide access, including tariff regulation.\(^{407}\) However, the law still provided for a duty to negotiate for gas deposit installations.\(^{408}\)

The Dutch Gas Union was subjected to special duties to contract: it had to exploit, accept and enter into an agreement with producers of smaller gas fields.\(^{409}\)

Access charges were obviously another point of contention.\(^{410}\) A lot of attention was given to the levels of connection of different systems with other systems and the degree of interoperability established amongst them. This resulted in Member States not getting any derogations from the principles of the Gas Directive, unless this requirement (and eight other criteria) were satisfied.

3.5.1.3 The transport sector

The party that exploits the main railways infrastructure is required to provide access to third parties, notably railways companies that want to have access to the infrastructure. Another example in the railways sector is that railways of different infrastructure owners or operators must be connected, to ensure that passengers can get to their end destination. However, in this sector, the emphasis of the regulation lied on providing railway companies with non-discriminatory access to a minimum services package, including the aforementioned access to railway infrastructure.\(^{411}\)

\(^{406}\) See Article 14 (1) Gas Act (\textit{Gaswet}). Article 14 (3) Gaswet provided that the conditions for access must be reasonable, transparent and non-discriminatory. An exemption to negotiate was embedded in Article 18h Gaswet for large, new cross-border networks. Besides capacity shortage that can be demonstrated was also accepted as a ground to refuse transport delivery; see Article 15 (1) sub a Gaswet.


\(^{408}\) Cf. Article 18c (1) \textit{Gaswet}, which merely referred to a duty to negotiate as opposed to a duty to contract.

\(^{409}\) See Article 54 (1) sub b \textit{Gaswet}.


The issue of access to infrastructure has also been subject to dispute settlement under Article 82 EC Treaty.\textsuperscript{412}

In the Netherlands, after much debate, on the first level described, the law provided that parties wishing to have access to railways infrastructure were to negotiate an access agreement with the infrastructure provider.\textsuperscript{413} The railway infrastructure provider was required to ‘make a reasonable offer’ to other service providers.\textsuperscript{414} This was something else than the primary interconnection rule, which provided for a reciprocal duty to negotiate, but rather similar to the obligation imposed on the TO to make reasonable offers for access.\textsuperscript{415} Given the manner in which the obligations of the infrastructure provider were embedded in the law, in literature it was qualified as a statutory duty to contract.\textsuperscript{416}

3.5.1.4 The postal sector

In this sector, by 2005, monopolies were still allowed to some extent. However, the monopolist was under a duty to contract for access as regards liberalized services.\textsuperscript{417}

In brief, the holder of a postal concession was to provide access to other postal service providers to its mailboxes in post offices against reasonable, objectively justified and non-discriminatory conditions and tariffs.\textsuperscript{418} In the Netherlands, a conflict that arose as regards the scope of the access obligations was brought before the NRA, which is also responsible for dispute resolution in the postal sector.\textsuperscript{419} Basically, the concession holder


\textsuperscript{413} Article 57 of the Railway Act (\textit{Spoorwegwet}) provides which parties are entitled to enter into an access or a framework agreement in detail.

\textsuperscript{414} Cf. Article 67 (1) \textit{Spoorwegwet}.

\textsuperscript{415} See, \textit{infra}, paragraph 3.4.3.4.

\textsuperscript{416} See Houben 2005, p. 66ff.


\textsuperscript{418} Cf. Article 2d (1) of the Dutch Postal Act (\textit{Postwet}). See also Houben 2005, p. 81ff.

\textsuperscript{419} OPTA, decision of 16 July 2001 and OPTA decision in the appeal of 15 February 2002 (\textit{Mail Merge Nederland}/TPG), www.opta.nl.
Interconnection Regulation and Contract Law

was ordered to deposit mail from other competing service providers in the mail boxes it owned. Although similar to providing an end-to-end service, the scope obviously was very different from an ECS.

3.5.1.5 Summary
Differences occur in the utility sectors both in terms of pricing issues, complexity of technical considerations, market considerations and industry practices. It must also be noted that energy, gas, transport and water are probably less elastic 'products' than ECS. It should be borne in mind that the nature and scope of the electronic communications industry enables the offering of a host of services, ranging from mere infrastructure to sophisticated value-added services; whereas in other utility sectors – although they may converge in terms of network configuration and the offering of other services – the offer is much more limited. Another marked difference, especially in the electricity sector, is the reliance on international provisioning. Indeed, the electronic communications sector is international in terms of scope and service provision and roaming agreements abound, but, interconnection negotiations remain predominantly a national issue.

Different systems for negotiating access were used and promoted by the EC. Comparing these systems with the ITU negotiations models described above, the negotiations ranged between commercial negotiations subject to regulatory intervention and commercial negotiations subject to a regulatory model. There was considerable reliance on competition law.

---

420 Another question that arises in the postal sector is if regulated access is justified to force the concession holder to provide access to its network of mailboxes, see Houben 2005, p. 82-83. The provision of special (access akin) services by the postal concession holder was already taking place in 2005 and was not really regulated.

421 It remains to be seen whether these products can qualify as 'goods' within the civil law meaning; cf. Goes, Koster 2004, p. 58-59. The recent changes in the field of procurement do not take this into account either. For a brief description of the latest changes, see Edens 2005.

422 For energy, see the Proposed Regulation on Network Access for Cross-Border Trade in Electricity, Cameron 2002, paragraph 8.17-8.33.

423 Cf. Article 4 (1) and 21 Interconnection Directive, supra, paragraph 3.4.


425 For a discussion of these models, see, supra, paragraph 3.2.2.1.

426 Issues identified included: (1) who should have access and under what conditions, (2) how much should access cost, and (3) what to do if network congestion arises, see Cameron 2002, p. 232.
The notion of SMP undertakings and the ensuing obligations was not elaborated in the energy, gas, transport or postal regulation yet, rather the regulation was based on dominance considerations.

Likewise, dispute settlement with respect to service provision was handed to different authorities nationally. Although the regulation of utility sectors was based on similar EC regulatory principles and objectives, its implementation was therefore distinctly different. Consequently, it is rather difficult to determine what the relevance or interaction was with electronic communications regulation, in particular with respect to access and interconnection agreements, for other utility sectors.

3.5.2 Contract formation regulation in civil law

Indeed, e.g., in the fields of the use of unfair general contract terms and conditions, distance contracts and electronic contracts, a degree of harmonization of the laws of the Member States occurred. It concerned measures aimed at harmonizing contract terms in Member States. The regulation was aimed predominantly at stimulating the internal market for e-commerce. It occurred on the retail level, at the level of consumers.

Certainly, contract law remained a matter of national law, and although an attempt to reach harmonization of contract law at the EC level was nascent, at the time of the NRF, there was no such thing yet as one system of European contract law.

3.6 Interim conclusion

3.6.1 Interconnection negotiations models

Within the ITU, thought was given to various negotiations models for establishing interconnection. The EC appears to have chosen for a mix of these models in its regulation of access and interconnection agreements.

3.6.2 The scope of EC regulation

The scope of EC regulation of the electronic communications sector was broad and as such impacted the duty to negotiate an interconnection agreement and the SMP requirements to provide access in a broad manner.


428 See further Chapter 6.
Although the EC attempted to take into account that technologies—such as mobile, fixed, satellite, internet, etc.—were ever present and emerging and that an approach aimed at facilitating convergence—such as, for instance, combining mobile with internet technologies—was required, the question debated by the Member States, the NRAs and market parties is whether the EC really succeeded in satisfying the technological progress rationale of providing a technologically impervious and competition sound framework for converging technologies.

The EC’s regulatory objectives were clearly stated, yet the emphasis on promoting competition was somewhat overtaken by more encompassing objectives. Otherwise put, the anti-monopoly rationale had been applied with some success through the implementation of the ONP framework and was enhanced with the NRF; the NRAs were given tools to satisfy the transaction cost rationale; i.e. by focusing on the cost of interconnection.

3.6.3 The timing of intervention

The meaning of *ex ante* and *ex post* intervention as regards access and interconnection contract formation was not really given adequate consideration in practice by the EC regulator. The ONP and NRF principles, all impacting significantly to contract formation and performance, were not analyzed from a contract law perspective, nor was it considered whether under the NRF, the regulation of access and interconnection could be made lighter. It seems, on the contrary, that regulation at the EC level was reinforced both as regards the primary and the secondary interconnection rule, for instance, in terms of the obligation to conduct commercial negotiations, the (implied) duty to interconnect and the review of the RIO.

Although the EC indicated in explanatory memoranda accompanying the NRF that it intended to rely more heavily on competition regulation, the Access Directive, in particular the delineation of the role of the NRA (Chapter 5), indicated that the EC regulator was contemplating which varied models of liberalization. It becomes clear from, *inter alia*, Article 9 Access Directive, that the Commission foresaw pro-active intervention by the NRA, which intervention seemed to take the shape of *ex ante* regulation, in spite of its contention of heavier reliance on general competition law.\footnote{Cf. this with Larouche 2000, *posita*, who considers that the Commission positioned itself as a substitute for a European Regulatory Agency for telecommunications. I concur with this.}

162
As a result of these broad obligations, it could be expected that TOs would always argue that they comply with their obligations. Consequently, the new regime for intervention by way of imposing changes to RIOs possibly had become probably somewhat less sustainable than the system available pursuant to the Interconnection Directive.

3.6.4 Other regulated markets
Having looked briefly at other regulated markets, it can be concluded that the regulation of interconnection agreements was rather sophisticated, due to the very different market composition. It is not clear, however, if the regulation had much relevance for other utility sectors.
4. Implementation issues with emphasis on the Netherlands

4.1 Introduction

The European Community’s (‘EC’) telecommunications regulation was characterized by precise, detailed definitions of access and interconnection — though not interoperability — and the new regulatory framework (‘NRF’) contained rules that appeared to leave somewhat less discretion for the national legislature or national regulatory authorities (‘NRAs’) as regards the implementation of the stakeholders’ rights and obligations. Still, NRAs tended to formulate national telecommunications policy guidelines, which were instrumental in achieving their nationally devised policy goals.

Besides, access and interconnection contracts were governed by national law and their formation and performance was supervised by the NRAs. The regulatory principles implemented in national law were interpreted in accordance with the national administrative law.

EC Member States were at various stages of privatisation of their incumbents at the time of the implementation of the open network provision (‘ONP’) framework and differences continued to exist even after the implementation of the NRF, which led to somewhat different regulatory approaches at the national level.

Geradin, Kerf 2003 classifies the rules for telecommunications into three broad categories: (1) rules primarily designed to promote and preserve competition, (2) rules aimed at preventing abuse of market power, and (3) rules aimed at preventing abuse of end-users, p. 13ff.

Cf. Recital (9) of the Access Directive, which provided that the promotion of interoperability was one of the aims of the national regulatory authorities (NRAs). See, e.g., the brief Netherlands Decision on Interoperability of 7 May 2004 (Besluit van 7 mei 2004, houdende regels met betrekking tot interoperabiliteit van openbare elektronische communicatiediensten, toegang tot de Europese telefoonnummeringsruimte en landoverschrijdende toegang tot niet-geografische nummers), Stb. 2004, 205; for the UK: Office for Telecommunications (‘OFTEL’), Guidelines for the interconnection of public electronic communications networks, 23 May 2003.

See, for instance, for the UK, which is at the more liberalised side of the arena, the Office for Communications (‘OFCOM’s’) Strategic Review of Telecommunications, 18 November 2004, www.ofcom.org.uk/consultations/current/telecoms_p2; and for a discussion of the possible consequences of OFCOM’s proposal to enter into a regulatory contract with British Telecom (‘BT’) designed to limit regulation at the retail level and to offer a way of avoiding a forced separation of BT’s retail and wholesale.

(Continued)
Interconnection Regulation and Contract Law

The EC attached great importance to the uniform implementation and interpretation of the NRF, as evidenced from the Commission press release of April 14, 2005, announcing it was starting infringement proceedings against ten Member States — including Germany and the Netherlands — for failing to implement the NRF correctly.4

Some of the variations and developments occurring at the national level will be discussed in this Chapter, with emphasis on Dutch law, comparing it to some extent with the legal framework on access and interconnection in Germany and the UK.

As a fairly liberal market, the Netherlands proved to be an interesting example in that both under the ONP framework and the NRF, significant difficulties occurred as regards defining where interconnection would occur, what the duty to negotiate would amount to, whether there existed an independent duty of interoperability and what the difference would be between a request for special access and that for interconnection.5 The powers of the Netherlands' NRA, known as the 'Onafhankelijke Post en Telecommunicatie Autoriteit' ('OPTA'), were subject to much debate and legal scrutiny.

divisions, Whitfield 2005. With the accession of the new Member States in 2004, these differences probably increased.

4 See, European Commission Press Release, 14 April 2005, IP/05/430. The action was announced following the Commission's Implementation Report published at the end of 2004, see COM (2004), 759 final. Indeed, the Commission has expressed its doubts as to what is the very essence of this research study: see Commission Staff Working Paper 2 December 2004, Volume I, annexed to the foregoing report: “The Netherlands law seems to extend the right and obligation to negotiate also to providers of publicly available electronic communications services. One of the functions of the Commission services are examining the conformity of such transposition arrangements.” Further infringement proceedings were announced on 7 July 2005, see press release IP/05/875, but these were not aimed at the Netherlands and concerned different topics, such as number portability and directory enquiry services. For another instance where the EU took an infringement procedure against Netherlands — in the context of unfair contract terms — Smits 2001.

4.1.1 Scope of work

This Chapter focuses on divergences in how the definitions of access and interconnection (and related notions) were implemented into Dutch law under the old and new regimes (4.2). It describes the legal regime following the 1998 Telecommunications Act ("Telecommunicatiewet, 1998 Tw") in paragraph 4.3. The reason for describing the 'old' regime is that it will be tested whether and how the NRT led to significant differences in interpretation of terms of interconnection contract formation and performance rules. Some issues relating to the primary and the secondary interconnection rule under the 2004 Tw, which entered into force on 19 May 2004, are briefly described next (4.4). An interim conclusion is contained in 4.5.

---

6 See Chapter 3 paragraph 3.4.2.2 for the basic definitions of electronic communications networks ('ECNs'). It is worth mentioning that with respect to those definitions, variations occur nationally as well. In the Netherlands, the definition in Article 1.1 (e) 2004 Dutch telecommunications Act ('2004 Tw') remains close to the definition set forth in Article 2 (a) Framework Directive: 'transmission systems, including the switch – or routing apparatus and other means, that enable the transmission of signals through cables, radio waves, networks, fixed and mobile terrestrial networks, electricity networks, in so far as these are used for this transmission of signals and networks for radio or television broadcasting and cable television networks, without regard to the nature of the information transmitted.' In the UK, Article 32 (1) of the 2003 Communications Act defines electronic communications network as: '(a) a transmission system for the conveyance, by use of electrical, magnetic or electro-magnetic energy, of signals of any description; and (b) such of the following as are used by the person providing he system and in association with it, for the conveyance of signals – (i) apparatus comprised in the system; (ii) apparatus used for the switching or routing of the signals; and (iii) software and stored data.' See 'Communications Act 2003, An Act to confer functions on the Office of Communications; to make provision about the regulation of the provision of electronic communications networks and services and of the use of the electromagnetic spectrum; to make provision about the regulation of broadcasting and of the provision of television and radio services; to make provision about mergers involving newspaper and other media enterprises and, in that connection, to amend the Enterprise Act 2002, and for connected purposes' (2003 CA), taken from Legislation Direct, UK Statutes, Communications Act 2003 (2003 c 21), Butterworths.

7 Like numerous other European Community ('EC') Member States, the Netherlands went beyond the grace period of implementation (which was required as of July 25, 2003). In March 2004, the Commission announced it would take the second legal step against eight Member States for not adopting the new privacy rules for digital networks and services. The Commission opened these proceedings against nine Member States in November 2004. See IP/03/1663. The Commission announced infraction proceedings in April 2004.
4.2 Harmonization of notions of interoperability and interconnection

In the Netherlands, the implementation of the EC ONP framework was achieved by 1997 through an interim overhaul of the then applicable Telecommunications Facilities Act (Wet op de telecommunicatie voorzieningen, Wtv). By comparison, in the UK, the British incumbent, British Telecom ("BT") had been subject of regulation, including price control, already prior to the enactment of the Telecommunication Acts 1984.

4.2.1 Disparity of definitions

The 1998 Tw did not mention interoperability or define interconnection, yet it defined the notion of special access. Conversely, the Interconnection Directive had defined interconnection, but not special access. As a consequence of this disparity of definitions, considerable confusion arose among market parties in the Netherlands, especially since some special access arrangements also required a (partial) connection of networks. Such network connection could constitute interconnection in the technical sense. This meant that interconnection rights and duties could arise in the field of special access. Numerous conflicts involved the unclear distinction between the terms interconnection and special access.

8 On July 1st, 1997, six months prior to the target date, the Dutch telecommunications market was fully liberalized. Following numerous interim modifications to the Wtv, the new Tw was passed on 15 December 1998. The ONP framework directives were implemented therein. Subsequently, the markets for terminal equipment, data communication, mobile telecommunications, satellite communications, cable infrastructure and fixed voice telephony were opened for competition. Terminal equipment with the implementation of the Wtv on 1 January 1989; data communication as of 1 January 1993; mobile telecommunications as of 1 September 1994 (Stb 1994, 628); infrastructure as of 15 July 1996 (Stb 1996, 320); voice telephony as of 1 July 1997 (Stb 1997, 296). For an early overview of access and interconnection issues, see Gijrath, Tempelman 1997, Van der Klis 1997.

9 Both the Telecommunications Act 1984 and the later Communications Act 2003 focus on the role the NRA plays. For a discussion of the price control in the UK in the period 1983-1997, see Franse 1997, p. 49-55.

10 See Article 1.1 (j) 1998 Tw: "special access: access to a telecommunications network at other points than the network termination points that are offered to most users." This book contains an informal translation of the relevant provisions regarding interconnection in the 1998 Tw and the 2004 Tw (annex).

11 See also Chapter 3 paragraph 3.4.2.2.

12 For more detail, see Chapter 8, especially paragraph 8.2.1.
Notwithstanding previous problems, the further legislation process remained cumbersome. At the time of implementation of the Access Directive and in a probable gaffe by the Dutch legislator, the definition of ‘interconnection’ was again dropped altogether from the second internal draft bill for the new Tw, issued on 8 November 2002. Once more, no definitions were set forth for ‘interoperability’ and ‘interconnection’. Arguably, more companies than before (such as cable access television (‘CATV’) providers) would fall under the regime of chapter 6 Tw, which, according to the heading, was aimed at regulating the rights and obligations with respect to ‘interoperability of services’ (and not networks, as would have been expected).

Following the parliamentary debate, access was then defined as:

"The making available to another undertaking of network elements, associated facilities or services under specific conditions, whether or not on an exclusive basis for the purpose of the offering of electronic communications services or the dissemination of programs to the public by that undertaking."

On 15 April 2003 the definition of interconnection appeared in the bill. It was maintained in the near final draft bill issued on 28 October 2003: (1) the term ‘telecommunications network’ was replaced with ‘communications network’, in accordance with the Communications Competition Directive. This change was consistent with the modification from telecommunications networks to the broader notion of

---

13 The Access Directive considered interconnection a special type of access to be implemented between public network operators Cf. Articles 2 (1) (a) Interconnection Directive and Article 2 (a) Access Directive, as discussed in Chapter 3.

14 Cf. Draft bill to amend the 1998 Tw, (Wijziging van de Telecommunicatiewet en enkele andere wetten in verband met de implementatie van een nieuw Europees regelgevingskader voor elektronische communicatienetwerken en -diensten), interdepartmental version OPT, not published. In the original internal working version of July 30, 2002, interconnection was redefined simply as: "the physical and logical connection of communications networks that are used by the same or another undertaking." Cf. with the definition below in the revised bill for the 2004 Tw. See also Van den Beukel 1999, who compared the 1998 act with the bill.

15 Cf. Article 1.1 sub n 2004 Tw.


17 According to the revised bill for the 2004 Tw interconnection now meant: "The physical and logical connection of public communication networks with those that are used by the same or another undertaking."

communications networks pursuant to the NRF. The word 'electronic' was initially missing from the definition (but reappeared in the later version); (2) the word 'organization' had been replaced with the word 'undertaking'. This was consistent with the consideration that the interconnection regime was aimed solely at parties who were commercial providers of communication networks. Consequently, the term 'organization' was considered too broad; (3) the words 'in order to enable the users of one organisation to communicate with those of another organisation or to have access to services that are provided by another organisation' were originally deleted from the revised definition. The Explanatory Memorandum to the revised bill for the 2004 Tw did not specify why these words were removed. The approach appeared to be consistent with the Access Directive: any connection of public electronic communications networks ('ECNs') would be subject to the obligations stipulated in chapter 6 Tw. But, the legislator was still not satisfied with the definition and made further changes to align the law more closely with the Access Directive (as it should have done in the first place). (1) interconnection was now explicitly considered as a 'specific type of access'; (2) The words: 'that enable the users of one organisation to communicate with those of the same or another organisation or to have access to services that are provided by another organisation' were reinstated.

The following comments are made about the definition finally adopted in Article 1.1 sub m. 2004 Tw:

(1) Article 6.1 2004 Tw still provided that the undertaking offering an ECN 'must control the access to end-users' in order to be subjected to the provisions of chapter 6 Tw.

19 In the final version of the 2004 Tw, interconnection was thus defined as: "A specific type of access that is realized between operators of public networks, meaning the physical and logical connection of public communications networks that are used by the same or another undertaking to enable the users of an undertaking to communicate with those of the same or another undertaking or to get access to services offered by another undertaking." Cf. Article 1.1 sub m 2004 Tw. Sib. 2004, 189, p. 3. See TK, 2003-2004, 28 851, nr. 50, p. 3. See also Explanatory Memorandum, 28 851, nr. 3, p. 36: interconnection and interoperability fell under the general access obligation. It offered the example of carrier selection.


21 Emphasis added.
Implementation issues with emphasis on the Netherlands

(2) The Interconnection Directive had provided insight as to what was considered 'access to network connection points'. This was the case where it was possible to control the available services for an end-user on that connection point and/or to deny access to the end-user to that network termination point ('NTP'). Arguably, it was no longer required by Article 6.1 Tw that the provider control a number of NTPs and the numbers belonging to those points. According to the law, any form of end-user access control would now suffice, but this was not reflected in the law.

(3) Any person or company wanting to use an ECN but not operating one was considered an end-user for the purpose of the law.

(4) The definition of special access, as laid down in Article 1.1 sub j 1998 Tw ('access to a telecommunications network at points other than those offered to most users') was finally deleted. This caused a lack of clarity in light of the legislative history, since, arguably, a possible consequence was that any provider — whether a network operator or a service provider — would thus be obliged to negotiate any kind of access agreements (including interconnection).

(5) Finally, the notion of interoperability — though not defined by the Commission either — became muddled, in that the legislator appeared to favour a requirement for all electronic communications providers in the Netherlands to take care of interoperability, whereas the Access Directive had not provided for this explicitly.

22 See footnotes at Exhibit II, sub 1, Interconnection Directive.
24 This issue became central to the Yarosa/T-Mobile case, see, infra, paragraph 4.4.3 and Chapter 8. Re the UK, in light of Condition 13 of the BT licence, OFTEL provided a definition of was considered in the former act 'a relevant connectable system' (later an ECN): “In essence, and with certain exceptions, it means a telecommunications system run under an individual licence, authorised for connection to BT's system, and providing services which have been or are to be conveyed over BT's network, for reward to the public. (...)” See also Lloyd, Mellor 2003, p. 93. The definition was later dropped.
25 This can be evidenced also from the Explanatory Memorandum, in which the Minister states [informal translation provided by SG]: “Interoperability is concerned with two providers A and B enabling their respective customers to communicate with one another. Thus, interoperability is aimed at the customers of A communicating with the customers of B, and vice versa. Next to communication with the customers of B interoperability may also be aimed at establishing that services from providers connected to network B can be accessed by customers of A. It is essential that a
Interconnection Regulation and Contract Law

Although it should have become clear from the parliamentary debate in the Netherlands that requests aimed at offering new ECS in principle, should be subject to free negotiations between the parties, the Minister failed to explain correctly what was envisaged by the words end-to-end connectivity and did not resolve the problems with the legal definition of interconnection and the ensuing obligations.26

By way of comparison, neither the 2003 Communications Act (‘CA), nor the German Telecommunications Act (Telekommunikationsgesetz, ‘TKG 2004’) defined the notion of interoperability, although the 2003 CA referred to the desirability of securing interoperability throughout the Act.27 Section 151 2003 CA provided for the purposes of chapter 1) of the Act not an exact repetition of the Access Directive either:

"2) In this Chapter references to interconnection are references to the linking (whether directly or indirectly by physical or logical means, or by a combination of physical and logical means) of one public electronic communications network to another for the purpose of enabling the persons using one of them to be able (a) to communicate with users of the

---

26 Ibid. The 2004 Tw was subsequently amended by corrective interim legislation in 2005 also covering the 1998 Electricity Act and the Gas Act, 'Herstel van wettechnische gebreken en kiezen alsmede aanbrenging van enkele inhoudelijke wijzigingen in de Telecommunicatiewet, de Elektriciteitswet 1998, de Gaswet, de Mijnbouwmet en enkele andere daarmee verbandhoudende wetten, de Wet voorraadvorming aardolieproducten 2001, de Wet op de kopers van koophandel en fabrieken 1997, de Raamwet EEG-voorschriften aanbesteding en diverse andere wetten', known as the 'Veegwet EZ 2005'). The Veegwet EZ 2005 included provisions to solve unclear points with respect to the duty to negotiate, to be discussed, infra.

27 UK OFCOM’s predecessor had provided its own interpretation of the term interoperability:

“Interoperability means the technical features of a group of interconnected systems (> systems includes equipment owned and operated by the customer which is attached to the public telecommunications network) which ensure end-to-end provision of a given service in a consistent and predictable way”, see http://www.ofco.org.uk/static/archive/oftel/publications/glossary/index.htm. OFCOM also established a network interoperability consultative committee, see www.niec.org.uk.
Implementation issues with emphasis on the Netherlands

other one; or (b) to make use of services provided by means of the other one (whether by the provider of that network or by another person)."

The UK definition referred to the linking of a network and the end-users more than the undertakings concerned and did not explicitly provide that interconnection be considered a form of access. The 2003 CA hardly applied the term ‘interconnection’, even though it had now become a defined term. Besides, the reference to service provision differed as the 2004 Tw referred to getting access to services, whereas the 2003 CA referred to making use of the services, which required that the end-user be enabled to actually use the services, and not only to have access to them.

The 1996 TKG initially did not follow the ONP framework exactly either. Interconnection was already defined as a special type of access (and not vice versa). The main difference was that the TKG 1996 afforded a broader scope to what constituted a telecommunications network in that leased lines

---

28 See Bratby, Strivens 1998, p. 328. Under regulation 2 of the 1997 Interconnection Regulations ‘interconnection’ was defined in line with the functional definition of the Interconnection Directive as: “(...) the physical and logical linking of telecommunications networks used by the same or a different organisation in order to allow the users of one organisation to communicate with users of the same or another organisation or to access services provided by another organisation. Services may be provided by the parties involved or other parties who have access to the network.” See http://www.legislation.hmso.gov.uk/si/si1997/97293101.htm. The obligation to provide Special Network Access is defined in regulation 26 of the Telecommunications (Open Network Provision)(Voice Telephony) Regulations 1998 as the obligation to “deal with reasonable requests from organisations providing telecommunications services, including systemless service providers, for access to a fixed public telephone system at network termination points other than the commonly provided network termination points referred to in Part 1 of Schedule II”. See http://www.legislation.hmso.gov.uk/si/si1998/98158003.htm. Special Network Access is further loosely defined and extensively discussed by Oftel in Guidelines on Special Network Access, July 2000 (http://www.ofTEL.gov.uk/publications/ind_guidelines/sna0700.htm).


30 Contrary to the 2004 Tw, the 2003 CA also contains a description of service interoperability: ‘interoperability between different electronic communications services,’ Section 151, subsection 2 2003 CA. But it does not connect this with the duty to negotiate.

31 German Telecommunications Act, Telekommunikationsgesetz (‘TKG 1996’), 25 July 1996, BGB1 1.1120. The details on special access and interconnection obligations were set forth in the Netzzugangsverordnung (‘NZV’).

32 See § 3 (24) TKG 1996, which provided (English translation): “the network access establishing the physical and logical connection of telecommunications networks to allow users connected to different telecommunications networks to communicate directly or indirectly.” See Scherer, Ellinghaus 1998, p. 144.
operators were considered to operate their own. Applying this conceptual difference to the obligation to grant interconnection to operators of public telecommunications networks, the TO would be under obligation to provide interconnection to small resellers or virtual network operators as well.

A consequence was that the German TO, Deutsche Telekom AG (‘DTAG’) had to offer the same terms and conditions to any party that qualified as a public telecommunications network and was requesting interconnection. In Germany, therefore, rather than OLO’s, resellers became active in the fixed infrastructure market, a practice to which DTAG opposed. It asked that the German NRA reconsider the rules for qualification as a public telecommunications network operator.

The argument was not dissimilar to arguments employed by other TO’s: it would be unfair for new entrants who had not invested to profit from the TO’s significant investments made. The German NRA (Regulierungsbehörde für Telekommunikation und Post (‘RegTP’)) undertook a consultation, kept its stance on the definition of network in the TKG 1996, but then considered if a link should be made with the point of connection (‘PoC’) notion. The subsequent position taken by the RegTP was controversial, since there was no economic or technical justification to require minimum switch or PoC specifications from a new entrant.

---

33 This follows from the definition of telecommunications network in § 3 (21) TKG 1996, which in the translation meant: “technical facilities in their entirety (transmission lines, switching equipment and any other equipment indispensable to ensure proper operation of the telecommunications network) which serve the provision of telecommunications services or serve non-commercial telecommunications purposes.” See also Larouche 2000, p. 82ff.

34 Cf. § 33 TKG 1996 requiring that an SMP operator provide non-discriminatory access to its services, including interconnection; and § 35 (1) TKG 1996 requiring that the SMP operator grant interconnection to all operators of public telecommunications networks. See also Bock, Völcker 1998, p. 479, Weisshaar, Koenig 1998, Riehmer 1998, p. 59.


36 Namely, that a new entrant who only controlled one PoC should not qualify as a public telecommunications network operator, Bock, Völcker 1998, p. 479 and Berger 1999, p. 224. The RegTP even considered increasing the requirement to three PoCs.

37 The Commission took the opinion that such an interpretation of the ONP framework would constitute a violation of EC law, in particular Article 4 (a) Services Directive. But,
The TKG 2004 defined interconnection (Zusammenschaltung) in line with the NRF with the clarification that interconnection was a form of access and that there appeared to be a duty to establish interconnection ('(…) wird zwischen Betreibern öffentlicher Telekommunikationsnetze hergestellt').

In the Netherlands, courts have tested the notion of interconnection and the scope of the meaning of interoperability in a few decisions. Basically, the courts decided that interconnection did not entail solely the linking of public communications networks, but included the realization of end-to-end communications.

This is similar to the position in Germany, where the definition is to mean the reciprocal connection of telecommunications networks. Some authors considered that the definition in the German Telecommunications Act (Telekommunikationsgesetz, ‘TKG 2004’), needed to be modified as a result of the NRF, and others felt that a clarification would suffice.

4.2.2 No distinction between direct and indirect interconnection

As was seen in Chapter 2, interconnection can be achieved in different manners. Simple interconnection, transit interconnection, by-pass interconnection, indirect by-pass interconnection and peering were mentioned.
Interconnection Regulation and Contract Law

It was not entirely clear to the market parties, whether regulatory requirements would apply also with respect to parties merely providing indirect or by-pass interconnection. It could be argued that the fact that the 1998 Tw referred to the establishment of direct PoCs an indirect connection of networks, i.e., through transit or by-pass over the network of a third party provider, presumably not satisfied the definition of (direct) interconnection; notwithstanding that such interconnection existed between the party originating and the party terminating the call. As a consequence, at least initially, the Court had held that there would be no competency on the side of the NRA to intervene if it concerned a form of indirect interconnection.43

The Explanatory Memorandum to the 2004 Tw explicitly mentioned that the 2004 Tw would prevent making a distinction between direct and indirect interconnection, thereby effectively ensuring the possibility of the legislator and the NRA to intervene in any kind of network interconnection issue.44

The issue was also clarified by a 2005 decision of the Court Rotterdam in appellate proceedings in mobile terminating access ('MTA') cases (instated under the 1998 Tw).45 At stake was whether an OLO (not subject to regulatory intervention) was entitled to unilaterally change its MTA rates. The TO had argued that the NRA was not competent to sanction changes unilaterally imposed by such OLO. The Rotterdam Court followed the TO's argument that it had an interest in challenging the outcome of the proceedings, even where it provided a transit service only.46

See also Chapter 2 for a technical explanation. See, OPTA 18 December 2001, www.opta.nl (KPN Mobile/Telfort Mobile). For the connection of networks over the network of third party an exemption is needed from OPTA, based on Article 6.1 (3) Tw. Cf. re disputes relating to indirect interconnection, such as Rb. Rotterdam 25 April 2003 (note A.T. Ottow), Mediaforum 2003/9, p. 309, (note R. van den Hoven van Genderen), Computerrecht 2003/4, p. 253, (O2/KPN Mobile and OPTA), discussed in Chapter 8. In brief, the initial position - later reversed - was that there would be no interconnection, if it concerned a by-pass or transit situation and Article 6.3 (1) 1998 Tw did not apply to those situations.

See Explanatory Memorandum, no. 28 851 no. 3, p. 38. See also Rb. Rotterdam, 25 August 2005, case no. 04/3391, LJN AU2878 (Versatel/OPT-A) to be discussed, infra, paragraph 4.3.2, reversing - rather unusually - a prior decision of the same court. This still did not tackle the issue that a complaint might be held inadmissible, if the defendant was the transit provider only.

Rb. Rotterdam, 25 August 2005, case no. 04/3387, LJN AU2876 (KPN/OPT-A); see also Chapter 8.2.1.

The Court referred to a decision in respect of fixed terminating access, CBB 16 June 2005, LJN AT7789 (KPN Telecom/Versatel).
4.2.3 No statutory definition of originating and terminating access

Another issue related to the terms originating and terminating access.\(^{47}\)

In case of terminating access, party A will pick up and terminate communications traffic from the (subscribers of) network of party B aimed at reaching subscribers of Party A (this may be applied *vice versa* where party B terminates party A's traffic). Party A may transmit that traffic itself or through the intervention of a third party and terminate it with its own subscribers.

In case of originating access, party B requests to have access to the network of party A. Party A will then deliver communications traffic that originates from subscribers to its own network so that party B's network may receive this traffic.\(^{48}\) An example is carrier pre-selection ('CPS').

In 1998, it was generally felt that the way by which the Dutch government had implemented the Interconnection Directive, did not do justice to the notions involving terminating and originating access.\(^{49}\) The 2004 Tw did not define the terms either, leaving the meaning thereof open to interpretation, for instance as regards interoperability requirements for parties A and B. An example resulting from this obscurity in the terminology might be the position that, although end-to-end connectivity entails that party B must offer terminating access to the customers of party A, it is really up to party A's discretion to decide whether it wishes to provide its customers with the possibility to call party B's subscribers; although in light of positive network effects, this may be a theoretical example.\(^{50}\) The difference – and resulting

---

\(^{47}\) See also Chapter 2 paragraph 2.2.1.

\(^{48}\) Definition as applied by OPTA, see www.opta.nl/woordenboek.

\(^{49}\) Cf. Paragraph 2.18 of Oftel's Guidelines on Interconnection and Interoperability, July 1999, which stated that, "It is not appropriate to distinguish between voice and data services in the application of licence conditions which provide for interconnection and interoperability." See http://www.ofTEL.gov.uk/publications/1999/competition/gii799.htm#Part A.

\(^{50}\) Cf. presentation ‘*Mobiele gespreksafgifte & interoperabiliteit*’, held by Mr. Jan-Pieter Verwiel, Director Legal and Regulatory Affairs T-Mobile Netherlands B.V., Elsevier Seminar 22 June 2005, slide 4ff. Verwiel referred to the assessment by the NRA that the markets for originating access and terminating access should be treated distinctly. Referring to the different regimes under the Access Directive for interconnection (Article 4) and SMP (Article 8-12) he argued that each network operator was dominant on the market for terminating access on its own network, slide 7, but only parties that had SMP on the market for SMP would be held to ONP principles and thus afford call origination as well.
Interconnection Regulation and Contract Law

(1) 1998 Tw: Moreover, the legislative history pointed to a duty to interconnect, when it discussed the primary interconnection rule in contracts between OLOs.\textsuperscript{57}

In a provisional decision under the 1998 Tw, the NRA attempted to establish the scope of the interconnection duty, with particular emphasis on the position of service providers who did not exploit their own network.\textsuperscript{58}

The NRA furthermore considered that the fact that a service provider or OLO had not yet established a market presence, should not prevent it from negotiating an interconnection agreement with the TO, thus, to some extent, confusing the secondary interconnection duty with the primary interconnection duty (the duty to negotiate).\textsuperscript{59}

By 2005, the matter had still not been settled, albeit that the TO sometimes appeared to have been successful in arguing it was under no stricter obligation than to negotiate an agreement\textsuperscript{60} and sometimes that there was a strict interconnection duty.\textsuperscript{61}

By comparison, it was felt that the right and obligation to interconnect and the duty to negotiate applied only between public ECN operators in Germany.\textsuperscript{62}

In the UK, BT operates on the basis of a licence granted to it under section t of the Telecommunications Act 1984.\textsuperscript{63} Regulation 3 of the 1997 Interconnection Regulations provided that a "relevant licence" imposed an obligation on the licensee – the TO – to negotiate interconnection when requested by another operator.\textsuperscript{64}

\textsuperscript{57} See EK 1997-1998, 25 533, no. 309b, p. 18ff. Charging excessive prices was given as an example where an OLO could act in contravention of its obligation under Article 6.1 1998 Tw.

\textsuperscript{58} See OPTA/IBT/2003/203596, Letter on interconnection duty (Brief interconectieverplichting).

\textsuperscript{59} See Letter on interconnection duty, p. 4.

\textsuperscript{60} See also Chapter 8. In 1997, the TO published its first interconnection offer, stating that the offer should be seen as an invitation to tender only.

\textsuperscript{61} See, e.g., CBB 16 June 2005, LJJN AT7789 (KPN Telecom/ Versatel).


\textsuperscript{63} This license came into force on 22 June 1984 and has a duration of 25 years. The license conditions have been modified several times. For a recent discussion of the legal relevance of ‘undertakings’ of BT to the NRA (currently OFCOM) under the licence, see Long 2006, p. 33.

\textsuperscript{64} See http://www.legislation.hmso.gov.uk/si/si1997/97293101.htm. For operators with SMP, regulation 3(3) of the 1997 Interconnection Regulations, "A licence granted to an
Implementation issues with emphasis on the Netherlands

For an SMP undertaking, OFTEL noted that it would expect such operator to provide interconnection and to make reasonable system upgrades where it was necessary to do so, thus implementing the secondary interconnection rule. The wording of Condition 13 of BT's Licence Conditions was not entirely clear whether this entailed a duty to contract and was subject to interpretation by OFTEL on several occasions. OFTEL indicated that a

Operator having Significant Market Power in a relevant market shall include a condition imposing an obligation to meet all reasonable requests for access to the network including access at points other than the network termination points offered to the majority of end-users.” For obligations imposed on the SMP operator BT, see, e.g., licence condition 45. The obligation to negotiate interconnection could not be avoided in the case of operators with SMP. An operator could choose not to be classified as an Annex II operator even though it met the technical requirements. Under the old law, the operator only had the right to interconnect with BT or Kingston at cost-orientated pricing levels if it had the status of an Annex II operator. See the Director General’s April 1999 statement: http://www.ofTEL.gov.uk/publications/1999/licensing/an20499.htm#Part 1. See also Condition 13 of the BT license, which obliges BT to enter into an agreement, interconnecting its telecommunications systems with those of another operator, upon request. Cf. Franse 1997, p. 33.

See Condition 13 of the Licence Conditions. However, OFTEL would consider various factors set out there and noted: “Oftel would not expect major investment to be undertaken solely for the purpose of providing interconnect unless there are compelling reasons for this to happen.” See Paragraph 2.21 of its Guidelines on Interconnection and Interoperability, July 1999, See http://www.ofTEL.gov.uk/publications/1999/competition/gii799.htm#Part A.

See Bratby, Strivens 1998, p. 330. Condition 13.1 of the BT Licence Conditions also contained extensive obligations for the TO, e.g., as regards maintaining PoCs. It read: “(...) the Licensee shall, unless it is impracticable to do, enter into an agreement with an Operator, that is to say any person who is authorised by a Licence to run a Relevant Connectable System, if the Operator requires it to do so: (a) to connect and to keep connected any of the applicable systems, or to permit to be so connected and be kept connected that Relevant Connectable System and accordingly to establish and maintain one or more Points of Connection as are reasonably required and are of sufficient number to enable Messages conveyed or to be conveyed by means of the Operator’s system to be conveyed by means of any of the Applicable Systems in such a way as conveniently to meet all reasonable demands for the conveyance of messages between the Relevant Connectable System and any of the Applicable Systems; (b) without prejudice to paragraph 13.1 (a), where an operator is a Long Line Public Telecommunications Operator to establish and maintain such Points of Connection as will enable persons running telecommunication systems connected to the Applicable System to exercise freedom of choice as to the extent to which Messages are conveyed by means of the Applicable Systems and in routing Messages so conveyed; (c) to provide such other telecommunications services (including the conveyance of Messages which have been, or are to be, transmitted or received at such Points of Connection), information and other services as the Director determines are reasonably required (but (Continued)
Interconnection Regulation and Contract Law

failure to provide interconnection could represent an abuse of a dominant position and be in breach of licence conditions.  

_Fixing timelines and setting the terms_ In the view of some, by imposing a term within which interconnection had to be established, the NRA could effectively turn a presumed _efforts_ obligation into a _results_ obligation, as the TO would be faced with a fatal date before which it would have reached a final agreement with the OLO, especially since it could also take enforcement measures, such as the imposition of administrative fines.  

---


68 In accordance with the Interconnection Directive, should the parties involved in interconnect negotiations fail to reach an agreement after the NRA had imposed a final term to complete the negotiations, then the NRA could interfere and, according to the 1998 Tw, determine the rules governing interconnection for the situation at hand (see for the EC regulation, Chapter 3 paragraph 3.4.2.3). Article 6.1 (6) last sentence 1998 Tw stipulated to this effect: “In the event the obligation meant in the previous sentence serves to perform the first paragraph [i.e. to take care of interconnection, SG] and an agreement fails to occur, the NRA can fix a term, during which the agreement must be brought about. After expiry of such term, the concerned providers are in default, unless one or more of them invokes Article 6.3 (1).” Article 6.3 (1) 1998 Tw provided: “If the providers do not enter into an agreement within the meaning of Article 6.1 section 6, then the authority may - at the request of one or more of them - establish the rules that will apply between them.”

69 The issue of enforcement was dealt with in chapter 15 1998 Tw. During the period 1998-2004, many interconnection disputes were brought before OPTA. Yet, in very few cases a dispute between the TO and the OLO eventually led to the NRA determining the terms, and it always concerned special access requests under the 1998 Tw. This could indicate that the provision of Article 6.1 1998 Tw effectively led to parties reaching an agreement amongst them under the threat of the sanction imposed by law. On the other hand, it could also be argued that this provision in practice had little significance because OLOs opted for a strategy where they would first - whether specifically reserving all rights or not - enter into an interconnection agreement with the TO, and then aim at re-establishing the conditions or the interconnection tariffs, following the deposit procedure in Article 6.2 (2) 1998 Tw. But again, no evidence was found to support this theory either.
Implementation issues with emphasis on the Netherlands

By comparison, in the UK, under the 1997 regime, the Director General could specify time limits within which interconnection must be realized. Regulation 6(4) of the 1997 Interconnection Regulations vested the Director General with power of his own initiative or on the request of either party to intervene in negotiations for interconnection between operators to set a time limit for the period in which negotiations shall be completed and to provide for what shall happen if no agreement is reached at this time, including appointment of a conciliator.

Disputes regarding the terms of and performance under the agreement
After an interconnection agreement was entered into, the parties could refer to the NRA to obtain a decision in a dispute regarding certain elements of the interconnection agreement between them, or the manner in which the contractual obligations were performed. The NRA could, at its discretion, determine new conditions under the interconnection agreement concerned. This amounted to a very broad discretion for the NRA to decide on contractual performance disputes between the TO and the OLOs. However, the NRA seldom made use of this right.

Nevertheless, it can be argued that the 1998 Tw provided the NRA broad discretion in individual cases to test the realization of interconnection agreements to the principles of reasonableness as enshrined in the private contracts law system.

---

70 See the xDSL determination http://www.ofTEL.gov.uk/publications/licensing/2001/ppc0301.htm #Direction. The negotiations had to include a timetable in which BT must offer the product and OFTEL's view of how long after completion of negotiations BT should be in a position to provide product offerings for trial.

71 See http://www.legislation.hmso.gov.uk/si/si1997/97293101.htm. This regulation was also reflected in condition 45.2 of BT's licence. See http://www.dti.gov.uk/cii/docs/btlicence.pdf.

72 Germany offered the possibility of NRA arbitration in the event of a special access dispute with an SMP undertaking. See Scherer, Ellinghaus 1998, p. 145.

73 Article 6.3 (2) 1998 Tw provided: "Disputes between the providers concerned with interconnection as meant in Article 6.1 with respect to the question whether the obligations existing with respect to interconnection, or the manner in which these are performed, run counter to this act or any decree ensuing therefrom, will be settled by the NRA at the request of one or more of the providers concerned. In the event the NRA determines that there is a conflict this act or any decree ensuing therefrom, to end this situation, it can set the terms that will apply between those providers. In certain cases these terms will replace the obligations existing until then."

74 Cf. Chapter 8.

75 See the Memorandum following the report Tw (Nota n.a.v. het verslag Tw), Van Breugel & (Continued)
Interconnection Regulation and Contract Law

4.3.3 Other obligations as a result of the implementation of the ONP framework

The ONP principles were implemented into the 1998 Tu:

Non-discrimination

In the UK, OFTEL incorporated a ‘fair trading condition’ in BT’s licence after an agreement on that issue was reached between OFTEL and BT, although it was not immediately clear what the sanction would be on BT if did not adhere to the fair trading condition. Like in the Netherlands, OFTEL provided guidance to the effect that, where an operator with SMP offered new services, these should be available to interconnecting operators at the time the service first become available; where an interconnecting operator wished to offer a new service that required interconnection with an operator having SMP, this should be available as soon as the new service was available.

Transparency

Dutch law implemented the deposit obligation for interconnection agreements. As long as the parties would not have implemented the


76 See Article 6 sub a., b. and d. Interconnection Directive. The SMP undertaking also had to provide all information with respect to interconnection and the duty to advise the OLOs of any changes thereto within the next six months. The sanction for not complying with this information duty was an administrative penalty, although the Parliamentary History also mentioned the possibility of civil law proceedings, Tempelman 2001, p. 99. Finally, it was made explicit that the SMP undertaking had a duty to use information provided to it only for the purpose for which it had been provided; Cf. Article 6.5 (4) 1998 Tw.

77 The fair trading conditions were modelled closely on Articles 81-82 (then 85-86) EC Treaty. Presumably, it enabled OFTEL to take swift action against BT if it behaved in an anti-competitive manner.


79 See also decision of OPTA, 31 May 2000, Policy regarding the deposit and publication
amendments required by the NRA, they would not have complied with the obligation to take care of interconnection set forth in Article 6.1 (1) 1998 Tw. Nevertheless, during 1998-2004, the NRA did not strongly enforce the requirement to deposit interconnection agreements, although it summoned the TO to comply with this provision.

In its policy rules regarding the deposit and the insight into interconnection agreements, the NRA determined under what circumstances such insight would be provided to interested third parties.

The notion of interested third party was interpreted broadly.

In its policy rules the NRA further determined that, in principle, it considered the description of services, tariffs and conditions that a party with SMP offered other providers as public and not confidential.

Condition 49 of BT’s licence provided that BT must send to the Director General a copy of all interconnection agreements it had entered into. It must also keep a list of all agreements and send a copy to anyone who requested it. Where the operator providing interconnection had SMP, a failure to provide the facilities according to the specifications could be in breach of the 1997 Interconnection Regulations and the BT licence conditions, thus providing a double basis for regulatory intervention.

Cf. Article 6.2 (2) 1998 Tw:

Had the NRA been able to verify the content of the interconnection agreements as deposited, binding force of directions to amend the agreements would be uncertain. A decision was subject to objection and appeal in two instances, so an order from the NRA to amend the terms of an interconnection agreement was by no means directly enforceable. The law only stated that should parties not incorporate decisions to change the agreement as issued by the NRA, then they did not satisfy their interconnection duty as provided for in Article 6.1 1998 Tw.

See Policy regarding the deposit and publication of interconnection agreements and agreements regarding special access.

"A (potential) provider who demonstrates that they services will be offered with respect to interconnection, leased lines or special access." Cf. with the position in Germany, see Andenas, Zleptnig 2004, p. 139, on the UK: p. 258.
Interconnection Regulation and Contract Law

In Germany, following the implementation of the ONP framework, the TKG 1996 did not contain a provision on the RIO. Rather, the RIO was regulated by the German Special Access Regulation (Netzzugangsverordnung, ‘NZV’), which did not contain room for different offers according to, e.g., the type of licence held. Since the law only recognized there should be one offer, it was difficult for the TO to distinguish one offer from another in terms of charges and pricing amongst different operators. The German TO intervened in interconnection disputes through special decrees (Zusammenschaltungsanordnungen), which had been imposed on DTAG since 1997. But, their legal status was not uncontested.

All three countries implemented the provision regarding the publication of a reference interconnection offer (‘RIO’) by an SMP undertaking, which should describe in detail the interconnection offer, split according to components, tariffs and the accompanying terms and conditions.

Cost orientation
The cost orientation requirement for SMP undertakings was implemented in Article 6.6 (1) 1998 Tw. The application of the principle of cost orientation proved to be the most contentious area nationally. Although the principle of some profit margin was accepted, the NRA struggled over the years to find an accounting system to ensure causality between the tariffs applied and the actual cost of providing interconnection. Various cost accounting systems

---

84 Cf. Article 6 (5) NZV: “The regulatory authority shall publish in its official journal such terms and conditions as can be expected to figure in a large number of [interconnection] agreements (basic offer). Operators [with SMP] shall be bound to include that basic offer in their general conditions of trade.” See also Larouche 2000, p. 83.


86 Article 6.7 (3) 1998 Tw provided the NRA the power to order the SMP undertaking which elements in the RIO required changes, based on their allegedly running counter to the provisions in the 1998 Tw or ensuing decrees. For the UK, see Sec paragraph 2, Part II, Schedule 3 of the 1997 Interconnection Regulations. See also http://www.legislation.hmso.gov.uk/si/si1997/97293101.htm. See Chapter 7 for the description of the RIO and the NRA’s Decision on the 2000 RIO.

87 It required SMP providers to design a system (which required NRA approval) for the cost allocation of interconnection charges, Article 6.6 1998 Tw. According to the Parliamentary History, cost orientation applied to some extent to parties not deemed to have SMP as well, See Memorandum of Answer, p. 311, Tempelman 2001, p. 100. They were under an obligation to apply reasonable tariffs.

Implementation issues with emphasis on the Netherlands

were enforced on the TO by the NRA under the 1998 Tw.89

The NRA set the rates to be applied by the TO for the coming year on a yearly basis.90

By contrast, prior to October 1997, OFTEL determined BT's charges for interconnection annually based on historic costs. In October 1997 a new regime was introduced: charges were based on forward-looking long-run incremental costs ('LRIC') and subject to charge controls.91

Accounting separation

The implementation of this ONP obligation was less specific in the Netherlands than it was in the Interconnection Directive.92

Other obligations

The 1998 Tw contained a rather ominous clause on special access, especially seen in the manner by which special access was (or was not) regulated in other EC Member States. The clause stipulated that parties with SMP had to comply with all 'reasonable' requests for special access, which led to disputes on the interpretation of what was reasonable. Under Article 6.9 1998 Tw, two forms of special access were regulated specifically: unbundled access and CPS.93 Pursuant to Article 44 of the Decision on ONP Leased Lines and

---

89 See, e.g., on the embedded direct cost ('EDC') method: OPTA 1 July 1998 Decision re the EDC Model KPN (Besluit inzake EDC model KPN); OPTA 1 July 1998, Amendment to EDC Decision (Aanpassing EDC oordeel); OPTA 29 November 1999, Decision EDC-IIA (Besluit EDC-IIA); OPTA 16 December 1999, Decision EDC II-B (Besluit EDC II-B); OPTA 4 December 2000, Decision transition rates (Besluit overgangstarieven). By 2001, the NRA replaced the EDC method with the BU-LRIC method, following EC Recommendation 98/511/EC of 10 March 2000, OJ 2000 L 83/30. All decisions have been published at www.opta.nl.


91 Under the new system, services were put into four categories according to the extent of competition in the relevant market: competitive services, new services, prospectively competitive services and non-competitive services. The charge control was different for each of the 4 categories. See, e.g., http://www.oftel.gov.uk/publications/1995_98/pricing/ncjul97.htm; http://www.oftel.gov.uk/publications/pricing/ psrc0201.htm; http://www.oftel.gov.uk/publications/pricing/prt0101.htm.

92 In order to enable the NRA to verify whether the SMP undertaking in the markets for fixed public telephony networks and services and leased lines (and again, not mobile) complied or not with its obligations regarding non-discrimination and cost orientation, it was required to keep separate books. Cf. Article 6.8 (1) 1998 Tw, implementing in part Article 8 Interconnection Directive.

93 See OPTA 4 June 1998, Consultation document special access services

(Continued)
Telephony (Besluit ONP Huurlijnen en Telefoonie, ‘BOHT’), it was provided that, in principle, any request for special access relating to CPS was considered reasonable. The government ordered the TO to make available CPS to its subscribers by 1 January 2000. Article 6.9 did not survive in the 2004 Tw.

The Local Loop Unbundling (‘LLU’) Regulation, which had direct effect in the Netherlands, was implemented in Article 6.10 1998 Tw. The NRA was specifically appointed as the administrative body meant in the LLU Regulation. In order to effectively exercise control over the charges, the 1998 Tw also stipulated that the provider had to set up a system for the allocation of the cost for unbundled access that needed prior approval by the NRA. The duty to deposit MDF-access agreements with the NRA applied likewise.

The NRA also issued non-binding guidelines with respect to co-location.

---

95 Article 44 BOHT. See also Sitompoel 1999. Since 2000, new entrants have instated various proceedings regarding the manner in which the TO offered carrier pre-selection (‘CPS’). See, for instance, OPTA 22 June 2000, OPTA/IBT/2000/201780 (provisional decision Versatel/KPN), OPTA 13 October 2000, OPTA/IBT/2000/202565 (interim decision Versatel/KPN), and OPTA 8 March 2001, OPTA/IBT/2001/200233 (definitive decision Versatel/KPN), www.opta.nl.
96 See Article 6.10 (2) 1998 Tw. As such, OPTA was competent to: (1) guard the rates for unbundled access, (2) amend the RIO for unbundled access and accompanying facilities, and (3) settle disputes with respect to unbundled access See, for instance, OPTA 29 June 2001, OPTA/IBT/2001/201679, Review of KPN reference offer for unbundled access to the local loop and accompanying facilities (Beoordeling KPN referentie-aanbod onbundelde toegang tot het aansluitnet en bijbehorende faciliteiten), www.opta.nl. This will be discussed in Chapter 7.
98 Prior to the LLU Regulation, the NRA published Guidelines for unbundled access. These offered an indication as to what was considered a reasonable request for unbundled access and as to what conditions and rates the TO could charge in its offer for unbundled access. OPTA 16 March 1999, Guidelines with respect to unbundled access to the local loop (MDF) (Richtsnoeren met betrekking tot onbundelde toegang tot de aansluitlijn (MDF-access)), OPTA/1/99/1443, Stert. 1999, 54; amended Stert. 1999, 215; www.opta.nl.
99 OPTA 20 December 2000, Guidelines on co-location and one-time cost with respect to the local loop (Richtsnoeren over collocatie en eenmalige kosten met betrekking tot toegang tot de aansluitlijn), OPTA/IBT/2000/203357; www.opta.nl.
Implementation issues with emphasis on the Netherlands

The manner in which the TO offered unbundled access and co-location, the terms and conditions of use and the tariffs it charged were all subject of legal proceedings.100

4.3.4 Summary
The 1998 Tw by and large implemented the ONP framework, but confusion arose in respect of the definition of access and interconnection and the resulting scope of the parties' primary interconnection obligations. The scope of the duty to negotiate interconnection was not altogether clear. The secondary interconnection duties applying to SMP undertakings were implemented with minor differences.

4.4 The 2004 Tw
The 2004 Tw entered into force on May 19, 2004. The revised chapter 6 was titled 'interoperability of services' (later the words 'and confidential information' were added) and brought a complete overhaul of the relevant provisions in the 1998 Tw, following the NRF.101

4.4.1 Purpose and scope
The Dutch legislator referred to the economic climate and important market developments, such as convergence, mergers in the industry, internet, and an increase of capacity and decrease of cost, new developments in the mobile

100 See, for instance the following cases which will be discussed in more detail in Chapter 8: OPTA 28 July 1999, OPTA/IBT/99/6646 (Devtronic International vs KPN); OPTA 30 October 2000, OPTA/IBT/2000/202797 (Cistron/KPN); OPTA 3 November 2000, OPTA/IBT/2000/202922 (Eager Telecom/KPN); OPTA 9 March 2001, OPTA/IBT/2000/200411 (Versapoint vs. KPN); OPTA 15 October 2001, OPTA/IBT/2001/203095 (Inovara/KPN); OPTA 12 November 2001, OPTA/IBT/2001/202834 (BabyXL/KPN); OPTA 11 February 2002, OPTA/JZ/2002/2200392 (BabyXL/KPN); OPTA 14 May 2002, OPTA/IBT/2002/200617 (BabyXL/KPN).

101 Some of the changes worth mentioning: (1) In line with the NRF, the 2004 Tw no longer contained a provision obliging market parties to deposit the copy of their interconnection agreement with the NRA, as was the case under See Article 6.2 1998 Tw. Review by interested third parties was no longer envisaged in the law. (2) Article 6a.9 (2) 2004 Tw dealing with the publication of a RIO had become somewhat opaque, especially in comparison to its counterpart Article 6.7 1998 Tw. (3) Article 6a.9 (4) 2004 Tw provided that the NRA would give instructions to the TO if the RIO did not conform with the SMP obligations of chapter 6a 2004 Tw; whereas under the 1998 Tw, the NRA could inform the TO which parts of the RIO needed to be changed, Article 6.7 (3) 1998 Tw. Cf. Schillemans 2005, p. 39ff.
Interconnection Regulation and Contract Law

market (e.g., broadband multimedia) and media. The responsible minister confirmed the numerous characteristics of the NRE.

The Explanatory Memorandum discussed the redefinition of the notion of SMP in extenso. It did not make a clear distinction between the primary and the secondary interconnection rules.

As regards access, the Explanatory Memorandum stated this was the use of the infrastructure of another party to offer ECS. It juxtaposed the interests of service providers to restrict interoperability by determining their service offer in the interest of full interoperability of other service providers.

Most notably, the Explanatory Memorandum emphasized the general duty of the parties to negotiate, thereby referring to policy statements made at the EC level.

4.4.2 The duty to negotiate interconnection revisited

The 'interconnection duty' of Article 6.1 (1) 1998 Tw did not survive in the 2004 Tw. As regards the provision that replaced Article 6.1 (6) Tw, the Dutch legislator considered that 'providers' (the term was also used in the 1998 Tw) were under a duty to negotiate, whether or not the request for interoperability of networks would result in direct or indirect interconnection:

"A provider of public electronic communications networks or public electronic communications services that controls the access to end users within that context must, at

102 See Explanatory Memorandum, 28 851 no. 3, p. 2ff.
103 (1) innovative regulation that enabled the government, market parties and the NRA to address new developments swiftly and flexibly; (2) technologically neutral regulation; (3) general registration requirement only for electronic communications networks and services; (4) less sector specific rules, including redefinition of SMP; (5) maintenance of the existing pack of universal services that would have to be available and affordable; (6) broader powers for the NRAs to intervene more flexibly. At the same time the uniform application of EC law was emphasized. See also Chapter 3 paragraph 3.3.3.2.
104 See Explanatory Memorandum, 28 851 no. 3, p. 18-22.
105 See Explanatory Memorandum, 28 851 no. 3, p. 22. The Explanatory Memorandum briefly discussed the obligations of transparency, non-discrimination, accounting separation, access to and use of specific network facilities, price control and cost accounting and other obligations, such as in respect of LLU, see Explanatory Memorandum, 28 851 no. 3, p. 22-32.
107 See Explanatory Memorandum, 28 851 no. 3, p. 35 and 37.
Implementation issues with emphasis on the Netherlands

the request of another provider of public electronic communications networks or public electronic communications services, enter into negotiations with that provider with a view to concluding a contract on the basis of which the necessary measures will be taken, if necessary by means of interconnection of the relevant networks, in order to establish end-to-end connections."^108

First, the duty to negotiate extended to ECN operators and ECS providers alike. For the Dutch legislator, it did not matter whether the provider controlled the end-user connection or not. For instance, Internet service providers ("ISPs") could also request interconnect negotiations with the TO or an OLO.109

Second, the 2004 Tw appeared to introduce a specific duty of interoperability (as opposed to the interconnection duty of Article 6.1 (1) 1998 Tw). This seemed to follow from the heading of Chapter 6 ‘interoperability of services’, the wording in Articles 6.1 (1) and 6.1 (3) and the Explanatory Memorandum. The Explanatory Memorandum to the 2004 Tw stated that in those cases of interoperability, where the general public interest so required, the law provided that by general decree, public services could be appointed, where a ‘duty of interoperability applied’.^110 Initially, the government had appointed public telephony services as such.111 This duty

---

^108 See Article 6.1 (1) 2004 Tw. In Germany, according to some writers, §§ 35-37 of the NZV established a de facto duty of interconnection as well, see Wissmann 2003, p. 1394. Pursuant to §§ 36-37 NZV, every ECN provider is under a duty to enter into an interconnection agreement with another carrier. However, the author cites §§ 36-37 as to state that: “operators of a public telecommunications network (§ 3 no. 2, 12 and 21) are obliged to make an offer and enter into negotiations,” (p. 1396) which points at a correct interpretation of the directives. There is also confusion as to whether the duty to interconnection applies solely to the SMP undertaking or not. It is unclear whether this position has led to practical problems, Wissmann 2003, p. 1394. Apparently, at least it is clear that the provision does not extend to ECS providers.

^109 Cf. this with OFTEL’s Guidelines for interconnection of public electronic communications networks - a statement, OFTEL 2003; and Article 16 TKG 2004 which provided for network operators being entitled to interconnection only.

^110 See TK 2002-2003, 28 851, no. 3, p. 37ff. Cf. Article 6.2 (2) and 6.2 (3) 2004 Tw. Article 6.2 (2) 2004 Tw stipulated: ‘In addition, the NRA can set requirements for providers of public electronic communications networks or public electronic communications services that control the access to end users ex officio, possibly within the context of a request within the meaning of the first paragraph, with respect to the establishment and guarantee of end-to-end connections if that is justified in the case at hand in light of the purposes within the meaning of Article 1.3.’

^111 Decree on Interoperability, Stb 205.
presumably extended to all providers alike. According to the Explanatory Memorandum, the notable difference in the telecommunications market was that providers of electronic communications networks did — or perhaps should — not always have a choice whether or not they would enter into contract negotiations (whether or not it concerned SMP undertakings). To some extent, this was balanced by the requirement that the provider requesting access would have to have a reasonable interest therein.

In sum, the three steps leading to access or interconnection agreements under the new law were: (1) a duty to enter into negotiations with a view to concluding a contract – which was a slightly stronger duty than to enter into negotiations to reach agreements as described in Article 6.1 (6) 1998 Tw; (2) the issuance of instructions by the NRA to speed up the negotiations process, but only at the request of one party and notwithstanding that, in principle, they were free to withdraw from the negotiations; and, if these steps would not work (3), direct NRA intervention upon request by a party.

At first sight, the scope of the parties falling under Article 6.1 2004 Tw had broadened, and their duty to negotiate was specified.

The legislator specified the circumstances for possible intervention: (1) the TO or an OLO would be unwilling to negotiate, or (2) where the TO or an OLO would refuse a request for interconnection from the OLO without

112 For a further analysis of this position, see, infra, paragraph 4.4.3.
114 Cf. Article 6.1 (3) 2004 Tw: “At the request of a provider of public electronic communications networks or public electronic communications services that is of the opinion that another provider has failed to comply with the obligation to enter into negotiations with it, the NRA may issue instructions with respect to the manner in which the negotiations must be conducted, without prejudice to the providers’ right to jointly terminate the negotiations. In their negotiations, the relevant providers must comply with the instructions issued by the NRA.”
115 Cf. Article 6.2 (1) 2004 Tw: “If the negotiations referred to in Article 6.1 above do not lead to a contract being concluded between the providers referred to in that Article, at the request of one of those providers the NRA may require the other provider - insofar as that provider controls the access to end users and if the NRA is of the opinion that further negotiations in all reasonableness will not lead to a contract being concluded - to establish and guarantee the end-to-end connection desired by the provider, under conditions to be set by the NRA, provided that the NRA is of the opinion that the other provider’s interests, which prevented a contract from being concluded, in all reasonableness do not outweigh the interests of the party that submitted the request.” The NRA could also intervene in the general public interest, cf. Article 6.2 (2) Tw, which reflected a very broad competence.
Implementation issues with emphasis on the Netherlands

motivation. This could imply that the NRA would not intervene in cases where a TO or an OLO did refuse to interconnect, but supported this by a clear motivation (based on the freedom to withdraw). According to the Explanatory Memorandum, the law also recognized the possibility of an OLO having recourse to the civil courts in such cases;\textsuperscript{116} and, (3) the option to intervene on the basis of Article 6.2 (1) 2004 Tw was limited to providers who controlled access to end users.\textsuperscript{117}

The 2004 Tw also set forth principles to which the NRA must adhere once it was sought to intervene. According to the Explanatory Memorandum, Article 6.1 (3) 2004 Tw, for instance, incorporated a double administrative reasonability test: (1) the NRA must establish that, in all reasonableness there was no chance that the parties would reach an agreement; and (2) the NRA must apply a reasonability test in balancing the interests of the parties.\textsuperscript{118} The legislator probably found it necessary to include such a reasonability test in the 2004 Tw to demonstrate good governance.\textsuperscript{119} However, the Explanatory Memorandum merely stipulated that an NRA decision must conform to general principles of administrative law, such as proportionality, motivation etc.\textsuperscript{120}

In a later amendment to the 2004 Tw bill, Article 6.4 2004 Tw provided explicitly that all conditions imposed based on either Article 6.1 (3) or 6.2 (1) or (2) 2004 Tw would have to be objective, transparent, proportionate and non-discriminatory, which addition was in line with the NRT.\textsuperscript{121}

\textsuperscript{116} Cf. Explanatory Memorandum, 28 851, no. 3, p. 106. It merely mentioned it would be possible at some stage to refer to the civil courts. For the analysis of civil court remedies, see Chapters 5 and 6.

\textsuperscript{117} An additional obligation to negotiate applied to specific categories of service providers who controlled access to end users, Article 6.3 (4) 2004 Tw.

\textsuperscript{118} See also Chapter 6.

\textsuperscript{119} See Explanatory Memorandum, 28 851, no. 3, to Article 6.3 (1) 2004 Tw.

\textsuperscript{120} Cf. Article 6.4 2004 Tw.

\textsuperscript{121} In interim legislation of 2005 the confidentiality obligation of the party negotiating interconnection agreements was clarified, see Article N and Article P of the "Herstel van wettechnische gebreken en hechten alsmede aanbrenging van enkele inhoudelijke wijzigingen in de Telecommunicatiewet, de Elektrieiteitswet 1998, de Gaswet, de Mijnbouwwet en enkele andere daarmee verhandhoudende wetten, de Wet voorraadvorming aardolieproducten 2001, de Wet op de kamers van koophandel en fabrieken 1997, de Raamwet EEG-voorschriften aannesting en diverse andere wetten, known as the ‘Voegwet E/Z 2005\textsuperscript{'}). The new clause referred to 'interoperability agreements' and it is unclear what the legislator meant with that.
The NRA gave a provisional opinion on the interconnect duty in case more than two providers were involved. The NRA was concerned mainly with the range of the interconnection duty – and expressed its opinion that public ECS providers had a duty to interconnect as well, and included the operator of a switch that indirectly provided interconnection. The letter revealed the NRA's point of view that there would not be an obligation to negotiate, but an obligation to enter into an agreement, which is more far-reaching than what the law stated. The NRA observed that an OLO who was under a duty to negotiate, could not refuse to do so using the argument that the party requesting access would have to actually offer its services, or that it would be unequivocally clear that a party would be entitled to special access (i.e., that its request for such access would be reasonable). The NRA probably meant that a party having to provide indirect interconnection could not make its cooperation conditional upon the two OLOs trying to reach an interconnection agreement.

By comparison, in the UK, the implementation of this part of the Access Directive was achieved through the drafting of the General Conditions of Entitlement notified and promulgated by what later became OFCOM. Condition 1 provided:

"The Communications Provider shall, to the extent requested by another Communications Provider in any part of the European Community, negotiate with that Communications Provider with a view to concluding an agreement (or an amendment to an existing agreement) for Interconnection within a reasonable period."

Thus, although the obligation was directed at both ECN and ECS providers, it was also clearly restricted to bringing about 'Interconnection' and not full

---

122 See Letter Interconnection Duty, OPTA/IBT/2003/203596, which was the consequence of a number of points raised by the TO and OLOs in interconnection disputes.

123 See Letter, p. 3, although the NRA noted in the same paragraph that there was a duty to negotiate.

124 The underlying motivation for this opinion was the factual connection between the different agreements, the importance of timing for the party requesting access and the need for having an agreement in place.


126 The term 'Communications Provider' refers to any person providing an ECN or an ECS, see Lloyd, Mellor 2003, p. 107.
Implementation issues with emphasis on the Netherlands

service interoperability. In comparison with the above-cited clause in the 2004 Tw, this was a correct implementation of Article 4 Access Directive.127

Under the implementation of the NRF, providers were no longer required to register with OFTEL to qualify for a right to negotiate interconnection. OFCOM did, however, decide to maintain a list, which was largely similar to the old list kept by OFTEL known as the ‘Annex II list’, to simplify the negotiations process.128 In line with the NRF, in the UK interconnection could not be denied to a network operator even if it was not listed in Annex II.

In Germany, the duty to negotiate was not specifically mentioned, but the law referred to making an offer, which could point at less than a duty to negotiate, or, alternatively, almost a duty to contract.129 The TKG 2004 also contained a clause that offered RegTP to order that interconnection be achieved. This was restricted to public ECNs and applied provided that the TO controlled end-user connections.130

4.4.3 A duty to provide interoperability?

The Explanatory Memorandum to the 2004 Tw somewhat contradicted the NRF, in that the explanation to Article 6.1 2004 Tw mentioned that the Access Directive expressly had been designed to promote a regime of commercial negotiations and that no results obligation to negotiate...

---

127 And, according to OFTEL's Guidelines for the interconnection of public electronic communications networks (2003), this encompassed a transmission system, the associated apparatus, software, and data used with the system for the conveyance of signals, where such system is provided wholly or mainly for making electronic communications services available to members of the public.

128 To be included on the register, providers were required to submit an application form - similar to the registration form provided by OPTA in the Netherlands - to OFCOM, specifying the details as to how their network qualified as a public electronic communications network, see Walden, Angel 2005, p. 242-243.

129 Cf. § 16 TKG 2004: "Jeder Betreiber eines öffentlichen Telekommunikationsnetzes ist verpflichtet, anderen Betreibern öffentlicher Telekommunikationsnetze auf Verlangen ein Angebot auf Zusammenschaltung zu unterbreiten, um die Kommunikation der Nutzer, die Bereitstellung von Telekommunikationsdiensten sowie deren Interoperabilität gemeinschaftweit zu gewährleisten."

Interconnection Regulation and Contract Law

interconnection should be applicable across the board.\textsuperscript{131} However, if a service would be appointed as such – which could occur where one of the providers controlled end-to-end connectivity –, according to the Explanatory Memorandum, then there would be not only a duty to negotiate, but also a \textit{results} obligation, \textit{i.e.}, to complete the negotiations and provide for interconnection.\textsuperscript{132} This position followed from Article 5 (1) (a) Access Directive, which offered fairly broad discretion for NRA's to impose obligations on OLO's to the extent necessary to ensure end-to-end connectivity.\textsuperscript{133} The obligation extended to services provided abroad.\textsuperscript{134}

Admittedly, Article 5 (1) \textit{intro} provided that the NRA's rights applied also in the event it did not concern an SMP undertaking, but, the Dutch legislator went too far by imposing an obligation on network operators to provide reasonable access to any service provider \textit{ex ante}, without following the consultation procedure prescribed by the NRF. The legislator did announce its intention to appoint the fixed and mobile telephony markets as markets where there would be a results obligation to interconnect. The Dutch policy approach resulted in a Decree on interoperability of May 7, 2004, appointing market parties within the meaning of Article 6.3 (1) 2004 Tw. As stated above, according to Article 2 of the Decree, public telephony services were appointed as parties over which the NRA would establish the rules of interconnection, should negotiations fail. The Explanatory Note to the Decree provided that in those instances where an ECS provider controlled

\textsuperscript{131} See reference to Article 4 Access Directive; See Explanatory Memorandum, 28 851 no. 3, p. 102ff.

\textsuperscript{132} Director General of Telecommunications, End-to-end connectivity; Guidance issued by the Director General of Telecommunications (2003).

\textsuperscript{133} \textit{Cf.} Article 6.3 2004 Tw. Such services must be of specific economic or social importance, according to the Minister, in a direct reference to the policy objectives formulated by Article 8 Framework Directive, Explanatory Memorandum, 28 851, no. 3, p. 109. Article 6.3 (4) 2004 Tw. stipulated that the appointed electronic communications provider in the event of a request would enter into negotiations with the other providers referred to therein in order to conclude contracts on the basis of which measures would be taken so that end-to-end connections will be established and guaranteed.

\textsuperscript{134} \textit{Cf.} Article 6.3 (2) 2004 Tw. The 2004 Tw reinforced the possibility for the electronic communications provider to apply for an exemption if it were technically or economically unfeasible to establish end-to-end connectivity, or if the necessary measures otherwise could not reasonably be expected to be taken in light of the available resources. This again, required some sort of reasonability test to be provided by the NRA, with the burden of evidence lying with the provider. This reasonability test will have to evolve through case law. See Explanatory Memorandum, 28 851, no. 3, p. 111.
end-to-end connectivity, a mere duty to negotiate was not enough. In those instances, according to the Dutch legislator, there should be a statutory duty to bring about and warrant interoperability.\textsuperscript{135}

Thus, the Tw introduced a possible ‘duty of (services) interoperability’ to be imposed on all OLOs not having SMP, which was not the aim of the Access Directive.\textsuperscript{136}

By comparison, in the UK, OFTEL issued Guidelines for the interconnection of public electronic communications networks in May 2003.\textsuperscript{137} It restricted itself to interconnection and did not address wider wholesale access issues.\textsuperscript{138} Interconnection, then, according to OFTEL, was the linking of public electronic communications networks. For this reason, the OFTEL Guidelines explored in detail the questions whether an electronic communications network was provided, and whether it was provided wholly or mainly for the purpose of making electronic communications services available to members of the public.\textsuperscript{139}

For Germany, according to some writers (who are critical), the RegTP had a duty to review whether interconnection would lead to interoperability.\textsuperscript{140}

\textsuperscript{135} See Explanatory Note to the Decree on Interoperability, Stb. 205, p. 4ff. and 13.

\textsuperscript{136} Cf., e.g., Recital (9) and Articles 1 and 4 (a) Access Directive, discussed in Chapter 3 paragraph 3.4.3. interoperability was an aim that could be achieved through interconnection, but not an aim in itself under the Access Directive; although it had been mentioned in Article 9 (5) Interconnection Directive.


\textsuperscript{138} These were set forth in the OFTEL Access Guidelines that were posted at www.oftel.gov.uk/publications/ind_guidelines/acce0902.htm.

\textsuperscript{139} As regards the first question, OFTEL simply provided, p. 10: ‘for there to be an ECN there needs to be elements of physical infrastructure, such as a network node.’ As regards the second question, OFTEL considered electronic communications services in comparison with information society services and stated, i.e., that the electronic communications network must provide primarily for electronic communications services. The Guidelines also dedicate a chapter to the notion ‘public availability.’

\textsuperscript{140} See Neitzel, Müller 2004, p. 740: “Im Rahmen der Verhältnismäßigkeitssprüfung muss die RegTP neben den Abwägskriterien des § 21 Abs. 1 Satz 2 TKG auch prüfen, ob durch die Zusammenschaltungsverpflichtung die Kommunikation der Nutzer und die bereitstellung von Diensten sowie deren Interoperabilität gewährleistet wird. Diese Zielrichtung dürfte in der Praxis jedoch keine Schwierigkeiten auferen, da die Zusammenschaltung von Telekommunikationsnetzen keine Selbtszweck verfolgt.”
Following the entry into force of the 2004 Tw, the scope of the negotiations obligation in light of the interoperability requirement was subject to an important ruling.\(^{141}\) The key consideration in this matter was whether a request to provide originating access to an OLO – T-Mobile – to allow it to pick-up SMS traffic from another OLO – Yarosa – was a request involving end-to-end connectivity, thus implying a duty to negotiate to warrant interoperability of networks.\(^{142}\)

When Yarosa lodged a complaint to get access to offer the SMS services, the NRA ordered T-Mobile to conduct negotiations, thereby basing itself on the aforementioned part of the Explanatory Memorandum to the 2004 Tw.\(^{143}\) According to the NRA, interoperability of services (the heading of the new chapter 6 2004 Tw) implied that end-users were entitled to choose for whatever end-to-end services from other providers and this resulted in an obligation to negotiate.\(^{144}\)

T-Mobile filed an appeal against this decision. Pending the appeal, the NRA issued an extensive consultation document regarding interoperability.\(^{145}\) In its consultation, the NRA sought input from market parties, for instance, as regards: (1) how interoperability should be applied in practice; (2) which parties could invoke what rights and be imposed with what obligations; and (3) what interoperability meant as regards services and infrastructure competition.\(^{146}\) It requested input on various questions, such as its analysis that the interoperability rights and obligations under Article 6.1 (1) 2004 Tw extended to both service providers and OLOs.\(^{147}\) For reasons cited below, the consultation was later cancelled.

---

\(^{141}\) CBB, 24 November 2004, LJN: AR6450, AlW 04/651 and 04/727, and OPTA, OPTA/JUZ/2004/202635, published on November 30, 2004, Mediaforum 2005/3, nr.12. This decision is also extensively discussed in Chapter 8 paragraph 8.2.1.

\(^{142}\) See for full text of Article 6.1 (1) 2004 Tw, Annex.

\(^{143}\) See Explanatory Memorandum, nr. 28 851, no. 3, p. 102. The fact that the Explanatory Memorandum considered that also services offered with the help of an electronic communications network or service fell under the scope was considered important; this included the hand-over of SMS traffic coming from Yarosa's SMS switch.

\(^{144}\) The NRA also considered the comparison made with special access to be of no relevance under the 2004 Tw, Decision paragraph 3.4. And it considered it was not - yet - under an obligation to conduct the consultation procedure, see Chapter 5 paragraph 5.2.3.2, where it merely had ordered the parties to negotiate further.


\(^{146}\) See Consultation Document Interoperability, p. 5.

In appeal, the Appeal Board for Businesses (College van Beroep voor het Bedrijfsleven, ‘CBB’) overturned the NRA’s decision. The CBB based its decision on the contrary to an observation made by the Minister in the Explanatory Memorandum, such that a provider could only invoke interoperability where it concerned improving its own end-users’ connectivity. The CBB also attached great importance to the fact that the service anticipated by the OLO merely concerned an added value service.\footnote{149}

According to the CBB, the manner in which Article 4 (1) Access Directive was written clearly stipulated that the duty to negotiate concerned interconnection agreements only.\footnote{150} This meant that ECS providers who did not operate their own infrastructure could not invoke the right to negotiate originating access under the 2004 Tw.\footnote{151}

The CBB also looked closely at Article 5 Access Directive, but did not discuss Yarosa’s position that it had requested end-to-end connectivity for its SMS service from T-Mobile.\footnote{152} According to some, the term ‘end-to-end connectivity’ in the Access Directive did not cover ECS providers and, therefore, did not belong in Article 6.1 2004 Tw, which referred to ‘providers’ in the broadest sense and could be said to extend to ECS providers.\footnote{153}

After the decision was issued it became clear that the Commission did not extend the right to negotiate under Article 4 Access Directive to ECS providers.\footnote{154}

\footnote{148} See also Chapter 5, in particular paragraph 5.4.4.

\footnote{149} The CBB also considered that Yarosa’s customers were able to communicate with T-Mobile customers, and \textit{vice versa}. See paragraph 4.1.3 of the CBB Decision.

\footnote{150} The CBB cited the phrase: ‘(when requested by) undertakings so authorised’ under Article 4 (1) Access Directive and concluded that this referred to public electronic communications network providers (and not public electronic communications service providers).

\footnote{151} See Decision, paragraph 4.2.3. Note that the NRA withdrew its market consultation on interoperability following the CBB Decision; see also Schillemans 2005, p. 38.


\footnote{153} Schillemans 2005, p. 42.

\footnote{154} See the Commission Staff Working Paper.
Following the CBB’s decision, the NRA cancelled the consultation on interoperability and changed its policy on interoperability.  

By comparison, OFCOM considered the question whether specific obligations were needed to ensure end-to-end connectivity. It established that there were indeed obligations going beyond the obligation to negotiate: all network operators were required both to purchase call termination services from other operators and provide call termination services when requested. If these rules were imposed on operators, they would be positively required to ensure that they were directly or indirectly connected with all other network operators and purchase call termination from those operators whenever one of their customers would want to reach a customer or a service on that other network.

OFCOM, contrary to the Dutch NRA, then considered that the imposition of specific obligations to ensure end-to-end connectivity was not appropriate. The reasons it cited were that: (1) the imposition of such an obligation on the universal service providers was considered disproportionate, and (2) for operators other than the TO, British Telecom, OFCOM considered that there were adequate commercial incentives to provide end-to-end connectivity in order for them to seek call termination - but there would be no duty to negotiate on either side. Likewise, OFCOM considered it unnecessary to impose additional obligations on TO’s to provide call termination services to other OLO’s in the UK, for instance.

Almost all public ECN were already under obligation (as a result of having been appointed as SMP undertaking) to provide call termination to all other public ECNs networks on fair and reasonable terms.

4.4.4 Other issues impacting on the secondary interconnection rule

The aforementioned Article 6.3 (1) 2004 Tw enabled the NRA to impose far-reaching interconnection duties on categories of ECN providers, and strongly pointed to the imposition of a potential results obligation.

155 The NRA stated it would only treat conflicts under Article 6.1 2004 Tw (1) if and where it concerned public electronic communications network providers and (2) where the request for interconnection related to a desired improvement of service provision to the requesting provider’s customer, see letter of 23 December 2004, OPTA/IBT/2004/204501, www.opta.nl. But the latter consideration had no basis in the NRF, so it did not really make sense for the NRA to use the criterion, cf. Borba Lefèvre, Doelemans 2005, p. 105.

156 See also www.opta.nl.


158 Disputes pursuant to Article 6.3 2004 Tw could be submitted to the NRA in accordance with the dispute settlement mechanism of Article 12 2004 Tw.
Article 6a.6 2004 Tw stipulated that the NRA could impose the obligation to comply with reasonable requests for forms of access to be determined by the NRA, among other things, if the NRA were of the opinion that to refuse access or stipulate unreasonable conditions with the same effect would impede the development of an end-user market characterized by permanent competition or if it would not be in the end users’ interests. To that effect, the 2004 Tw contained an elaborate overview of the possible scope of such obligations.\(^{159}\) Especially noteworthy for the purpose of this book were obligations to negotiate in good faith with providers of ECS requesting access and to ensure interconnection of public electronic communications networks or network facilities.\(^{160}\)

Article 6a.6 (3) 2004 Tw gave the NRA its broad discretion by providing it make these obligations subject to conditions with respect to ‘fairness, reasonableness and opportunity.’ The Explanatory Memorandum did not provide insight what this meant.\(^{161}\)

The 2004 Tw contained a fairly elaborate procedure for the determination of tariffs. Next to the requirement of unbundled specification of charges by means of a RIO and the requirement of separate bookkeeping, the 2004 Tw offered the NRA a broad competence to issue binding pricing

\(^{159}\) By providing that the obligation referred to Article 6a.6 (1) 2004 Tw could mean, inter alia, that the SMP undertaking must: give providers of electronic communications services access to certain network elements or facilities, including unbundled access to the local loop;

Negotiate in good faith with providers of electronic communications services requesting access; refrain from revoking access to facilities that has already been granted;

Offer certain services on a wholesale basis for resale by the providers of electronic communications services; grant public access to technical interfaces, protocols, or other core technologies that are indispensable for the inter-operability of public electronic communications services or virtual services; offer co-location or other forms of shared use of facilities, including shared use of cable conduits, buildings or masts; offer certain services that are necessary for the inter-operability of the end-to-end services provided to users, including facilities for intelligent network services or roaming within mobile electronic communications networks; provide access to operational support systems or comparable software systems that are necessary for fair competition in the provision of electronic communications networks or network facilities; ensure interconnection of public electronic communications networks or network facilities.

\(^{160}\) See Chapters 5 and 6.

\(^{161}\) The NRA could also issue operational or technical measures to the SMP undertaking. Cf. Article 6a.6 (4) 2004 Tw. See also Article 6a.11 2004 Tw, which established the power for the NRA to impose other access-related obligations, to be indicated by ministerial regulation, under exceptional circumstances. Cf. the Explanatory Memorandum, 28 851 no. 3, p. 124.
requirements. The burden of evidence that the cost charged were cost oriented was now fully placed with the SMP undertaking. Notwithstanding the legal requirement of cost orientation, a provider had the right to add a profit margin to its tariffs as a compensation for its past investments.

By comparison, OFCOM imposed substantial obligations on its SMP undertakings, including obligations: (1) to supply wholesale access products, (2) to supply new products and innovative products, (3) to provide access to information protected by intellectual property rights, (4) to provide fair, reasonable and timely access, which – according to OFCOM, meant that the SMP undertaking had to offer terms in a competitive market, which should be sensible and practical and should include obligations in relation to timelines, such as reasonable service levels and penalties for non-delivery, (5) relating to non-discrimination, transparency, cost orientation and accounting separation, all in line with the NRM.

162 Cf. Articles 6a.7 and 6a.9 (1) a.2004 Tw.
163 Cf. Article 6a.7 (3) 2004 Tw; see Explanatory Memorandum 28 851, nr. 3, p. 120. The 2004 Tw also provided that the NRA could attach conditions to the obligation to set up a cost-allocation system with respect to the submission of the results of the application of the system by the SMP undertaking. Moreover, if an obligation to set up a cost-allocation system has been imposed (1) the SMP undertaking must provide, in an adequate manner with due observance of the conditions imposed by the NRA, a description of the system containing in any event the primary categories in which the costs are classified and the rules applied for allocating the costs; and (2) the NRA, or an independent expert third party appointed by the NRA, would investigate once every year whether the SMP undertaking acted in accordance with the system or not; cf. Articles 6a.7 (4) and (5) 2004 Tw.
164 From 2001 to 2004, the NRA opted for a differentiated system of regulating terminating access and originating access interconnection services. OPTA 13 April 2001, Guidelines on tariff regulation interconnection and special access services, (Richtsnoeren tariefregulering interconnectie- en bijzondere toegangsdiensten), OPTA/IBT/2001/200850; www.opta.nl. The different cost systems are discussed in Chapter 2.
165 See, OFTEL. Imposing access obligations under the new EU Directives (2002), as discussed in Walden, Angel 2005, p. 244ff.
166 In 2005, OFCOM issued a consultation as regards its application of non-discrimination measures, see OFCOM 30 June 2005, Undue discrimination by SMP providers. Interestingly, where OFCOM is looking for guidelines on how to apply the principle, it stated: "(...) Secondly, Ofcom proposes that differences in non-price transaction conditions offered by an SMP provider in favour of its own downstream business (a vertically integrated SMP provider) should be treated as a special case."
4.5 Interim conclusion

4.5.1 Divergences in the notions of interconnection and interoperability

It becomes clear from an analysis of the national regime that: (1) the 1998 Tw diverged from the EC regime as regards the implementation of the terms ‘interconnection’ and ‘interoperability’, and as a result, (2) the NRA struggled in interpreting the national regime and its competencies. Under Dutch law, the notion of interoperability was interpreted to be a specific regulatory requirement under the NRF, whereas the principle was not new and it had always been clear that interconnection of networks could achieve interoperability, but this was not an obligation per se.

4.5.2 Duty to negotiate versus duty to contract

The implementation of the NRF was intended to move the primary interconnection rule as it concerned OLOs away from any (intended or unintended) obligation stronger than a duty to negotiate. Under the previous ONP regime, in the Netherlands, Germany and the UK there had been some lack of clarity regarding the scope of the interconnection obligation, and the NRF was supposed to lead to a simplification, which was underlined by the statement at the EC level that parties would rely more on commercial negotiations.

In contrast, the 2004 Tw was effectively aimed at broadening the scope of the duty to negotiate, due to a partial incorrect interpretation of the NRF, in particular, Articles 4 and 5 Access Directive; but also by confusing the primary and the secondary interconnection rule. In other words: all the NRA could do was push the parties towards reaching an agreement, not establish rules for interoperability; or even retroactively apply interconnection rates. This impacted the position the NRA took under national law on the formation and negotiation of interconnection agreements between OLOs.

Prima facie, it appeared that - at least between OLOs - the duty to negotiate was weakened from inclining towards a results obligation to an efforts obligation, but the Dutch NRA, on the contrary appeared to interpret the duty to negotiate in a broader manner, tending towards an interoperability obligation both for ECN and ECS providers, which resembled a duty to contract (even if, once it concerned the TO, under the secondary interconnection rule, there clearly was a rationale to intervene, namely to take away adverse effects resulting from a party having SMP). The NRA confused its powers to act against adverse effects of SMP with the limited possibilities it had to push OLOs to achieve services interoperability, however desirable an objective this was.
5. The powers of the national regulatory authority

5.1 Introduction

The national regulatory authority ('NRA') had numerous statutory powers to supervise the telecommunications market and Member States were to ensure it could pursue broad policy goals. The Commission bestowed the NRA a key role in securing interoperability through intervention in interconnection agreement contract formation and - to lesser extent - performance.

In Chapter 1, it was considered that any intervention must conform to, *inter alia*, the principles of effectiveness and sustainability. As a consequence, the question arises whether the NRA was adequately equipped with statutory powers and actual knowledge to set the terms of access and interconnection if the parties could not reach an agreement, or to decide on the terms when

---

1 See Article 8 Council Directive 2002/21/EC of 7 March 2002 on a common regulatory framework for electronic communications networks and services, [2002] OJ L 108/33 ('Framework Directive'), which refers to, *inter alia*, the promotion of competition (paragraph 2), and the contribution to the development of the internal market by encouraging '(...) end-to-end connectivity' (paragraph 3). The new regulatory framework ('NRF') specified the various competencies, including under the Framework Directive: (1) national number assignment, see Article 10; (2) encouraging co-location and facility sharing, Article 12 (and Article 12 Council Directive 2002/19/EC of 7 March 2002 on access to, and interconnection of, electronic communications networks, [2002] OJ L 108/7 ('Access Directive')); (3) conduct of a market analysis - including to determine whether specific measures for significant market power ('SMP') undertakings (such as under the Access Directive) remain necessary, Article 16 (2); dispute resolution between undertakings, Article 20; and under the Access Directive: encourage and where appropriate ensure access and interconnection, Article 5; impose ONP measures on SMP undertakings, Articles 8-13 Access Directive. Cf. with Geradin, Kerf 2003, p. 16-17 who mention the following competencies that could be bestowed on NRAs: (1) selection of new operators, (2) preparation and grant of licences, (3) tariff regulation, (4) administration of technical and quality standards, (5) administration of the rules applicable to number portability and the allocation of frequencies, (6) administration of the interconnection regime, (7) dispute resolution between market parties, (8) administration of the universal services regime, (9) monitoring activities of operators, (10) imposition of sanctions on providers, and (11) provision of advice to the government on communications matters. In most Member States these tasks have been conferred on different agencies, including government agencies (such as the grant and administration of frequency licences). Items (2), (3), (6), (7), (9), (10) and (11) have been allocated - at least to some extent - to the NRAs. For the competencies initially bestowed on the NRA in the Netherlands, see Article 15 OPTA Wet.

access and interconnection disputes arose between undertakings. Another issue is what legal principles the NRA applied and how it coordinated its efforts with other institutions, such as the competition authority and the civil courts.

5.1.1 The NRA and network convergence
The principal aim of the open network provision (‘ONP’) framework regarding NRAs was to ensure that they would be strictly separated at the national level from government bodies that controlled telecommunications organizations in that Member State. The new regulatory framework (‘NRF’) by way of the Framework Directive broadened the scope of the competencies of the NRA by providing, inter alia, for coordination of the activities of NRAs and stimulating cooperation, both nationally and internationally, such as within the context of the European Regulators Group (‘ERG’). The Framework Directive listed no less than 14 broad policy objectives that were, directly or indirectly, relevant to access and interconnection.

---

3 For the qualification of the term ‘adequate’, see Chapter 1 paragraph 1.4.1.
5 Article 3ff. Framework Directive generally provided for the manner in which the NRA must exercise its functions. In short, the Member States must ensure that the NRA: (1) was a competent body; (2) was functionally independent from all electronic communications providers; (3) must exercise its powers impartially and transparently; (4) published its tasks in easily accessible form; and (5) provided information regarding the application of the NRF to the competition authorities. The last obligation is reciprocal and applies to the competition authority as well. See also recital (35). Other obligations of the NRA can be found spread among various Directives, such as Articles 9-13, 16 and 20 Framework Directive, and Articles 5 and 12 Access Directive.
6 According to: Article 8 (2) Framework Directive: (a) ensuring that users, including disabled users, derive maximum benefit in terms of choice, price and quality; (b) ensuring that there is no distortion or restriction of competition in the electronic communications sector; (c) encouraging efficient investment in infrastructure and promoting innovation; (d) encouraging efficient use and ensuring effective management of radio frequencies and numbering resources; Article 8 (3) Framework Directive: (a) removing of remaining obstacles to the provision of electronic communications networks, associated facilities and services and electronic communications services at European level; (b) encouraging the establishment and development of trans-European
In spite of the perceived network convergence, the obligation of NRAs to contribute to the achievement of content-related regulatory objectives was hardly considered. 7

At the time the European Community (‘EC’) was contemplating the NRF, it still had concerns regarding the effectiveness of NRA intervention at the national level. 8

5.1.2 Scope of work

This Chapter discusses the powers of the NRA bestowed at the EC level (5.2). The tools provided for decision-making, such as those regarding significant market power (‘SMP’) will be discussed (5.3), both at the EC and the national level (in particular the Netherlands). This Chapter also talks about how the NRA views its competencies regarding access and interconnection agreements (5.4). The delineation of competencies of the NRA will be discussed in comparison with, inter alia, the competition authority and the civil courts (5.5). The ERG’s position on competition networks and the interoperability of pan-European services, and end-to-end connectivity; (c) ensuring that in similar circumstances, there is no discrimination in the treatment of undertakings providing electronic communications networks and services; (d) cooperating with each other and with the Commission in a transparent manner to ensure the development of consistent regulatory practice and the consistent application of this Directive and the Specific Directives; Article 8 (4) Framework Directive: (a) ensuring all citizens have access to a universal service specified in the Universal Service Directive; (b) ensuring a high level of protection for consumers in their dealings with suppliers, in particular by ensuring the availability of simple and inexpensive resolution of procedures carried out by a body that is independent of the parties involved; (c) contributing to ensuring a high level of protection of personal data and privacy; (d) promoting the provision of clear information, in particular requiring transparency of tariffs and conditions for using publicly available electronic communications services; (e) addressing the needs of specific social groups, in particular disabled users; and (d) ensuring that the integrity and security of public communications networks are maintained. See also Article 20 (3) Framework Directive, which instructs the NRA to take all of these objectives into account when resolving a dispute between undertakings.

7 This was perhaps not that surprising given the content neutrality of the NRF; see article 1 (3) Framework Directive. NRAs could contribute within their competencies to ensuring the implementation of policies that were aimed at the promotion of cultural and linguistic diversity as well as media pluralism. This did not, however, prevent a Member State, either on the basis of its constitutional law or through other statutory provisions, from pursuing the objectives of cultural and linguistic diversity or media pluralism and assigning these tasks to other governmental authorities.

8 See, e.g., 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 (‘Seventh Report’).
problems that may affect interconnection agreements’ formation is discussed in paragraph 5.6. Paragraph 5.7 contains the interim conclusion.

**5.2 The empowerment of the NRA under EC regulation**

The renewed empowerment of NRAs was one of the pillars of the Framework Directive. The Commission considered that: (1) decision-making powers of NRAs must be clearly defined, (2) swift procedures to control the telecommunications operator’s (‘TO’s’) behaviour must be instated, and (3) deterrent sanctions must be provided for.9

The starting point of the NRF was that NRAs would be facing new and more specific tasks, in particular with respect to the designation of SMP and the accompanying market analysis. The right to intervene *ex ante* in access and interconnection contract formation was preserved, notwithstanding that the Commission appeared to consider it wishful that commercial negotiations would prevail.10

**5.2.1 Preliminary observations**

As an independent administrative body, the NRA was empowered to step in when commercial negotiations between large enterprises in a highly specialized sector failed.11

Article 9 Interconnection Directive did not survive in the same form in the NRF.12 This provision had covered the responsibilities of the NRA broadly.

---

11 For the Netherlands, see, e.g., Article 1:1 Act on Administrative Law (*Algemene wet bestuursrecht, ‘Awb’*), which provides that an administrative authority is an organ of a legal entity, established under public law, or another person or body, vested with any public authority. Legal entities under public law can be divided into: (1) public bodies and (2) autonomous, incorporated, administrative authorities. In the Netherlands, the NRA was an autonomous administrative authority. Because of its status, the *Onafhankelijke Post- en Telecommunicatie Autoriteit* (‘OPTA’) functioned at arms’ length from the Ministry of Economic Affairs - in charge of an electronic communications policy. Besides, Article 2 (2) of Act of July 5, 1997 (*Wet van 5 juli 1997, houdende regels inzake instelling van een college voor de post- en telecommunicatiemarkt* (Wet onafhankelijke post- en telecommunicatie autoriteit)), Sb. 1997, 320 (‘OPTA wet’) provided that the NRA possessed corporate personality. This means that the minister was politically responsible for certain tasks of the NRA, but did not have a direct control in relation to the decisions made by the national regulatory authority (‘NRA’). See also Arnbak, Mulder 2000.
The powers of the national regulatory authority

Article 5 Access Directive was concerned solely with the NRA's competencies with respect to access and interconnection.

It was observed that *ex ante* sector specific rules should be progressively decreased, as the market developed. This could entail less intervention for the NRA in contract formation and disputes, except where the pre-contractual emphasis involved price control. But Article 5 (1) Access Directive, in comparison with Article 9 (1) Interconnection Directive, still set a very broad authority for the NRA.\(^{13}\)

Article 20 Framework Directive appeared to increase the scope of dispute resolution by referring to *any* dispute between undertakings connected to obligations arising under the Directives rather than repeating the previous restricted scope of resolving access or interconnection disputes and deciding on the reference interconnection offer (RIO).\(^{14}\)

The NRA's enhanced powers were counterbalanced by increased requirements for co-ordination of NRA decisions and positions at the EC level. This co-ordination was achieved in the first instance by obligating the NRAs to cooperate and to consult with one another and with the Commission.\(^{15}\) In addition, the EC considered it to be necessary to back up such consensus building by the possibility to give decisions of the Commission legal force. To this end, powers of control and harmonization were granted to the Commission, including a right to veto certain decisions of the NRAs.

5.2.2 General powers

The Framework Directive distinguished three types of procedures, relevant to the NRA: (1) consultation; (2) coordination; and (3) dispute resolution.\(^{16}\)

---

13 It must: "(...) encourage and where appropriate ensure (...) adequate access and interconnection, and interoperability of services in a way that promotes efficiency, sustainable competition, and gives the maximum benefit to end-users." On the notion of interoperability, see Chapter 3 paragraph 3.4.1.

14 See Chapter 3 paragraph 3.3.4.

15 See *infra*, paragraph 5.2.3. This was based on the Commission Decision 2002/627/EC of 29 July 2002 establishing the European Regulators Group for Electronic Communications Networks and Services, OJ I, 200/38, 30 July 2002. According to Article 3 (2) Decision the role of the ERG was: 'to provide an interface between national regulatory authorities and the Commission in such a way as to contribute ... to the consistent application in all Member States of the regulatory framework'. See also Recitals (36) and (37) Framework Directive.

The Member States were obliged to inform the Commission of the tasks assigned to the NRA. Besides, all measures taken by the NRA must be proportionate to the many objectives set forth in the Directive and technologically neutral as much as possible.\(^{17}\)

Proportionality is derived from administrative law: it is usually applied strictly when an administrative body imposes a penalty, to ensure that the sanction is in proportion to the offence. But, it was not immediately clear what the term meant when being conferred upon the NRA in terms of access and interconnection. Must it act proportionally by taking into account the legitimate interests of the TO? If so, how?

As will be demonstrated, a gap may have existed in interconnection contract dispute resolution due to the NRA not applying contract law principles to access and interconnection agreements and the civil courts not hearing conflicts on formation and performance of access and interconnection on the assumption that it was up to the NRA's competence to decide whether these were in accordance with telecommunications law.

### 5.2.3 Decision making by the NRA

The EC empowered the NRA to intervene on its own initiative. It provided in detail for the NRA's decision-making process.\(^{18}\) *Prima facie*, the Directive did not impose high demands on the degree of self-justification or motivation to the NRA's decision-making process.\(^{19}\)

However, the Framework Directive did establish procedural rules, which pertained, in part, to the regulatory procedures of the NRAs and, in part, to the cooperation between NRAs and Commission. These procedural rules included obligations to: (1) publish information; (2) conduct public hearings or consultations; and (3) cooperate. These obligations will be discussed briefly as well as the veto rights the Commission required.\(^{20}\)

---


18. For instance, as regards information gathering, or motivation of the NRAs decisions. See, *infra*, paragraph 5.4.3; also, Ottow, Eeken 2003, p. 30-31.

19. See Ottow 2005/2 on the NRAs justification as regards SMP.

20. Article 6 Framework Directive; Article 12 (2) Framework Directive: the obligation to hold a public consultation with all 'interested parties' prior to imposing the sharing of facilities or property.
5.2.3.1 Publication of information
The obligation to publish information was interspersed in the Framework Directive and included the obligation to publish: (i) such information that would contribute to an open and competitive market, (ii) the national numbering plans and (iii) up-to-date information pertaining to the application of the directives.\textsuperscript{21}

The first requirement bore some relevance in terms of interconnection agreements, as it regularly provided the market with information on the state of competition. The broad formulation of this obligation gave the NRA some elbow room to decide what information to publish.

5.2.3.2 Consultation
The Member States were required to ensure that, where NRAs intended to take measures in accordance with the Framework Directive or the specific directives that had a significant impact on the relevant market, a consultation procedure would be conducted.\textsuperscript{22}

The Framework Directive did not specify how a significant impact on the relevant market had to be assessed. The Directive also failed to provide detailed guidance for conducting the consultation procedure: the NRAs were obliged to give interested parties the opportunity to comment on draft measures within a reasonable period. This left open the question as to who was to be included among the interested parties.\textsuperscript{23} It would seem, from the wording of other provisions of secondary Community law that ‘interested parties’ were to include all third parties whose interests might be affected. This definition meant that the consultation procedure was not open to anybody, but only to parties who could demonstrate a sufficient interest in the decision under consideration.\textsuperscript{24}

\textsuperscript{21} Cf., \textit{inter alia}, Articles 5 (4), 10 (3) and 24 (1) Framework Directive.
\textsuperscript{22} See for exceptions to this obligation: Articles 7 (6), 20 and 21 Framework Directive.
\textsuperscript{23} Cf. Scherer 2005, p. 28; See Nikolinakos 2001, p. 93, 99.
Interconnection Regulation and Contract Law

Consultation procedure
NRAs were obliged to conduct a consultation procedure before issuing a measure which: (1) would fall under Article 5 or 8 Access Directive, and (2) would affect trade between Member States. The NRA would have to make the draft measure accessible to the Commission and the other NRAs, together with a motivation for the measure. After the one-month period for comments would have lapsed, the NRA would be entitled to adopt the measure, under the obligation to take into account possible comments.

Veto procedure
The Framework Directive provided for a veto right for the Commission, in the event an NRA would intend to take a measure aimed at: (1) defining a relevant market, which would differ from those defined in the Commission

---

25 Measures concerning access and interconnection and measures concerning undertakings designated to have SMP. This also applied in the areas of Articles 15-16 Framework Directive (measures in the context of the market definition or market analysis procedure) and Article 16 Universal Services Directive.


27 Cf. Article 7(5) Framework Directive. The first Dutch notification in the context of the international consultation procedure occurred in November 2003, before the new Telecommunications Act (Telecommunicatiewet, '2004 Tw') entered into force, see Case number NL/2003/0017. The notification by the Onghebouwijke Post- en Telecommunicatie Autoriteit ('OPTA') concerned the draft Interoperability Decree, intended to transpose Article 5 (1) (a) Access Directive. The notified draft decree imposed an obligation upon all providers of publicly available telephone services and operators of the underlying networks to ensure that retail customers were able at all times to make calls to all other retail customers, regardless of whether they were on the same or different networks or not (i.e. fixed and mobile voice calls. Carrier (pre-) selection services are excluded from the definition of publicly available telephone services). The decree did not regulate the terms and conditions on which operators must interconnect. The Commission considered that, given the limited scope of the proposed obligation (limited to ensuring end-to-end connectivity and limited to publicly available telephony services) and its relatively low impact on the providers concerned, the notified draft measure was proportional and justified. See the Commission's comments pursuant to Article 7(3) of Directive 2002/21/EC (Case NL/2003/0017). The Commission further commented that, once the NRA had completed the market analysis process under articles 15 and 16 Framework Directive and the designation of provider(s) with universal service obligations under the Universal Services Directive, the Dutch legislator should consider if the decree remained necessary and proportionate to avoid any severance of end-to-end connectivity in the Netherlands. The Dutch legislator subsequently enacted the draft measure on 19 May 2004, simultaneously with the enactment of the 2004 Tw.
The powers of the national regulatory authority

recommendation, or (2) deciding whether or not to designate an undertaking as having SMP.\textsuperscript{28} A one-month consultation period was to be followed by the veto procedure, if the measure would affect trade between the Member States and the Commission indicated to the NRA that it: (1) considered that the draft measure would create a barrier to the single market; or, (2) had serious doubts as to its compatibility with EC law; in particular the objectives referred to in Article 8 Framework Directive.\textsuperscript{29} Such procedure would prevent the NRA from adopting the measure for another two months. During the two-month period, the Commission could take a decision requiring the NRA concerned to withdraw the draft measure. This decision must be accompanied by a detailed Commission analysis.\textsuperscript{30} The Commission did not obtain the right to replace the proposed measure of the NRA by a measure of its own.\textsuperscript{31}

Both the consultation and the veto procedure could lead to delays of the regulatory procedures at national level.\textsuperscript{32} Only in exceptional circumstances — which were not specified — could the NRA deviate from the procedures and adopt provisional measures, where it considered that there was an urgent need to act in order to safeguard competition and protect the interests of users.\textsuperscript{33}

\textsuperscript{28} See Article 7 Framework Directive.

\textsuperscript{29} The assessment as to whether the proposed measure would affect trade between Member States must be based on the same standard as the comparable assessment under articles 81 (1) and 82 EC Treaty. Cf. ECJ Judgement of 30 June 1966, Case 56-65 (\textit{Société Technique Minière v Maschinenbau Ulm GmbH}) [1966] ECR 282.


\textsuperscript{31} The Commission’s decision requiring the NRA to withdraw its draft measure would be preceded by the advisory procedure in accordance with Council Decision of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission, \textit{OJ L} 184/23, 17 July 1999.

\textsuperscript{32} See Nikolakis 2001, p. 93, 99.

\textsuperscript{33} In August 2004, the Dutch provider of broadband Internet services Wanadoo requested OPTA, on the basis of article 6b.3 2004 Tw, to refrain from applying the consultation procedures, and to take immediate appropriate measures to safeguard the competition on the broadband market. Wanadoo claimed that the Dutch TO was causing irreparable damage to the competition in the broadband market by applying consumer tariffs that were below cost and wholesale tariffs for broadband providers, that were significantly...

(Continued)
5.2.3.3 Cooperation
Article 3 (4) Framework Directive instructed the Member States to ensure cooperation between the NRAs of the various Member States and between the NRAs and national authorities entrusted to enforce EC competition law and consumer law, on matters of common interest. This general cooperation requirement was further specified in article 3 (5) Framework Directive, which obliged NRAs and national competition authorities to provide each other with the information necessary for the application of the provisions of the Framework Directive and the specific Directives. The ERG was the result of the cooperation requirement.34

5.2.4 Powers in respect of access and interconnection
The NRAs contained a fair level of detail in the delineation of the tasks and tools of the NRA in respect of access and interconnection agreements. The starting point was Article 5 (1) Access Directive.35

5.2.4.1 Dispute resolution between undertakings
The NRA was afforded the right to intervene in business relationships between the TO and OLOs and between OLOs: (1) where there was an active request from a party to intervene in a dispute arising 'in connection

above cost. In its ruling of 31 January 2005 and the appeal of 25 May 2005, the NRA rejected Wanadoo's request on the ground that the decision to deviate from the consultation procedures can only be taken after the market analysis procedure has been completed. OPTA argued that, as long as the market analysis procedure for wholesale broadband access was not completed, it was unable to ascertain whether the competition in that market and the interests of users were being compromised, see OPTA/IBT/2005/200046. The Appellate Board for Businesses (College van Beroep voor het Bedrijfsleven, 'CBB') overruled the decision and sent it back to OPTA for renewed consideration. On 25 May 2005, OPTA confirmed its decision, published 13 July 2005 at www.opta.nl.

34 See, infra, paragraph 5.6.
35 This clause combined the important policy objective of ensuring interoperability and the objective of encouraging adequate access and interconnection. For the full citation see, supra, paragraph 5.2.1. Cf. with Article 3 (2) Interconnection Directive which ordered Member States to 'ensure the adequate and efficient interconnection of the public telecommunications networks set out in Annex I to the extent necessary to ensure interoperability of these services for all users within the Community.' Initially, adequate and efficient interconnection was to be ensured if necessary to ensure interoperability, whereas later the NRAs were to stimulate interoperability as a goal independent from ensuring adequate access and interconnection. See also Chapter 1 paragraph 1.1, Chapter 3 paragraph 3.4.1 and Chapter 4 paragraph 4.4.3 on both the relationship between the notions of interconnection and interoperability and the competencies of the NRA to decide on 'interoperability' requests.
with the obligations under the Directive\textsuperscript{36} between undertakings providing electronic communications networks ('ECNs') or services ('ECS'), and (2) 'in order to meet the policy objectives of Article 8 Framework Directive'.\textsuperscript{37} In the latter case, the NRA could either intervene: (i) 'on its own initiative where justified', or (ii) 'in the absence of agreement between undertakings at the request of either of the parties involved'.

5.2.4.2 Request to intervene
Pursuant to Article 20 Framework Directive, the NRA could impose a binding obligation upon the parties provided: (1) there was a dispute.\textsuperscript{38} This was presumed when a party filed a complaint with the NRA; (2) the dispute arose in connection with an obligation arising under the Access Directive, i.e., an obligation to provide access upon reasonable request;\textsuperscript{39} (3) it concerned public providers of ECNs and ECS and sometimes the law mentioned that the NRA could intervene only where the undertaking concerned controlled end-to-end connections.\textsuperscript{40}

Ad (1): presumably, in light of the preferred commercial negotiations model, the NRA would be reticent to play any advisory role during the negotiations process.\textsuperscript{41} This could be rather undesirable, since it might be practical that the NRA were to establish its clout and experience in a pragmatic way to help arrive at an agreement, instead of spark a dispute.

Ad (2): if the TO could demonstrate there was no connection with the Directive then the NRA would not be competent to intervene. But the regulatory objectives had been formulated so broadly that it would be nearly impossible for the TO to demonstrate there was no connection. Hence, almost any dispute regarding the formation or performance of access and interconnection agreements was likely to fall under the NRA's competence.

\textsuperscript{36} See Articles 20 and 21 of the Framework Directive.
\textsuperscript{38} This includes the situation where the parties have failed to reach an agreement, see Recital (32) Framework Directive that describes disputes as a situation where the parties "(...) have negotiated in good faith but have failed to reach agreement."
\textsuperscript{39} Article 20 Framework Directive mentions disputes in relation of all Directives that form the NRF.
\textsuperscript{40} See Chapter 4.
\textsuperscript{41} Cf. Chapter 3 paragraph 3.2.2.1.
Interconnection Regulation and Contract Law

Ad (3): if the TO could demonstrate the OLO was not a public provider, the NRA was not competent either. Having a registration or licence to provide the network or services was a very good indication, but generally, this amounted to an objective test. The NRA usually only marginally discussed this in its decisions.

5.2.4.3 Intervention ‘on its own initiative’ to meet the policy objectives

Next to the general policy objectives of Article 8 Framework Directive, Article 5 (4) Access Directive provided that the NRA could intervene on its own initiative in access and interconnection business relationships. The starting point again was Article 5 (1) Access Directive, which provided in broad terms the right to intervene for the NRA and combined with a reference to the policy objectives formulated in Article 8 Framework Directive, which in turn referred to the ONP principles.

As was seen above, the Access Directive also provided that the NRA could intervene “in the absence of agreement”. This may have been a cross-reference to Article 20 Framework Directive. But the use of the words “absence of agreement” as opposed to “a dispute” — perhaps unwillingly — suggested that there was a broader scope for NRA intervention, notably to intervene where there was no written agreement at all and no negotiations had effectively occurred. This could most likely not have been the intention of the EC, since such broad discretion would have granted NRAs unlimited power to intervene in contract formation, including between OLOs.

42 See Dries, Gijs, Knol 2003/1 and 2003/2.
43 For the meaning of the notion ‘public’, see Chapter 2 paragraph 2.4; on the obligation to negotiate with public providers: Chapter 3 paragraph 3.4.1.2 and 3.4.2.2.
44 In this case, intervention may also be subject to the consultation requirements of Article 6 and 7 Framework Directive, according to Farr, Oakley 2002, p. 67.
45 Dependent upon how the previous clause is interpreted, the right to intervene was formulated more broadly than the right to intervene at its own initiative under Article 9 (3) Interconnection Directive; the point of reference being whether under the Interconnection Directive, the NRA could indeed intervene at any time, or only ‘in order to specify issues which must be covered in an interconnection agreement, or to lay down specific conditions to be observed by one or more parties to such an agreement’, as the rest of the text suggests. I am not convinced that this broad description of powers, which does not appear to have been closely coordinated with the provisions in the Framework Directive, will lead in practice to harmonized NRAs. The provision vests almost unlimited discretionary powers that are driven by policy considerations and not legal considerations. In other words, although the NRA is also a dispute settlement body, it can become very political.
47 This interpretation follows from Recital (19) of the Access Directive.
5.2.4.4 Right to lay down technical or operational conditions
The scope of intervention was broadened to the extent that the Access Directive provided explicitly that NRAs could ‘lay down’ technical or operational conditions to ensure the normal operation of the network. This was almost akin to a hard law competence to set standardized technical norms. But, any conditions that referred to the implementation of technical standards or specifications must conform to the very detailed standardization provisions to be implemented pursuant to the Framework Directive.

Conversely, if the NRA desired to go into the detail of technical specifications required from TOs, it needed to focus on standardization bodies that were able to act only with the parties’ will and intentions. This possibility was quite helpful in providing OLOs support when negotiating technical terms with the TO. It was not analyzed what NRAs have achieved in terms of laying down detailed technical and operational conditions, but, prima facie, the right conferred did not appear to facilitate a straightforward routine task for NRAs.

5.2.4.5 Other powers and corresponding obligations
Besides the intervention powers described in the previous paragraph, the directives laid down further possibilities to intervene. Notably, Article 5 (1) sub (a) Access Directive afforded intervention rights for the NRAs (in addition to specific intervention in respect of SMP undertakings pursuant to Article 8 Access Directive), to impose obligations on undertakings that controlled access to end-users, including those justified in case of an obligation to interconnect their networks. It included a new right to intervene specifically to the extent necessary to ensure accessibility for end-users to digital radio and television broadcasting services that were specified by the Member State, and impose obligations to provide access on fair, reasonable and non-discriminatory terms.

50 Cf. Chapter 7, in which Dutch NRAs response to the reference interconnection offer (‘RIO’) is analyzed, also in terms of what technical and operational conditions were imposed on the TO.
51 See Article 5 (1) sub (a) Access Directive.
5.2.5 Decision must be binding

Pursuant to Article 20 (1) Framework Directive, the decision taken by the NRA must be binding, notwithstanding the right of the NRA to defer to alternative dispute resolution. The Directive did not consider how a binding decision was to be enforced in the Member States. Since the decision was subject to appeal anyway, the question is whether - pending the appeal - the NRA could require a party to abide by the decision. Did it mean the decision was immediately enforceable? If so, how, since the NRA has been reluctant in immediately imposing penalties.

If an interconnection dispute would have an impact on Community trade, then the NRA would have to request advice from the Commission prior to taking a decision.

5.2.6 Timelines

The NRA must make a decision within four months after a complaint was filed. It could take longer in case of exceptional circumstances. But, neither the Directives nor national law described certain ‘exceptional circumstances’. What should greatly facilitate the timing was that the Framework Directive also required the Member States to ensure that the parties to a dispute fully co-operate with the NRA. In line with the EC’s emerging position on alternative dispute resolution, the NRA must refuse to decide on a complaint, if it considered that the matter could be solved best through mediation or a form of alternative dispute resolution.

It is not that easy to think of an example in interconnection contract formation or performance that might be suited for alternative dispute

---

52 See for the answer, infra, paragraph 5.2.5.4.

53 In the Netherlands, decisions pursuant to Article 7 (3) sub a) and 5 Access Directive were accidentally not mentioned in the 2004 Telecommunications Act (Telecommunicatiewet, “Tw”). Cf. Ottow 2005, p. 91. Thus, it was not clear in this context what would happen with decisions that were subject to prior advice by the Commission, but that had not been reported to the Commission. See, e.g., Decision 2 August 2004, case AT/2004/0085.

54 Under the 1998 Tw, the NRA had to issue a binding decision within six months after an interconnection dispute had been brought before it, Article 6.3 (3) sub a 1998 Tw. In a Dutch study on lead times by the NRA, it transpired that the six-month decision window under the 1998 Tw was hardly ever made. See Ottow et al. 2004, p. 47ff.

resolution. Neither was the NRA very likely to consider another organization to be more competent to decide on highly technical matters. If the mechanism did not work, then the NRA was still obliged to resolve the dispute anyway.

5.2.7 Right to appeal
The Framework Directive provided that the Member States must ensure that effective mechanisms existed at the national level, so that any user or undertaking that provided ECNs or ECS that were affected by a decision of an NRA, had the right to appeal against the decision before an appellate body. It was explicitly provided that this appellate body should be a court that was independent from the NRA, and had the appropriate expertise to carry out its functions. It was the responsibility of the Member States to ensure that these courts took into account the merits of the case and that the appeal mechanism was effective. According to the Framework Directive, pending appeal, the NRA’s decision would stand, unless the appellate body decided otherwise by way of an interim order.

Article 4(1) Framework Directive did not establish an obligation of national legislators, under EC law, to enable an end-user or undertaking providing ECN or ECS other than the provider affected by the decision, to appeal against the decisions of an NRA by which they were somehow ‘affected’. Only the addressees and others that were directly affected (i.e. ‘the subject’) by a regulatory decision would have the right to appeal. National legislators were not prevented from extending the right of appeal to other third parties that could have an interest in the outcome of a dispute.

5.2.8 International dispute resolution
For the first time, the EC regulator provided for the resolution of cross-border disputes. Article 21 Framework Directive was concerned with dispute resolution only, not with intervention to meet the policy objectives. The Directive did not formulate a choice of forum. The party filing the complaint had the choice of the NRA, in its own country, or in the Member

---

57 See, in particular, from recital (12) Framework Directive, which stated: “(...) any party who is the subject of a decision by a national regulatory authority should have the right to appeal to a body that is independent of the parties involved.”
58 On administrative appeal in the Netherlands, see, e.g., Stroink 2002.
59 Re international aspects of administrative decisions: Polak 2003.
Interconnection Regulation and Contract Law

State of the other party. The Directive allowed for a joint dispute settlement and the NRAs must coordinate their efforts.

It was unclear from the provision what would happen in case of conflicting opinions, remedies that were not available in one Member State, or diverging principles of contract law. The provision did not make much sense. The Directive provided that parties might also file an action before the courts. But the EC regulator did not give any thought to the most unwelcome consequences of referring to the normal rules of civil procedure. In principle, the court of the defendant would be competent to hear the case, although there could be exceptions – whilst not making a choice in terms of relative competence of the NRAs. Without a doubt, this lack of regulatory guidance led to legal uncertainty, as the market parties had to comply with the rules of different competent authorities.

5.3 The NRA and the notion of SMP

With respect to access and interconnection, the NRAs were required to determine whether to impose, maintain, amend or withdraw obligations following an analysis of the relevant markets to determine whether: (1) the existing access and interconnection obligations mentioned in Article 7 (1) Access Directive should be maintained, amended or withdrawn; and (2) (new) obligations must be imposed on SMP TOs. Only if the NRA determined there were no SMP players on the relevant market, would it withdraw specific regulations.

As discussed in Chapter 3, the EC provided that the NRAs must take into account the Commission’s guidelines and recommendations. Even though EC recommendations and guidelines were not binding the Member States, Article 249 (5) EC Treaty, the strong wording forced the NRAs from now on to better expand their market definition. In addition, procedural rules increased the EC’s influence at the national level. The 2002 Commission

---

60 Cf. Article 21 (2) Framework Directive.
61 Cf. Article 21 (4) Framework Directive. And Article 21 (3) Framework Directive grants the NRAs a similar right as Article 20 (2) does for the national NRA: refusal to dispute settlement, if alternative dispute resolution ('ADR') is more meaningful.
62 The procedure as such does not require further elaboration for the purposes of this book. It is described in Article 16 Framework Directive and provides for close cooperation between NRAs and the Commission. The ensuing guidelines and recommendations will be briefly analysed, infra, paragraph 5.3.1.
The powers of the national regulatory authority

Guidelines and the 2003 Recommendation delineated the NRA's powers further. 

5.3.1 Powers of the NRA under EC Guidelines and Recommendations

5.3.1.1 The Commission Guidelines

The purpose of the Commission Guidelines were intended to guide the NRAs, were phrased in a forceful manner and NRAs were set to undertake market reviews by February 2003.

The Commission Guidelines set out the principles that NRAs must use in the analysis of markets and designation and assessment of SMP parties under the NRF. The Commission Guidelines also addressed the assessment and the designation of SMP in more detail, and described procedural issues in depth. The Commission provided in detail information as to how to assess potentially separate markets and consider overlap. There was also an extensive set of rules for the determination of joint SMP and SMP in transnational markets, the importance of which was likely to increase in view of the consolidation in the sector.

It could not be predicted whether the NRAs would use the Commission Guidelines to establish at their own initiative, different rules for TOs at the different market levels, for instance in the area of access to new technologies, or market definition on a route-by-route basis.

---

63 Commission of the EC, Commission Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services, Of C 165/6, 11 July 2002 ('Commission Guidelines'); Commission Recommendation on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, Brussels, C (2003) 497, 11 February 2003 ('Commission Recommendation'). Note the difference here from ex ante merger regulation. This is carried out on a case-by-case basis as a precondition for a consolidation of enterprises. There is no periodic or continuous review of contractual provisions.

64 The NRAs should take the 'utmost account' of the Guidelines (see no. 7). In the UK, this led to interim legislation as the Communications Act 2003 was not passed in time, the Electronic Communications (Market Analysis) Regulations 2003, SI 2003/330.

65 The Commission Guidelines were adopted under Article 15 (2) Framework Directive.

66 See Commission Guidelines, p. 5. In addition, the Guidelines address market definition and procedural issues, see no. 72ff. See also Walden, Angel 2005, p. 235ff.


68 See also the case law overview in Commission Guidelines, no. 89ff.

Interconnection Regulation and Contract Law

Where OPTA intended to take measures based on either Article 6.2, 6a.2, 6a.3, 6a.16 or 6a.18 2004 Tw,\(^70\) the extensive preparatory procedure, laid down in paragraph 3.5.6 of the Awb applied. In short, this procedure includes the following steps: (1) OPTA would take a draft measure, which it had to announce in the Dutch Government Gazette to make the draft decision available for inspection; (2) OPTA would consult, where appropriate, on the draft measure with the Dutch Competition Authority (NMa); (3) OPTA would give any party the opportunity to comment on the draft measure within one month after the announcement thereof; and (4) OPTA would publish the results of the consultation procedure (usually on its website). Under the Awb, the extensive preparatory procedure initially was open to anybody (\textit{equivis ex populo}), not just to parties who could show a sufficient interest in the decision at hand. Following the entry into force of the Act on Uniform Preparatory Procedures only interested parties could comment on draft measures.\(^71\)

Furthermore, it should be noted that the Awb provided for a one-month term for making comments, while the Commission Guidelines considered that, 'a period of two months would be reasonable for the public consultation' for decisions related to the existence and designation of undertakings with SMP.\(^72\)

5.3.1.2 The Commission Recommendation
The purpose of the Commission Recommendation was to identify products and services markets in which \textit{ex ante} regulation was warranted. It did not address the scope and extent of \textit{ex ante} regulation, nor was it concerned with the manner in which NRAs could intervene in the RIO process.

A distinction was made between the retail and the wholesale markets (the latter were obviously the most relevant to access and interconnection agreements). The Commission Recommendation provided an insight as to

\(^70\) Which are the following measures respectively: (1) measures concerning access and interconnection; (2) measures in the context of the market definition procedure or the market analysis procedure; (3) measures concerning undertakings designated to have SMP on the market for the minimum set of leased lines; (4) market analysis procedures to determine whether to maintain, amend or withdraw obligations relating to retail markets; and (5) measures concerning undertakings designated to have SMP on the market for the access to or use of public telephone services at a fixed location.


\(^72\) See Commission Guidelines, no. 145.
what criteria were to be applied in identifying markets.\textsuperscript{73} Eleven wholesale markets were identified for further scrutiny.\textsuperscript{74}

Once market definition and market analysis would have led to the appointment of an SMP undertaking, \textit{ex ante} remedies should be applied by the NRA.\textsuperscript{75}

5.3.1.3 Determination of SMP by the NRA  

Through various policy guidelines, NRAs laid down how they would apply the principle of SMP.\textsuperscript{76} The practical value of such guidelines was doubtful. From a legal perspective, they could bind only the NRA, not the market parties.

Under the 1998 Tw, OPTA stipulated that it would present further delineations of scope of SMP.\textsuperscript{77} The relevant geographic market for which an appointment could be made was described for the three products markets as 'the area in which the concerned providers are active on the Dutch market' (Article 6.4 (1) 1998 Tw).\textsuperscript{78} The OPTA Guidelines provided that the market share would be calculated, in principle, based on the turnover of the

---

\textsuperscript{73} See Commission Recommendation, no. (9).

\textsuperscript{74} These wholesale markets are: (1) call origination on the public telephone network provided at a fixed location, (2) call termination on individual public telephone networks provided at a fixed location, (3) transit services in the fixed public telephone network, (4) wholesale unbundled access (including shared access) to metallic loops and sub-loops for the purpose of providing broadband and voice services, (5) wholesale broadband access, (6) wholesale terminating segments of leased lines, (7) wholesale trunk segment of leased lines, (8) access and call origination on public mobile telephone networks, (9) voice call termination on individual mobile networks, (10) the wholesale national market for international roaming on public mobile networks and (11) broadcasting transmission services, to deliver broadcast content to end users.

\textsuperscript{75} Cf. Article 16 Framework Directive.

\textsuperscript{76} In the Netherlands, decisions on SMP must be published in the State Gazette and remained subject to administrative appeal, see, e.g., Article 6a.5 2004 Tw.

\textsuperscript{77} OPTA Guidelines re appointment of significant market power (\textit{Richtsnoeren aanwijzing aanmerkelijke macht op de markt}), Sttrt. 2000, 48, www.opta.nl ('OPTA Guidelines').

\textsuperscript{78} This might well be a restricted part within the Netherlands. As regards the market for fixed and mobile telecommunications jointly the relevant geographical market was the 'national' market, i.e., the territory of the Netherlands (Article 6.4 section 2 1998 Tw). In line with the ONP Framework Directive, the main rule was that any provider, who possessed more than a 25% market share of the relevant product market, was deemed to have SMP on that market (Article 6.4 (3) 1998 Tw). OPTA could decide to appoint a party with SMP if it had a market share of less than 25%. Contrarily, OPTA could also decide not to make an appointment, in spite of the party having a market share of more than 25%.
total undertaking of the provider in comparison with the size of the relevant market. OPTA must base its decision on the four criteria mentioned in Article 6.4 (4) Tw, notably: (1) the ability of the provider to influence market conditions; (2) its turnover in comparison to the total size of the market; (3) its control over the means of access to end-users, its access to financial means; and (4) its experience in the provision of products and services on the market. If a provider had a market share larger than 25%, then it was up to that provider to demonstrate that there was basis to justify divergence from the rule that such a provider be appointed to have SMP.\(^79\)

In line with the Commission Recommendation, the new procedure under the 2004 Tw for the determination and establishment of SMP was more elaborate.\(^80\) The obligation to take the utmost account of the recommendation and the guidelines of the EC was fully implemented.\(^81\) In applying the criteria and before issuing an appointment the NRA must request the advice of the director general of the NMAs.\(^82\) These appointments were given for an indefinite period of time. For example, OPTA yearly evaluated ex officio whether to continue its appointment.

\(^79\) The President of the Rb. Rotterdam held that OPTA should also ex officio investigate actively if there are grounds to avert an SMP appointment in case of a market share that is larger than 25%. In other words: The President did not agree that the burden of evidence to establish that a provider with a market share of larger than 25% lies with that provider. See, President Rb. Rotterdam 23 December 1999, with note by E. Loozen and K.J. Mortelmans, Mediaforum 2000, p. 67-69. Notwithstanding the Court’s provisional judgement, OPTA kept to its Guidelines. See, OPTA 9 November 2000, (Besluit op bezwaar aanwijzing Libertel); see www.opta.nl.

\(^80\) Article 6a.1 (4)ff. 2004 Tw.

\(^81\) This follows form Article 15 (3) Framework Directive. The Commission could define trans-national markets after consultation with the NRAs in accordance with the procedure set forth in Article 22 (3) Framework Directive.

\(^82\) Cf. Article 18 (2) and (3) 2004 Tw. Until 2002, only KPN Telecom (including its affiliates) had been appointed as a party with SMP both on the market for fixed public telecommunications networks and services, OPTA 15 November 2000, Stert. 2000, 223, and the market for mobile public telecommunications services, OPTA 20 October 1999, OPTA/S&C./99/7870; see also www.opta.nl. KPN Telecom had been subjected to the full regime of far-reaching interconnection obligations. These will be discussed later. The appointment of KPN as party deemed to have SMP on the markets for fixed and mobile telecommunications was extended lastly by OPTA in its decision of 10 December 2001; the appointment for the market for public mobile telecommunications in its decision of 9 November 2000. It remains to be seen whether under the new Tw and the new market circumstances, it will be viable for OPTA to maintain its appointment of KPN Telecom as SMP party on the market for mobile public telecommunications services. Both the legal and the market conditions appear to have shifted somewhat away from maintaining KPN Telecom’s position.
In practice, the NRA could put particular emphasis on the review of contract provisions between the TO and OLOs for such specific markets. However, no evidence was found that the NRA in the Netherlands actually did or planned to do so; rather it issued policy guidelines on a case by case basis as to what it required from the TO in this respect.

The procedures for identifying relevant markets in the Netherlands were relegated to chapter 6a 2004 Tw. For the purpose of carrying out the market analysis, OPTA clustered the 18 markets from the Commission Recommendation into five related market areas, notably mobile telephony, broadcasting, leased lines, broadband, and fixed telephony.

The market analysis process was delayed substantively owing to the late implementation of the 2004 Tw, which was needed to give OPTA the necessary powers to collect market data. Furthermore, the Dutch Parliament voted for an amendment to the 2004 Tw, which obliged OPTA to provide detailed reasoning for its regulatory decisions following the market analysis procedures. In practice, this led to extensive questionnaires being used in the data gathering process. These questionnaires have been a considerable administrative burden for the regulated market parties and have led to more delays in the process.

OPTA's first draft decisions were issued on 17 March 2005. The decisions concerned the market for access and call origination on public mobile

---

83 Each market analysis is comprised of three elements: (1) the demarcations of the relevant product market and geographical market, (2) the assessment as to the presence of parties with SMP in the requisite market, (3) the determination of appropriate and proportional obligations to be imposed on parties with SMP.

84 In order to get regular feedback from the regulated market parties regarding how both the approach to and progress with the market analyses are experienced, OPTA set up a 'reference group'. Represented parties were allowed to give OPTA their view on the process side of the market analysis; they were not supposed to comment on the content of OPTA's findings. The five participating market parties (KPN, MCI, Tele-2, T-Mobile, UPC and Versatel) represented the five market clusters mentioned above.

telephone networks (market No 15), and the market for voice call termination on individual mobile networks (market No 16). With respect to the latter market, OPTA concluded – as was expected – that each mobile network operator was to be considered a single supplier on its separate market and thus had SMP over the market for termination over its own network.

OPTA's draft decision imposed upon SMP operators of mobile telephone networks to gradually decrease their call termination tariffs over a period of three years. By July 2008, the call termination tariffs should be cost oriented. OPTA foresaw that end-users would eventually save a minimum of €145m on calls from fixed to mobile networks. OPTA indicated that the draft decisions for the other market clusters would be taken in the middle of May 2005 (covering broadcasting), respectively May/June 2005 (covering leased lines, broadband and fixed telephony). By 1 July 1, 2005, further presentations were held for interested parties and decisions were published subsequently, which will not be further discussed.

Another example in the Netherlands was OPTA's policy on a reasonable offer for local interconnection. The NRA correctly considered its competency on numerous prior regulatory measures. The issue in the Netherlands was that all OLOs connected with the TO through regional access points ('RAPs'), whereas the NRA had fixed low rates for local access points ('LAPs'). The NRA had taken three measures as regards the TO: (1) it wanted the TO to include an offer for LAP access in its RIO, and (2) to apply cost-oriented rates, and it (3) investigated the cost-orientation of the TO to make LAPs suited for OLO access. Based on four policy options advised by N/E/R/A, the Dutch NRA announced its intention to develop a model to warrant cost-orientation with respect to the required conversion of the local switches. It asked OLOs to advise on to what extent they considered minimum purchase obligations of local switches reasonable.

Chapter 4 – which discusses the imposition, maintenance, amendment or withdrawal of obligations under the regulatory framework is relevant to

---

86 Letter from OPTA to market parties of 13 September 2004, concerning the revised schedule for the OPTA Market Analyses (OPTA/EGM/2004/203434).
89 See N/E/R/A report on the desirability and feasibility if an efficiency-improving local interconnection policy, December 2002, published at www.opta.nl.
The powers of the national regulatory authority

access and interconnection contracts. The Commission Guidelines included a possibility to withdraw obligations. But the extent of and conditions for withdrawal of onerous SMP obligations were not discussed in any detail, so the Commission Guidelines did not provide any guidance in this respect.\

In the UK, the determination of BT as an SMP undertaking led to a host of new products being requested from it by OLOs. As a result, decisions were taken in respect of, inter alia, flat rate interconnection access call origination ('FRIACO') and asynchronous transfer mode ('ATM') interconnection.\

Under the NRF, the Office for Telecommunications ('OFTEL'), later named the Office for Communications ('OFCOM'), published guidelines in terms of assessing access obligations for SMP undertakings. These guidelines not only complemented the Commission Guidelines, but also contained additional criteria that OFCOM could assess and decided it would undertake a market analysis before proposing to impose conditions on undertakings. For instance, the OFCOM Guidelines specified what would happen in a situation where an OLO would demand a new service, or where new products or services would first become available owing to an innovation introduced by a SMP undertaking. OFCOM also held a consultation on the topic. The process of market analysis and definition

90 It merely reiterated the ONP obligations applying to SMP providers. Cf Commission Guidelines, no. 109.

91 Director General of Telecommunications ('DGT'), Determination of a dispute between BT and MCI Worldcom concerning the provision of a Flat Rate Internet Access Call Origination product (2000) and follow-up decision in 2001; and DGT, Direction to resolve a dispute between BT, Energis and Thus concerning xDSL interconnection at the ATM switch (2002). For analysis of these decisions, see chapter 8 and Walden, Angel 2005, p. 228ff. For interesting look at OFTEL regulatory intervention before 2003, see Stern 2004.

92 See, e.g., OFTEL, Market review guidelines: criteria for the assessment of significant market power (2002) and OFTEL, Imposing access obligations under the new EU Directives (2002).

93 See also, OFTEL, Regulatory option appraisal guidelines: assessing the impact of policy proposals (2002). See also Stern 2004 for criticism on the role OFTEL played.

94 See Walden, Angel 2005, pp. 244ff. for examples on the manner in which these were worked out, including access to information protected by intellectual property rights, the scope of the TO’s terms and conditions, imposition of non-discrimination, transparency and accounting separation obligations. See also Cave 2004/2 on OFCOM’s role and Duvernoy, Desmedt 2005.

95 OFCOM, Undue Discrimination by SMP Providers, 30 June 2005.
Interconnection Regulation and Contract Law

was started soon after the publication of the Commission Recommendation. Walden & Angel note that OFCOM defined national markets more narrowly than recommended in the Commission Recommendation.\(^\text{96}\)

As of 2005, OFTEL/OFCOM had made 46 notifications.\(^\text{97}\) According to a survey, OFCOM/OFTEL conducted over 25 investigations for the wholesale markets from the period November 2003 to October 2004.\(^\text{98}\)

---

96 See Director General of Telecommunications ('DGT'), Wholesale international services markets, identification and analysis of market and Determination of market power, final explanatory statement and notification (2003). The example given is the market for wholesale international call services, where OFCOM distinguished 242 markets (each country), 117 of which were deemed competitive; Walden, Angel 2005, p. 247-248.

97 In general, where it found SMP, the remedies imposed were in line with the Recommendation 2003 with particular focus on transparency obligations, obligations to provide access to network facilities and cost accounting and accounting separation obligations.

98 See Baker & McKenzie, P Strivens, Finding of OFCOM/OFTEL, Market Reviews - Wholesale markets, internal B&K document. Strivens found the following: (A) Final Statement 3 October 2003: (1) wholesale access and call origination on mobile telephone networks (no single firm, no collective dominance, but clearly strong barriers to entry); (B) Final Statement 18 November 2003: (2) wholesale international call services - competitive routes (123) (no single firm had SMP); (3) wholesale international call services - routes for which BT has SMP (108); (4) wholesale international call services - routes for which Cable & Wireless ('C&W') has SMP (4); (C) Final Statement 28 November 2003: (5) wholesale residential analogue exchange line services; (6) wholesale residential integrated digital services network ('ISDN') 2 exchange line services; (7) wholesale business analogue exchange line services; (8) wholesale business ISDN2 exchange line services; (9) wholesale ISDN30 exchange line services; (10) call origination on fixed public narrowband networks; (11) local-tandem conveyance and transit on fixed public narrowband networks; (12) inter-tandem conveyance and transit on fixed public narrowband networks; (13) single transit on fixed public narrowband networks; (14) interconnection circuits; (all BT considered to have SMP); (15) wholesale unmetered narrowband Internet termination services (no single firm had SMP); (16) fixed geographic call termination (all fixed public electronic communications networks ('PECNS') listed in the statement were considered to have SMP in the provision of their own network fixed geographic termination services); (D) Final Statement 13 May 2004: (17) asymmetric broadband origination; (18) broadband conveyance (both BT); (E) Final Statement 1 June 2004: (19) wholesale mobile voice call termination (where OFCOM considered that each mobile network operator had SMP in the market for the provision of wholesale voice call termination on its own network; (F) Final Statement 24 June 2004: (20) wholesale low bandwidth symmetric broadband origination (up to and including 8Mbit/s); (21) wholesale high bandwidth symmetric broadband origination (above 8Mbit/s up to and including 155Mbit/s) (both BT); (22) wholesale very high bandwidth symmetric broadband origination (above 155Mbit/s) (no single firm); (23) wholesale alternative interface symmetric broadband origination at all bandwidths; (24) wholesale trunk segments at all bandwidths (including Kingston
In the wholesale market for mobile voice call termination, OFCOM established SMP for all operators, including new entrants.\(^9\)

Since this book is concerned less with the procedure of establishing SMP, and more with the consequences attached thereto for the secondary interconnection rule, no further analysis will be made as to whether the tools were sufficient and appropriate. The next paragraph discusses powers of the NRA as relevant to access and interconnection in more detail.

### 5.4 Powers of the NRA at the national level

In the Netherlands, the powers of the NRA were laid down in the 1998 Tw restrictively. The NRA was competent to intervene only in those instances where the law had armed it with certain competencies. The rather strict system of the 1998 Tw was largely maintained in the 2004 Tw and it was expected that disputes regarding the NRA's competency would generally continue.\(^100\)

This was contrasted by the UK approach wherein both the Telecommunications (Interconnection) Regulations 1997 and the Communications Act 2003 largely replicated the provisions of the Interconnection Directive and the Access Directive, respectively.\(^101\) In the German situation where the NRA is the Regulierungsbehörde für Telekommunikation und Post ("RegTP"), established on 1 January 1998, it appears to have powers more similar to OPTA.\(^102\)

---

\(^9\) New entrant Hutchison 3G appealed against this decision before the Competition Appeal Tribunal. The point was made that even if it would be accepted that a mobile operator would have a monopoly on its own customers, then the question still arose who would benefit if the interconnecting operators would fail to agree. This remained a controversial issue under the NRF. See also, e.g., Commission Decision 17 May 2005, C (2005) 1442 final (Withdrawal of notified draft measures, Case DE/2005/0144: Call termination on individual public telephone networks provided at a fixed location).

\(^100\) Cf. Ottow 2002.

\(^101\) See also Article 6.4 Communications Act which provides: "OFCOM must, from time to time, publish a statement setting out how they propose, during the period for which the statement is made, to secure that regulation by OFCOM does not involve the imposition or maintenance of unnecessary burdens."

\(^102\) Cf. Wisssmann 2003, p. 995ff. and 1399ff. on the competencies of RegTP when interconnection negotiations between the parties fail. See § 35 of the (Continued)
5.4.1 Competencies of the NRA after implementation of the ONP Framework

Initially, OPTA's competencies were set forth in the Act containing rules regarding the establishment of an Independent Post and Telecommunications Authority (Wet Onafhankelijke Post- en Telecommunicatieautoriteit, 'OPTA Wet').

Under Article 15.3 1998 Tw, the NRA was made responsible for supervising the compliance of market players with all rules laid down in or by way of the 1998 Tw, save with respect to those tasks explicitly retained by the Ministry. Originally, matters that were not explicitly covered in Article 15 of the OPTA Wet were beyond its reach.

The NRA's competencies were not uncontested. For instance, under the 1998 Tw, lengthy debates emerged whether the primary competence to decide on disputes regarding cable access television ('CATV') providers should lie with either the Nma or OPTA. It was finally decided that the competency to decide in such access disputes lies with both authorities. OPTA should be on the forefront in the settlement of such disputes. As a consequence, in so far as OPTA's competency did not follow from the Tw, the Nma could well settle the dispute according to Articles 6 and 24 Mw.

This problem apparently did not occur in the UK, where the government had implemented the provisions regarding the NRA's competencies largely

---

Netzzugangsverordnung ('NZV'). There is a difference in that RegTP works with 'Decision Chambers' who have been organized in a manner to effectively take decisions when regulatory intervention is required. These chambers need not be further discussed here. For a description, see, e.g., Rädler, Elspaß 2004, p. 418ff.

OPTA wet. See also Fleury, Smals 1997.

The latter included the supervision of provisions relating to the legal interception of telecommunications, the adoption of security measures in crises and exceptional situations, the charging of a market player with universal service obligations, and the regulation of broadcasting transmitters. Furthermore, the Ministry retained the responsibility for frequency management, which includes the grant of licences involving the use of frequencies.

Article 8.7 1998 Tw provided that in the event of a dispute between the provider of a broadcasting network and the provider of a programme regarding the question of access by the programme maker to the network in question, OPTA could issue a binding decision at the request of the programme maker. In principle, the party who provides or operates the broadcasting network must respect the decision. OPTA and the NMAs have also issued guidelines for the decision making process they will apply in the settlement of such disputes.
The powers of the national regulatory authority

in accordance with the provisions in the relevant EC Directives. Contrary to, for instance, OFCOM in the UK, OPTA could not simply initiate any action against anti-competitive behaviour by the TO. In the Netherlands, such action would have to be initiated by the NMa.

In the UK, under the ONP framework, the Director General of Telecommunications (‘DGT’) had powers under section 16 of the Telecommunications Act 1984 (‘1984 TA’) to make an order requiring compliance with licence conditions. Failure to comply with the terms of this order could be acted upon in civil proceedings under section 18 of the 1984 TA by any person who had suffered loss or damage. Section 18 also bestowed on the DGT the power to take civil proceedings as necessary to ensure compliance with his order. Section 50(3) 1984 TA allowed the DGT concurrent jurisdiction with the Director General of Fair Trading (‘DGFT’) to act under the Competition Act 1998 in relation to the telecommunications industry. This gave the DGT a limited power to impose penalties under section 36 of the Competition Act 1998 for abuse of a dominant position or the making of anticompetitive agreements. Regulations under the Competition Act 1998 required the DGT to consult with the DGFT before reaching any decision that the Competition Act obligations were breached and imposing any fine.

By way of comparison, in Germany, RegTP was the prime competent authority to deal with access and interconnection disputes, and worked according to a ‘two-step’ approach to proceedings (first, an investigation by the ruling chamber (Beschlusskammer), then, a public hearing). However, in the resolution of interconnection disputes, it transpired that RegTP was not clearly empowered to set the conditions for interconnection under the TKG 1996, according to a judgement of the Appellate Administrative Court of Münster.

---

109 For an extensive description, see Andenas, Zlepntig 2004, p. 131ff. Compare this with the two-step approach applied by OFCOM in the UK under the NRE, p. 234ff.
Another problem that arose specifically in Germany, was that due to the extensive administrative confidentiality requirements of the proceedings before the NRA, many documents submitted could not be submitted to the appellate courts, thus putting the parties (notably the OLO) at a disadvantage.111

5.4.2 Competencies of the NRA after implementation of the NRF

Initially, the bill for the 2004 Tw appeared again to limit the NRA's right to intervene at its own initiative only in the circumstances described in the law.112 The provision was dropped subsequently, thus underlining that the NRA's right to intervene at its own discretion, was broadened. Otherwise, the NRA's competencies were not really enforced.113

In the UK, the main change resulting from the implementation of the Access Directive was the formation of OFCOM, commencing operations in December 2003. Unlike the Netherlands, the UK was more faithful to the implementation of the Access Directive.114 OFCOM often imposed obligations on SMP undertakings and, in addition to requiring that third parties must be provided with access as they reasonably requested, OFCOM also could order them to provide network access 'as OFCOM may direct'.115 However, OFCOM's position on dispute settlement may be different from OPTA and from the Recitals to the Framework Directive.116 Like in the Netherlands, OFCOM would not review a dispute (such as with respect to contract negotiations) where the parties had not used their best efforts to reach a solution through commercial negotiations.117 However, OFCOM

112 Article 12.3 draft 2004 Tw.
113 Cf. Articles 6.1 (3), 6.2 (1), 6.2 (2) and 12.2 (1) Tw.
115 See infra, paragraph 5.3.2.2, for recent OFCOM instructions. Cf. Section 73 2003 CA which provided that OFCOM could impose 'access related conditions on network and service providers' alike. Moreover, Section 74 2003 CA appears to be as broad, where it stipulated specific types of access conditions which could be imposed, including that OFCOM could: 'require the interconnection of networks.' See also generally on the duties of OFCOM, which are broader than those bestowed on OPTA: Lloyd, Mellor 2003, p. 55ff. and p. 105-106.
116 See OFCOM, Guidelines - handling of competition complaints, and complaints and disputes about breaches of conditions imposed under the EU Directives; and the older version with Responses to the consultation and Ofcom's views, July 2004, a discussed in Dick 2005, p. 78.
117 Only if negotiations would be inappropriate, for instance, because it involves (alleged) breach of an ex ante condition, would it take up the complaint. See, for the Netherlands, Article 6.2 (1) Tw.
The powers of the national regulatory authority
distinguished between the resolution of disputes and the investigation of complaints. A dispute was considered the failure of commercial negotiations about matters falling under the scope of Section 185 2003 CA. As disputes were referred to OFCOM it stated it would only hear disputes where the complainants submit clear information about the scope of the dispute, including documentary evidence on the commercial negotiations and a statement by a company executive that the company has used its best endeavours to resolve the dispute through commercial negotiation. OFCOM has also stated it would be reluctant to resolve disputes, unless one party was dominant and/or failure to agree would result in detriment to competition or consumers, thus signalling it was bent more on letting the parties try to find a commercial solution under the primary interconnection rule. OFCOM would also specify what it needs from the parties to a dispute before accepting a case (for instance, evidence that commercial negotiations occurred).

Judicial review in appeal is also somewhat different from the Netherlands, especially where it regards the competent authority: the Competition Appeal Tribunal ("CAT"), although a point of law could be appealed before the Court of Appeal or the Court of Session.

5.4.3 Status of NRA decision and principles applied

The NRA’s decisions were deemed administrative judicial decisions within the meaning of the administrative law (in the Netherlands, the Awb). As such, the NRA must adhere to statutory regulation, common law and to the principles of adequate administrative law in its decision-making.

The principles will be discussed briefly under Dutch law as they are relevant both for assessing the manner in which the NRA intervened in access and interconnection disputes and the scope the decisions as regards the appeal. The principles can be distinguished in: (1) procedural principles; (2) material

---

120 In the Netherlands, the appellate court would examine whether an administrative authority took its decision in accordance with the law and the principles, cf. Article 8:77 (2) Awb. The test would be carried out marginally only, as the appellate court was not competent to judge whether the administrative authority issued, e.g., an efficient decision. Since the appellate process changed under the 2004 Tw, it was uncertain whether the principle of Article 8:77 Awb also applied to the new appellate court. See also Polak 2000 on the material decision making of administrative agencies.
principles, and (3) general principles relevant to access and interconnection agreements.

5.4.3.1 Procedural principles
The NRA must respond to a request of a party to take an order or administrative decision. Absent a term provided by law, the NRA was obligated to take a decision within a reasonable period. The NRA must closely examine the circumstances prior to making any decision. This meant the NRA had to engage in intensive fact-finding. The law required that the NRA's motivation be known, which meant in practice that the NRA should specify thoroughly on which grounds a decision was made. The NRA was also required to publish its decision. A decision would become enforceable only from the moment it was made public.

Thus, the principles were devised to warrant adequate decision-making by the NRA and were in accordance with the principles formulated at the EC level.

Notwithstanding that the statutory requirements imposed on NRA decision making, in practice, OPTA's motivation sometimes gave rise to criticism. Especially where the Dutch NRA applied enforcement measures, the choice for such measures was hardly explained.

121 See Ten Berge 1997, p. 42. See also Damen et al. 2003, paragraph 8.2.4ff. On the European administrative law aspects, see Jans et al. 2002.
122 Articles 1:3 (3), 4:13 and 6:2 Awb. If the administrative authority would decide not to issue a decision, it would have to communicate this through a special order.
123 Article 4:13 Awb. See, supra, paragraph 5.2.5.3, on the term for decision-making prescribed by the Framework Directive, which was implemented into national law.
124 Cf. Article 3:2 Awb. NRAs would have various competencies to gather facts, e.g., including filing of court documents and the conduct of hearings, see Articles 4:7 and 4:8 Awb.
125 See, in particular Chapter 3.7 Awb. The CBB confirmed the importance of a thoroughly motivated decision in its judgement of 3 December 2003, TJ 201 (UPC/OPT-A).
126 Cf. Chapter 3.6 Awb.
128 This led to one of eleven recommendations made by the institute for information law in Amsterdam, which, in Ottow et al., p. 60, recommends that the Dutch NRA improve its motivation of choice for enforcement measures. The Dutch NRA later published guidelines on enforcement measures pursuant to Article 15.4 Tw, see www.opta.nl.
The powers of the national regulatory authority

In 2005, the NRA published rules of procedure on dispute resolution and enforcement, in order to improve the handling of disputes. 129

5.4.3.2 Material principles
The NRA had to make its decision in accordance with statutory regulations. 130 The Commission Guidelines and the Commission Recommendation were not statutory regulations, but it was clear from the manner in which the NRAs applied them, that these were by and large considered as such.

An important added principle was that the competency awarded to the NRA should never be applied to pursue another regulatory objective. 131

Furthermore, the contents of a decision should comply with several principles, which were very relevant to interconnection agreements, such as the principle of equality, which simply provided that all equal cases must be treated equally. 132

The principle of confidence meant that parties could reasonably rely on expectations raised by an NRA (for instance through the issuance of guidelines). This principle was closely connected with the principle of legal certainty, which required an NRA to conduct its business based on its official guidelines in order not to cause legal uncertainty.

The most relevant principle was that the NRA must always weigh the different interests of the parties proportionally: the adverse consequences of a decision of interested parties must always be in proportion with the purpose of the decision. 133

129 Cf. Polak 2000. See OPTA, Procedural rules regarding dispute resolution and enforcement (Procedureregeling geschillen en handhaving OPTA), March 21, 2005, www.opta.nl. In Germany, RegTP works on the basis of the German Administrative Procedure Act (VwVfG), according to the TKG 2004 § § 73-79, there are three types of procedures, which are described in detail in Wissmann 2003, p. 1642ff.


131 This principle is also referred to as the prohibition of détournement de pouvoir, see Article 3:3 Awb.

132 Cf. e.g., OPTA, 29 May 2003, OPTA/IBT/2003/201727 (Tiscali/KPN Telecom), in which it applied principles used in prior decisions, specifically referring to these decisions.

133 See, for a reference to this principle: e.g., OPTA 29 June 2001, OPTA/G.10.01/2001/201633 no. 51, (XOIP/KPN Telecom en KPN Mobile); OPTA 12 November 2001, OPTA/IBT/2001/202834, no. 70 (BabyXL/KPN). Cf. this principle with the standards RegTP must observe in Germany, in particular that it must take into account the end-user interest, but, also the 'entrepreneurial freedom of each carrier in relation to the configuration of its own network', Wissmann 2003, p. 1401.
Interconnection Regulation and Contract Law

Notably, in deciding on access and interconnection, the NRA also often applied or referred to ‘reasonableness’ in the context of disputes surrounding access requests. This was a logical consequence of how the law was drafted and did not imply that the NRA felt it was coerced to apply its own notion of reasonableness. In one decision the NRA stated explicitly:

"With a view thereto the [NRA] considers the principle of reasonableness without a doubt a norm of administrative law which, moreover, requires a consideration under administrative law. With a view to the interests of promoting durable competition on the telecommunications market and the protection of end-users, the [NRA] as a public administrative body that needs to supervise compliance with the Tu, at least in respect of mobile interconnection rates, can not, in all reasonableness, consider only what is reasonable and fair between two parties."134

This means then that the principle of reasonableness applied by the NRA is broader in scope than the principle as it would be applied by a civil court, since it felt bound to take into account the regulatory objectives of the NRA. A civil court would base itself on the law and on precedents in case law following contract conflicts. However, the court would be inclined to look more closely at the specifics of the situation and the conflict between two parties (even though it could be expected to have an eye for the regulatory objectives as well). Contrary to the NRA, the court would be less inclined to apply reasonableness as an overriding broad notion.

5.4.3.3 General principles

Finally, the NRA would have to apply general principles of impartiality and confidentiality. As regards the former, an administrative authority must act without prejudice and could not act in case of a conflict of interests.135 A conflict of interest would be difficult to sustain by a TO, and it is unknown whether this has actually occurred.

As regards the latter, administrative authorities must observe secrecy regarding confidential data.136 This principle was always applied strictly and enabled the parties to a dispute to prevent others from taking note of the content of the evidence submitted as part of the proceedings.

134 Cf. OPTA 19 July 2002, OPTA/JUZ./2002/201770, OPTA/JUZ./2002/201772 (KPN Mobile/O2 and others), which considered the mobile terminating access (MTA) rates applied by non-SMP mobile operators. See also Chapter 8.

135 Cf. Article 2:4 Awb.

136 Article 2:5 Awb.
5.4.4 Enforcement and appeal

**Enforcement measures**
The Tw afforded two types of enforcement measures to the NRA: (1) administrative coercion, Article 15.2 Tw; and (2) the imposition of an administrative penalty, after the NRA observed that a party did not comply with an administrative order issued by it. This meant that, contrary to civil courts (at least in the Netherlands), the NRA was not allowed by law to immediately issue a compliance order against the TO with respect to access and interconnection on pain of a simultaneous cognisance to encourage the TO to comply.

Should a provider fail to comply with the obligations laid down in the 2004 Tw, the NRA could coerce that provider with an administrative fine. The NRA could impose financial fines of up to €450,000. This amount did not apply to providers that failed to live up to their obligations, which the NRA required them to fulfil as providers with SMP. In such case, the NRA had the authority to impose fines of up to 10% of the relevant turnover of the provider in the Netherlands.

On 7 November 2004, OPTA published guidelines regarding its authority to impose fines.

---

137 Also note that in terms of investigation, the NRA and the Minister of Economic Affairs were authorized to demand information from anyone at any time in so far as this was reasonably necessary in fulfilling their tasks. Anyone from whom such information was demanded was obliged to provide without delay the information and the further cooperation that could be reasonably demanded, but within the time limit stipulated by the NRA or the Minister; Article 18.7 2004 Tw.

138 See on the use the NRA made of enforcement measures in the Netherlands: Ottow et al. 2004, p. 61 ff. regarding pain of recognition and penalties. A civil court, for instance, could order the TO to comply with interconnection obligations or to enter into an access agreement, while simultaneously issuing a substantial penalty if the event the TO would not comply.

139 Or, if the non-compliance concerned radio spectrum issues: the Minister of Economic Affairs.

140 Art 15.4 2004 Tw.

141 The amount of the fine would be geared to the gravity, the duration of the violation and the extent to which the offender could be deemed at fault.

The NRA could also prohibit a provider from offering its ECNs or ECS for a certain period, if that provider had repeatedly and severely failed to comply with the applicable regulations, and the aforementioned measures of administrative coercion or financial fines failed.\textsuperscript{133}

**Appeal**

Under the 1998 Tw, there existed no less than three object and appeal possibilities: with the NRA itself, with the administrative chamber of the court of Rotterdam and in last instance, with the CBB. This made the dispute resolution process cumbersome, as, in practice, all of the NRA's decisions were appealed, either by the TO, the OLO, or the NRA.\textsuperscript{144}

The 2004 Tw simplified the procedure. Pursuant to Article 17.1 (1) 2004 Tw all disputes related to access and interconnection were now subject to appeal only once, that is, before the CBB.\textsuperscript{145} This provided for one appellate instance, just as a case brought before the civil courts would be subject to appeal in one instance, before it could be referred to the Supreme Court.

The question arising in respect of the CBB was the same as that posed in this book in respect of the NRA: was it in a position to apply the principles of contract law, where necessary? The CBB was not a civil court, but an appellate board that would test whether the NRA had satisfactorily met the requirements for decision making under the Awb. By way of comparison, a court order (at least in the Netherlands, to enter into an agreement or perform obligations, for instance) normally would be immediately enforceable and accompanied by a penalty.\textsuperscript{146}

### 5.5 Concurring competencies

The NRA and the market players faced the problem that competencies to decide on access and interconnection issues sometime overlapped.\textsuperscript{147}

\begin{flushright}
\small
\textsuperscript{133} Art 15.2a (2) 2004 Tw: To date, the NRA did not apply this measure.
\textsuperscript{144} This was rather exceptional in the EC, with the exception of Denmark, Dommering \textit{et al.} 2003, p. 36.
\textsuperscript{145} Article 17.1 (1) refers to Articles 6, 6A and 6B 2004 Tw that deal with access and interconnection, and the designation of SMP. In other cases, the administrative chamber of the Court Rotterdam will be competent to hear the case, Article 17.1 (2) 2004 Tw.
\textsuperscript{146} Interestingly, Article 21 of the TO's model interconnection agreement (MIA) contained a clause dealing with the issue of binding force of a NRA decision from a contractual perspective. See Chapter 7 paragraph 7.4.
\textsuperscript{147} Re on the tension this may create, see Ottow 1997. See on Germany, Wissmann 2003, p. 1685ff.
\end{flushright}
The powers of the national regulatory authority

Once a complaint is filed with an administrative authority or court, and the court considers that it is competent to hear the case, it is unlikely that the complainant could also adjudicate the civil court, except to obtain a decision on additional or different matters. Besides, there is a lack of clarity as regards the question whether administrative and civil courts should take note of each other's decisions.

It is therefore important for an OLO to decide beforehand what instance it will address in the event of a dispute and which issues will be submitted. In light of the extensive competencies reserved for the NRA (set forth above) the key consideration for the complainant OLO will be its capability to inform a civil court, which may have somewhat less clearly delineated competencies to investigate claims as regards interconnection negotiations or performance.

The NRA's competencies overlap with those of other administrative bodies and even with government bodies, notably: (1) the Ministry, (2) the NMa, and (3) the Dutch Broadcasting Committee (Commissariaat voor de Media, 'CvdM'). Although no specific rules were laid down to avoid competency conflicts between the Authorities, both in the OPTA wet, the 1998 and the 2004 Tw. The Dutch Competition Act (Mededingingswet, 'Mw') provided a basis for cooperation between OPTA and the NMa, whose respective

---

148 Cf. Grosheide 2001/2, p. 95, Houben 2005, p. 320-321. Only if the administrative authority refuses to hear the case, can the complainant also adjudicate the civil court. The same applies vice versa. The German TKG 2004 clarified that the competition authorities were competent on matters not specifically reserved for the German NRA under the TKG 2004, cf. § 2 (3) TKG 2004. It did not provide similarly as regards the civil courts, although left this implicit in § 133 (1) TKG 2004 ('(...) soweit dies gesetzlich nicht anders geregelt ist').

149 Houben 2005, p. 320. For Germany, see Wissmann 2003, p. 1013ff. Cf. with Article 70 Dutch Code on Civil Procedure (Wetboek van Burgerlijke Rechtsvordering, 'Rv').

150 Overlap also occurred with the Ministry in the area of numbering and with the Privacy Authority in the area of personal data protection. These would unlikely create conflicts and are not directly relevant for this book, so this concurrence of competencies will not be further discussed. On 12 July 2005, OPTA and the Dutch Privacy Authority (College bescherming persoonsgegevens, 'CBP') entered into a cooperation protocol, 13 July 2005, Sert. 2005, 133, p. 127.

151 Article 24 OPTA wet stipulated that OPTA may under certain (confidentiality) conditions supply other supervisory authorities with information and data concerning a (telecommunications) organisation.

152 Article 18.3 1998 Tw provided that OPTA first had to seek advice from the Nma before ruling that a telecommunications organisation had SMP. Cf. § 2 (3)-(5) TKG 2004.
competencies should in any event gain firmer delineation in actual practice.\textsuperscript{153}

### 5.5.1 The NRA and the NMa

The NMa remained competent to decide on matters where competition was restricted, but it must take into account the competencies awarded to the NRA and the Ministry under the Tw.\textsuperscript{154} This meant that the NMa did not have the right to decide on the issues that were reserved exclusively for the NRA as described above, even as regards matters of general competition law.\textsuperscript{155}

According to Article 18.2 2004 Tw the NMa and the NRA must coordinate their efforts closely. To that effect, they entered into a cooperation protocol, which eventually was intended to pave the way towards partial or full integration of the two bodies.\textsuperscript{156}

For the purposes of this research, it is important to ask whether the NMa could be adjudicated in the event the TO would refuse to either negotiate interconnection agreements (the primary interconnection rule), or to provide access against reasonable terms, for instance, if the TO would impose unduly burdensome obligations on the OLO, or charge excessively (the secondary interconnection rule).\textsuperscript{157} This is first of all, a question of the absolute delineation of formal competencies. But, more importantly, it concerns the dichotomy between general competition law and sector-

\textsuperscript{153} Article 91 (2) Mw generally empowers the NMa to exchange information with OPTA, if necessary with regard to special cases, provided certain confidentiality provisions are met. On January 10, 2006, the NMa in a press release announced its intention to closely monitor the media and communications markets in the Netherlands, see www.nmanet.nl, news and publications.

\textsuperscript{154} See on this concurrence: Van Marissing 2004, especially the discussion on several important decisions for the telecommunications sector. For an analysis of the convergence and divergence between sector-specific and general competition law regulatory intervention, see Dommering \textit{et al.} 2001/3.

\textsuperscript{155} For a discussion of the overlap of competencies between the NMa and the civil courts, see Grosheide 2001/2.

\textsuperscript{156} Cooperation Protocol between OPTA and NMa (\textit{Samenwerkingsprotocol OPTA/NMa}), 24 June 2004 www.opta.nl; a consultation document was issued on the same date. See also Cooperation Protocol between OPTA and NMa (\textit{Samenwerkingsprotocol OPTA/NMa}), 4 January 1999, \textit{Stert.} 1999, 2, p. 5. See also Andenas, Zleptmig 2004, p. 169ff.

\textsuperscript{157} The ERG made an analysis of the competition issues concerning the telecommunications market, which will be discussed, \textit{infra} paragraph 5.5.4. The ERG did not consider in detail whether the national Competition Agencies would be well equipped to deal with these matters.
The powers of the national regulatory authority

specific regulation and it is therefore a matter of principle as to how to approach the electronic communications market.\textsuperscript{158}

It would indeed require further investigation to see whether the NMa would be competent and offer the right remedies in the event of an OLO filing a complaint against an unwilling TO. Even without very thorough analysis, it can be said that, \textit{prima facie}, it is difficult to see that the NMa would be competent to decide in the event of an absolute refusal (an alleged breach of the primary interconnection rule). However suitable non-price issues (including the denial to interconnection at the termination level) might be for NMa consideration, the matter was explicitly reserved for the NRA, so there would be no competency for the NMa in that field.

However, the law offers the competition authorities adequate remedies to deal with excessive pricing (and possibly, unreasonable demands, both of which are governed by the secondary interconnection rule).

Consequently, it is difficult to see why the NMa would be incompetent to, for instance, apply ONP principles in disputes between the TO and OLOs.\textsuperscript{159} In disputes between OLOs on contract formation, where there is no SMP, the competencies of the NMa would have to be specifically created.\textsuperscript{160}

Besides, a party may adjudicate either the NMa or the civil courts when it wishes to enforce provision of the Mw. In sum, for the reasons set forth in Chapter 6, it would make less sense to have the NMa decide on the refusal of a TO to enter into an agreement, or otherwise put: breach of the statutory duty to negotiate, as these are matters of statutory and contract law.

5.5.2 The NRA and the CvdM

Since the CvdM was competent to supervise the compliance of broadcasters with the "must carry" obligations, there was some overlap as to the competencies of the NRA. Again the 2004 Tw - just like the 1998 Tw, foresaw that there would be close cooperation between the two bodies. However, none of this emerged so far, although perhaps, in light of OPTA's market analyses on the broadcasting markets, this might be forthcoming.


\textsuperscript{159} Cf. Houben 2005, p. 320.

\textsuperscript{160} For a comparison of the concurring competencies of the NRA and the competition agency under the German legislation, see Piepenbrock, Schuster 2002. Cf. also § 123 TKG 2004.
5.5.3 The NRA and the civil courts

A party that brings a conflict under an access or interconnection agreement, whether regarding the performance, or the tariffs, could consider this an ordinary contract law matter.

A court would never be able to intervene 'on its own initiative', since the court has no role to play as regards the pursuit of a policy; nor would the court be competent to lay down technical or operational conditions, except at the specific request of one of the parties (and then, a court would be likely to consult a court-appointed expert first).

Since the NRA was competent in many areas as regards access and interconnection, a tension on the level of procedural competency by no means was a theoretical possibility, as was illustrated in the Netherlands by several procedures before OPTA and the court (Rotterdam).\[161\] So far, neither OPTA nor the courts attempted to delineate their competencies, or to create clarity as to what (part of a) complaint should be filed before what instance.

For the purpose of this Chapter, it will suffice to look into the decisions for two reasons: (1) to see what the court and the NRA have stated with respect to its competence to decide on access and interconnection disputes, and (2) to describe what contract law matters have been brought before the civil courts so far.

5.5.3.1 Overlapping competencies?

An interconnection agreement is a mixed agreement\[162\]: (1) it is a civil law agreement between private undertakings, (2) it is an agreement governed to a large extent by administrative law considerations as a result of the ONP framework and the NRF. It is not that uncommon that the competencies of the civil and the administrative courts overlap to some extent.

---

161 These decisions will be discussed in Chapter 8. See, for instance, President Rb. Rotterdam, 18 February 1998, MediaForum 1998/5, no. 28, Computerrecht 1998/2, p. 89 (Versatel/OPTA); President Rb. Rotterdam, 25 February 1999, Computerrecht 1999/2, p. 78 (Energis/KPN Telecom); Rb. Rotterdam, 21 December 2000, 138043/HAA ZA 00-1088 (Energis/KPN Telecom); Rb. Rotterdam, 29 November 2001, 156783/HAA ZA 01-1308 CLEC Netherlands (BabyXL Broadband/DSL/KPN Telecom); President Rb. Rotterdam, 19 February 2002, VTELEC 02/327-SIMO (KPN Telecom/OPTA); President Rb. The Hague, 18 March 2002, KG 02/248 (BT Ignite/KPN Telecom); President Rb. Rotterdam 14 May 2002, 173281/KG ZA 02-284 (Energis/KPN Telecom); Rb. Rotterdam 23 May 2002, 161233/HAA ZA 01-2032 (BT Ignite/KPN Telecom).

The powers of the national regulatory authority

Neither the ONP framework nor the NRh referred to the role to be played by the civil courts, and this led to lack of clarity in practice regarding the competencies of the NRA and the civil courts. This can be demonstrated by reference to a few cases after a few preliminary observations are made.

First, no cases have been published where the civil court was asked specifically to grant a remedy in the contract formation process. Rather, conflicts ensued in the contract performance phase, where there was a grey area between strict performance questions and tariff conflicts.

Besides, there is no all-encompassing literature on the timing of court decisions in comparison to the statutory terms of NRA decision-making. In the *BabyXL* decision, the court Rotterdam delineated the competence of the NRA in comparison with civil courts, whilst providing the following regarding its competence in access and interconnection agreements conflicts:

"This specific competence of OPTA and the ensuing judicial process which is covered by guarantees result in the civil courts - except in exceptional circumstances - having to refrain from an independent assessment as to whether obligations in connection with access and interconnection, or the manner in which these are performed, contravene the provisions of the Telecommunications Act or related decrees. However, this does not conflict with the court's competence under Article 42 RO, but concerns the issue whether the claim can be awarded. (...) Article 6.9 in connection with Article 6.3, section 2, Tw, does not afford OPTA the right to do more than determine the rules that will apply between the parties to resolve the disputes mentioned. Not included in its competence is the sentencing of a party for undue payment or unlawful acts, as is currently claimed (...). (And the law does not provide for the enforcement of such decisions by OPTA). The Algemene wet bestuursrechtnor the Telecommunicatiwet provide for proceedings whereby [the plaintiff] can obtain the same decision, or a decision with by nature the same effect, as it is currently claiming."

---

163 Cf. Ottow et al. 2004, who deals with the NRA only. The common view among telecommunication experts was that the lead-time for courts would be (significantly) longer than with NRAs in case they would be adjudicated by OLOs. See also Andenas, Zleptneg 2004, p. 14-15.

164 Article 42 Act on Judicial Organisation ('Wet op de Rechterlijke Organisatie, 'Wet RO') and Article 43 Wet RO deal with absolute competence. Article 42 Wet RO provides that the civil court shall hear all civil law matters - which includes contract law matters - that the law has not reserved for other bodies. Conversely, Article 43 Wet RO Act provides that the administrative courts shall hear all administrative law matters, which could include those matters concerning NRA policies and decisions on access and interconnection that have been awarded to it.

In short, the court acknowledged it was, in principle, competent to hear matters involving contractual performance aspects of access and interconnection.

The court noted that there were matters for which the Tw did not create a competency for the NRA. Indeed, the NRA did not always consider itself competent to rule on performance of interconnection agreements conflicts. There are cases in which the NRA denied the complainant's claim when it considered this to constitute a strict contract performance issue. There are also a few decisions, in which the NRA did order the TO comply with a requirement pursuant to an interconnection agreement, but those instances always involved sending credit invoices to OLOs for charges that the NRA considered too high.

A decision from the NRA did not constitute a writ of execution and this prevented the NRA to issue truly enforceable judgements regarding the non-performance of interconnection agreements. The NRA usually requested from OLOs that any conflict arising from an interconnection agreement be phrased as an enforcement request.

This raised another important issue: in spite of its many competencies, the NRA did not have the tools to enforce a decision on an access or interconnection agreement, other than the imposition of an administrative penalty, after it first issued a warning. In sum, dependent upon the nature of the claim, sometimes recourse could be had only to the civil court. This lack of effective enforcement created a significant gap in the dispute resolution process, because a decision by the NRA could not always be enforced immediately and sometimes, there were no sanctions as regards non-compliance. Conversely, a court would be reticent in deciding matters concerning access and interconnection, given the statutory powers awarded to the NRA. It would not likely accept competence if the matter involved a

---

167 See, e.g., OPTA 7 April 2003, OPTA/IBT/2003/201398 (Versatel); OPTA, 5 June 2003 (MCI Worldcom); OPTA 21 June 2004 on interconnecting leased lines.
168 See also recommendation 9 of the IVIR report, Ottow et al. 2004, p. 6 urging the Dutch NRA to formulate obligations that are clear and can be enforced.
169 In practice, this road was not taken often in the Netherlands. For one exception involving a request for release of information as regards carrier pre-selection ('CPS'), see President Rb. The Hague, 1 June 2004 (note N.A.N.M. van Eijk), Mediaforum 2004/9, no. 31 (Prestitum/KPN).
The powers of the national regulatory authority

dispute on interconnection cost charged. Moreover, an issue would be the role a court could play in fact finding.

Unlike the NRA, the court would not engage in fact finding independently and will rely on the parties. However, at least in the Netherlands, civil procedure law will offer the parties numerous possibilities to provide the court with legally relevant information on the matter, and the court could also ask for advice from the NRA or the competition agency in this respect. There are numerous possibilities, such as: the information assembly (inlichtingencomparatie, Article 88 Dutch Act on Civil Procedure, Wetboek van Burgerlijke Rechtsvordering, 'Rv'), the assembly after answer statement (comparatie na antwoord, Article 131 Rv), oral pleadings (pleidooi, Article 134 Rv), ex officio expert statement (ambtshalve deskundigenbericht, Article 194 Rv) witness hearings (getuigen, Article 163ff. Rv) and the duty to exhibit (exhibitieplicht, Article 162 Rv). Another option could be a settlement assembly (schikkingscomparatie, Article 87 Rv) where the court could attempt to discuss the terms for the interconnection agreement, or what items need to be performed. The rules of civil procedure in first instance have not yet been harmonized, although this is subject to further consideration.

There is no convincing case to be made that interconnection contract formation and performance disputes should be kept outside the civil courts, because of intricate inefficiencies in the civil procedure. If the position turned out to be correct, the solution would lie in remedying the procedures before the court, not in leaving dispute resolution to a newly established authority, based on administrative law and that is hesitant to apply contract law principles even when required.

In order to set a framework for the procedure used in dispute settlement, the NRA published a set of formal procedural rules. Numerous examples illustrated how broad the NRA saw its powers in contract intervention,

---

170 Cf. Grosheide 2001/2, p. 93. Some of the clauses he mentions have been renumbered as a result of the new Rv and the new numbers are mentioned here. One might add also that the Rv provides that the court should ex officio prevent delays from occurring, Article 20 Rv. Note that the duty to exhibit would include the obligation for the TO to open its books, for instance, as regards, accounting separation of the services it offers.


173 Cf. Rules of procedure in disputes OPTA (Procedurreregeling geschillen OPTA), Stett. 2001, 138. This procedure is also applicable to disputes regarding shared antennae, Article 3.11 1998 Tw, special access and cable access, Articles 8.7 and 8.6 section 2 1998 Tw.
without, apparently, having considered that its position might raise contract law issues. Probably the most accurate formulation of the manner in which the NRA saw its competencies comes from a decision on mobile terminating access (MTA) tariffs:

"The Telecommunication Act is an administrative act that aims at serving the public interest, in particular the promotion of durable competition in the telecommunications market and the protection of end-users. One of the means that is laid down in the Tw to serve these interests is the interconnection duty (or the interoperability duty), set forth in Article 6.1 Tw. According to the parliamentary history, a provider acts in contravention to this duty, and the underlying public interest, if it charges unreasonably high tariffs. In determining the reasonableness of interconnection rates, the [NRA] must therefore also weigh the public interest [...]."

Although, arguably, the NRF was slowly moving back to (some) freedom of contract as the prevailing principle for access and interconnection agreement, the NRA insisted that the Netherlands' legislator motivate in the Explanatory Memorandum as to why the NRA should have to intervene ex officio to regulate interconnection, which implicitly included the right to intervene in contract formation beforehand.

Another important issue is tariff regulation. Several issues can be raised. First, it is fairly certain that a civil court would not have any power to fix tariffs, in the event of price discrimination, as this decision is reserved explicitly for the NRA. Second, if the NRA would issue a price order against the TO, would the OLO then be able to enforce this administrative order before the civil court? This creates uncertainty, especially if the court would not consider that it was bound by the decision of the NRA. Moreover, it is uncertain whether a third party OLO would be successful in enforcing a NRA decision on rates before the civil courts.

In my view, the NRA wanted to have maximum room also under the NRF to intervene ex ante, as evidenced by the examples given below. The NRA was unhappy with the manner in which the government intended to further

174 Cf. OPTA, decision in objection, 19 July 2002, OPTA/JUZ/2002/201770, OPTA/JUZ/2002/201772, (KPN Mobile/O2 and others), which considered the MTA rates applied by non-SMP mobile operators. See also Chapter 8.


176 Cf. Wissmann, p. 1721.

177 Re Germany, see Wissmann, p. 1721, who also considers this uncertain.
The powers of the national regulatory authority

regulate its intervention right. The NRA pleaded, for instance, to introduce a statutory obligation for TO's to report on service level agreements ('SLAs') and to provide the level of detail required in the RIO.

Apparently as a result of its frustration with the process preceding the Decision RIO 2000, the NRA also urged the government to swiftly issue a decree containing the minimum requirements with which a RIO must conform. The NRA also requested that the description of its right to intervene be made more specific, to protect not only the interest of the general public but also that of competitors.

In another document, OPTA gave a provisional opinion on the interconnection duty in case more than two providers were involved. OPTA was concerned mainly with the range of the interconnection duty and incorrectly expressed that ECS providers, including operators of switches that provided for indirect interconnection, had a duty to interconnect as well. This letter also appears to state that OPTA considered the operators to be obliged to enter into an agreement, rather than to negotiate an agreement, which statement goes beyond what the law stated.

In another letter the NRA addressed how it could secure the delivery of regulated services by the TO. The NRA addressed its competency to require security from the TO in the context of Article 6.3 1998 Tw. If there was a conflict between the parties, for instance, with respect to the provision of a bank guarantee (which used to be a requirement under the RIO), then the NRA considered it was entitled to determine the same based on the

178 See Letter, p. 12-19, nos. 46-72, on interoperability and SMP.
179 See Letter, p. 13, no. 52 and p. 17, no. 65.
180 See Letter, p. 13, no. 49. The NRA also noted that the obligation to deposit the RIO should remain regulated explicitly.
181 See Letter on Interconnection Duty, OPTA/IBT/2003/203596, resulting from a number of points raised by the TO and other licensed operators (OLOs) in interconnection disputes.
182 See Letter on Interconnection Duty, p. 3, albeit that the NRA - rather confusingly, noted in the same paragraph that there existed a duty to negotiate. The NRA also observed that an OLO, who was under a duty to negotiate, could not refuse this using the argument that the other party must actually offer the ECS, or that it must be unequivocally clear that such party would qualify for special access. The NRA probably meant that a party having to provide indirect interconnection could not make its cooperation conditional upon the two OLOs in question trying to reach an interconnection agreement.
183 See www.opta.nl. The letter is not dated and can be found under 'interconnection'. It follows a letter of 17 December 2002, OPTA/IBT/2002/202957.
Interconnection Regulation and Contract Law

asked advice from the NRA. A more elaborate cooperation between the two bodies would be preferred as a consequence.

These decisions provide a limited insight as to the overlap of competencies involving the administrative authority and the civil court in interconnection disputes, mostly following contract formation. Parties have not addressed the courts, for instance, to get an injunction against another party to enter into an access or interconnection agreement, or to claim performance of specific obligations, other than contested payments.\textsuperscript{192}

5.6 The ERG

A central authority in charge of electronic communication issues was not created at the EC level. Under Article 22 (2) Interconnection Directive, the Commission was obliged to investigate the added value of the setting up of a ‘European Regulatory Authority’. The Commission initiated several studies on the topic.\textsuperscript{193} The Commission finally came to the conclusion that the creation of such an authority would not provide sufficient added value to justify the likely costs.\textsuperscript{194}

On 29 July 2002 the Commission established the ERG for ECNs and ECS. The group served as an interface between NRAs and the European Commission in the context of the NRF.\textsuperscript{195}

On 1 April 2004, the ERG Common Position on the approach to appropriate remedies in the NRF (‘Common Position’) was approved.\textsuperscript{196} The Commission took notice of the Common Position but it did not approve the content. The document took into account the practical experience of the NRAs in dealing with competition problems in their respective markets. The ERG intended to improve its decision-making in light of the further experience of the NRAs in applying remedies. The ERG hoped that the

\textsuperscript{192} See Chapter 8. For England, see Bnsby 2005.


\textsuperscript{196} See ERG (03) 30rev1 (‘Common Position’).
The powers of the national regulatory authority

Common Position would help to ensure a more coherent and harmonised approach across the EU and help to improve predictability in the market place. The Common Position was not legally binding for its members and the conclusions drawn should not preclude an NRA from coming to a different position based on its own market analysis. The document listed 27 standard competition problems, some of which had importance for the regulation of access and interconnection agreements.

5.6.1 Identification and categorization of standard competition problems

The Common Position distinguished between two dimensions.

First, it discussed the market-dimension, consisting of four cases: (1) vertical leveraging (including that at the wholesale level relevant to access and interconnection); (2) horizontal leveraging (including that at the wholesale level); (3) single market dominance (including that at the wholesale level); and (4) call termination level.

Second, it recognized the cause-and-effect dimension, made up of: (1) strategic variables, such as price, quality, time, and information; (2) behaviour, such as price discrimination, delaying tactics, and withholding information; and (3) effects, such as raising competitors’ cost, and margin squeeze.

The standard competition problems relevant to the negotiation and performance of access and interconnection agreements (which are not related to price issues and which this book does not tackle) that were identified, were: denial of access, discriminatory use or withholding of information, delaying tactics, undue requirements, quality, denial to interconnect.

---

197 *Cf. ERG Common Position, p. 28-30.

198 The full list of the ERG read: (1) vertical leveraging: 1.1 refusal to deal/denial of access; 1.2 discriminatory use or withholding of information; 1.3 delaying tactics; 1.4 bundling/tying; 1.5 undue requirements; 1.6 quality discrimination; 1.7 strategic design of product; 1.8 undue use of information about competitors; 1.9 price discrimination; 1.10 cross-subsidisation; 1.11 predatory pricing; (2) horizontal leveraging: 2.1 bundling/tying, 2.2 cross-subsidisation; (3) single market dominance: 3.1 strategic design of product to raise consumers’ switching costs; 3.2 contract terms to raise consumers’ switching costs; 3.3. exclusive dealing; 3.4 over-investment; 3.5 predatory pricing; 3.6. excessive pricing; 3.7 price discrimination; 3.8 lack of investment; 3.9 excessive costs/ineficiency; 3.10 low quality; (4) termination level: 4.1 tacit collusion; 4.2 excessive pricing; 4.3 price discrimination; and 4.4 refusal to deal/denial to interconnection, see ERG Common Position, p. 31.
It is clear from the description of these problems that the ERG was convinced of the need for regulatory intervention in the contract formation process.

The denial of access at the vertical level revolved around the provision of access on unreasonable terms, thus weakening competition in the downstream market.\(^{199}\)

The non-price issues were described in terms of market behaviour and not so much influencing the contract formation process.

Undue requirements were described as contract terms, which required a particular behaviour of the OLO, unnecessary for the provision of the upstream product, but raising the cost or sales of the OLO. Examples were: costly technological requirements, bank guarantees or security payments, information requirements (e.g., a request for customer data of the OLO beyond what might be typically technically or economically justified).

Quality discrimination was defined, \textit{inter alia}, as a TO giving priority to its own customers’ traffic.

Denial to interconnect at the termination level was also described at foreclosing a market to new entrants. The example was that whereas it were vital for the OLO to be connected to established networks, the TO could easily manage without interconnecting the OLO, as long as that OLO’s customers were few, hence, the foreclosure.\(^{200}\) The Common Position did not discuss what the positive effects would be of NRA intervention in the process.

The effects of the behaviour identified were: (1) first mover advantage; (2) margin squeeze; (3) raising rivals’ costs; (4) restriction of rivals’ sales; (5) foreclosure; and (6) negative welfare effects.\(^{201}\)

### 5.6.2 Catalogue of available standard remedies

Chapter three of the Common Position summarized the remedies available under the NRF: (1) transparency obligation, (2) non-discrimination obligation, (3) accounting separation obligation, (4) access obligation, and (5) price control and cost accounting obligation.\(^{202}\) Interestingly, transparency

---

199 ERG Common Position, p. 33.

200 Re these aspects and the pricing issues, see ERG Common Position, p. 33-41.

201 For a graphical depiction of these problems, see ERG Common Position, p. 44-45.

202 Cf. ERG Common Position, pp. 46-47. These have been discussed in Chapters 3 and 4.
The powers of the national regulatory authority

and non-discrimination were considered unlikely to be effective remedies by themselves.

Importantly, the Common Position stressed that commercial negotiations were the exception rather than the rule in access and interconnection situations. But although the ERG continued to discuss the NRF, it did not give attention to the specifics of the contract formation process in its report.

According to the ERG, leading in the formulation of the appropriate remedies was the welfare of consumers. The principles offered to NRAs for their decisions were that: (1) they should produce reasoned decisions in line with their obligations under the Directives, (2) they should protect consumers where replication was not considered feasible, (3) they should support feasible infrastructure investment, and (4) they should be designed in a manner to give strong incentives to compliance.

5.6.3 Matching between the standard competition problems and available remedies

The last chapter matched the competition problems with the available remedies identified in chapter 3 of the Common Position. It focused on price control and cost accounting remedies. But the ERG did not provide a more thorough insight as to how these remedies should be applied in respect of access and interconnection contract formation of performance. Rather, it reiterated the remedies as defined under the relevant Directives. It left significant discretion to the NRAs as to how to apply these principles in disputes, or on its own initiative, thus making the Common Position in this area appear more like an internal discussion paper for NRAs to share their experiences.

5.6.4 Summary of the ERG Position

It becomes clear from the above that, in line with the Commission's and the NRAs' approach to access and interconnection contracts, the ERG was concerned predominantly with the application of economic principles and competition law remedies. It did not consider court intervention in access and interconnection contracts or disputes, simply because of the overriding and underlying economical and regulatory principles. Nor did it consider

---

203 See ERG Common Position, p. 50.
204 The ERG provided three examples in the last areas, where it considered what financial incentives might be appropriate: (1) private information and cost inflation, (2) delays in supply and (3) service level agreements and service level grades, ERG Common Position, p. 72-73.
how administrative remedies compared to civil law remedies. Its aim was to offer NRAs better guidance in applying the remedies afforded to them under the NRF in a consistent manner across the Member States.

The Common Position was written very much from the perspective of SMP undertakings being the 'bad guys'. The Common Position contained no objective description of common or diverging interests where the TO could justifiably counter certain requests from OLO, e.g., if these would be unreasonable. Although the Common Position argued that commercial negotiations on access and interconnection were the exception, it provided no factual data thereon.

5.7 Interim conclusion

The questions asked at the beginning of this Chapter boiled down to the central issue whether an administrative body was adequately equipped to apply the principles of contract law; either in fixing the terms of access and interconnection if the parties were unable to agree, or in deciding interconnection disputes. It is rather specific to electronic communications regulation that detailed rules exist for dispute resolution at the NRA level both as regards time frames, appeal and consultation procedures. National courts also have to offer effective remedies against breach of EC law in this respect, although systemic differences may occur at the Member State level. This leads to the following observations.

5.7.1 The NRA's competencies in respect of contract formation

The NRA was given comprehensive competencies in the field of facilitating access and interconnection agreements, both in terms of setting timelines for the process to be completed and even the possibility of fixing the contract terms (mostly under the primary interconnection rule).

These competencies significantly impacted the freedom of undertakings to contract.²⁰⁵ Besides, the NRA was awarded an *ex ante* right to intervene, especially where it concerned SMP undertakings (the secondary interconnection rule), in order to facilitate the contract formation process, notably in setting the terms of the RIO; later its independent intervention right was broadened in scope. Its rights in regulating SMP undertakings were broad and impacted the position taken on both the process of contract formation and the terms used.

²⁰⁵ The justification for this is discussed in Chapters 3 and 4.
The powers of the national regulatory authority

These unprecedented competencies of an administrative body were not necessarily complemented by the competencies or obligations in respect of the contractual law aspects of interconnection agreements.

5.7.2 The NRA’s competencies in respect of contractual non-performance

The NRA was not able to address the civil law consequences of non-performance by the TO, first because it considered itself an administrative body and, unlike a court, it was not equipped to hear matters based on principles of contract law; and second, because the ONP Framework nor the NRF afforded it any competencies in the field. This resulted in an ineffective weapon for the OLO to claim performance: it must address both the NRA and the civil courts. As a result, the question of the consequences arising of an administrative body resolving contract disputes between undertakings cannot be really answered.

It is also rather evident, both from the NRA’s own statements, the Explanatory Memorandum to the law and the position taken by the ERG that the NRA would never be adequately equipped to apply principles of contract law; whereas it was unclear how the principles of administrative law could be applied to solve disputes between undertakings.

5.7.3 The NRA and other institutions

Conversely, next to the fact that civil court proceedings may be lengthy and tedious, it appears that these courts have been reluctant to interpret interconnection contractual obligations and have left these to the NRA. But as was discussed previously, the NRA did not always consider itself competent in deciding thereon. And there appeared to be no coordination between the two institutions. This effectively created an important gap in dispute resolution, where there was an overlap in other areas. It would be helpful if the NRA were to publish guidelines as to how it would see the delineation of its competencies in comparison with the courts.206

The ERG did not address the fundamental issue of contract formation and performance dispute resolution, so no lessons could be drawn from it.

Finally, it was clear from the NRF that the Commission at least warranted close coordination with the NRA in the field of market analysis.

5.7.4 Final remark

In paragraph 5.1.1, reference was made to the regulatory objectives formulated by the Framework Directive. Although this is not, strictly

speaking, a concern for the regulator of electronic communications markets, it would have been helpful if, the legal principles, that in my opinion were also relevant to access and interconnection contract formation had been considered to justify the EC’s regulatory objectives, notably as: (1) the protection of the weaker party in contract negotiations; and (2) the application of principles of contract law in determining access and interconnection conditions.

As regards the first principle, the NRA would possibly consider that protection of the weaker party in contract negotiations fell under the non-discrimination requirement. Such line of argumentation would be difficult to sustain for the NRA. Non-discrimination meant the TO must apply the same terms across the board.

An administrative body could issue an order against the TO to apply the same terms for all other licensed operators (‘OLOs’) in the same circumstances. But it did not entail that an administrative body could set the terms (instead of the TO) if the TO and the OLO failed to agree on the substance of the terms. In other words, the application of the non-discrimination principle had a more limited scope than focusing on protection of the weaker party as such.

As regards the second objective, arguably, the EC did not have any competence to impose contract law harmonization on its Members States’ (including on NRAs); notwithstanding the fact that the EC was becoming more and more actively involved in attempting to harmonize contract law and dispute resolution. Besides, this objective was not sector-specific. Yet, it could have helped if the Commission had taken into account the principles in addressing how the Member States must instruct NRAs, for instance by developing a ‘best practice model’ (which could be issued by means of EC guidelines) that could help both NRAs and courts in electronic communications dispute resolution.

207 Re the non-discrimination principle, see Chapter 3 paragraph 3.3.2.1.


209 For such a model see Andenas, Zlepnic 2004, p. 29ff.
II Negotiation, formation and performance of access and interconnection agreements
6. Contract law aspects

6.1 Introduction

Interconnection agreements are horizontal agreements between private undertakings at the wholesale level. Although these agreements affect how end-users conduct their communications traffic, they are not a party to interconnection agreements.

It was discussed in Chapter 1 that contract law seldom intervenes in contracts between companies a priori.1 The open network provision ('ONP') framework and the new regulatory framework ('NRF') as regards interconnection agreements thus affected sector-specific contracts before they were entered into by the parties, inter alia, by imposing obligations to negotiate an agreement and after they were entered into, inter alia, by price intervention.2

From a contract law perspective, in principle, it is acceptable that there may be an inherent imbalance in the business relationship between two or more parties and the imbalance may be standard when shared by different parties in the same situation.3 In the context of interconnection: other licensed operators ('OLos') are considered to be largely in the same situation vis-à-vis the telecommunications operator ('TO').

The main functions of contract law relevant to this thesis are: (1) to provide a framework for negotiation, formation, performance and termination of agreements; and (2) to provide a safety net with sufficient remedies when significant imbalance in the relationship with the TO occurs.4

---

1 Cf. Chapter 1 paragraph 1.3.1. Intervention will occur in case of rules of mandatory law, take, for example, the law applicable to commercial agency agreements. There are some other examples where European Community ('EC') law led to a limitation of freedom to contract even between undertakings, for instance, in the electricity, the gas and the post sectors, see Houben 2005 p. 9ff. Cf. also the implementation of Council Directive 2000/35/EC of June 29, 2000 regarding the combating of late payment in commercial transactions, [2000] OJ L 200/35 ('Late Payment Directive'). Krans 2004, p. 504, posed the question whether professional parties could contractually diverge from the provisions imposed by the Late Payment Directive, or whether these had a mandatory character.

2 On the duty to contract under civil law, see Houben 2005, p. 215ff. Houben discussed the duty to contract as regards the provision of services to end-users, see p. 215. This book focuses at the wholesale level; cf. the drawing in Chapter 3, Figure 3.1.


4 See Chapter 1 paragraph 1.3.1.
Freedom of contract is one of the pillars of contract law and it must be considered why this principle is not applicable to interconnection negotiations and contracts.\(^5\)

Freedom of contract could be affected, *inter alia*, by:

1. (Mandatory) rules as regards the protection of special interests, such as the position of the weaker contract party.\(^6\) In the context of the TO controlling essential facilities or having SMP this could lead to a civil law duty to contract (the secondary interconnection rule). The notion is known under German law as ‘Kontaktrichtungswidr’. In literature, there is a difference of opinion as regards the question whether the duty to contract means that there is a duty to enter into an agreement or a duty to perform an obligation, whether or not there is a contract;\(^7\)

2. Possible (mandatory) material aspects of international and supranational law, such as European Community (‘EC’) law: the main area being the cartel prohibition of Article 81 and the prohibition of abuse of a dominant position of Article 82 EC Treaty.\(^8\) These rules afford broad powers of intervention in agreements that restrict competition. Another example of EC regulation that impacts contract formation can be seen in the field of public procurement.\(^9\) Even where directives have not yet been implemented in national law, there may be a duty to apply their main principles to, e.g.,

---

\(^5\) See, e.g., Hesselink 1999.

\(^6\) See Hartlef 1999, p. 5ff. See, e.g., Busch et al. 2002, p. 32 and 40. Within the framework of the Commission on European Contract Law, the authors have devised draft standard clauses for the proposed Principles of European Contract Law (‘PECL’). The PECL are not implemented or accepted in any treaty, union, or national law, but provide insight into principles of contract law. For instance, Article 1:101 PECL provides that mandatory rules established by the Principles may affect the freedom to negotiate.

\(^7\) This question will not be discussed in this book, in light of the regulatory framework specific to interconnection agreements, which explicitly includes a duty to negotiate interconnection.

\(^8\) These rules were traditionally concerned less with setting *ex ante* terms and conditions for sector-specific contracts. See on Articles 81-82 EC Treaty and contract law, in general Slot, Wissink 1999; extensively, in the context of telecommunications liberalization, Larouche 2000, p. 37ff. Re the proposed invalidity of such terms, Article 15:101 PECL.

\(^9\) The EC public procurement rules significantly impact the freedom of contract, as the rules provide for strict pre-contractual procurement procedures that must be followed by the government agency wishing to award an assignment for instance to a communications provider. See: Pijnacker Hordijk, Van der Bend, Van Nouhuys 2004, p. 29ff.
contracts 'to the extent possible', which duty is based on the principle of the
conformity of interpretation;\(^\text{10}\)

The regulation of contractual aspects of access and interconnection is
influenced heavily by these aspects.

This Chapter puts the emphasis on the contract approach to interconnection
and thus, the duty to negotiate a contract (as compared with the duty to
contract, which forms part of the secondary interconnection rule).

It must be investigated whether applying the principles of contract law – in
convergence with telecommunications law – will be adequate to bring about
interconnection or not.\(^\text{11}\) Otherwise put: would the preliminary reliance on
contract law be sufficient to facilitate the desired formation (the primary
interconnection rule) and ensure the correct performance of
interconnection agreements by the TO?\(^\text{12}\) The question under the secondary
interconnection rule is slightly different. How would the negotiation of
interconnection agreements with an SMP undertaking be affected by the
perceived inequality of the parties?\(^\text{13}\) Would sufficient remedies be available
under contract law for the weaker party, the OLO? The role of the national
regulatory authority ('NRA') and/or the courts will be included in this
analysis.\(^\text{14}\) This means that some reference will be made to rules of civil
procedure.\(^\text{15}\)

Three preliminary observations are made.

See, e.g., Wissink 2001, p. 34, 215-221, 226-238 and 302ff. Once an EC Directive has
been implemented, it becomes part of the national law. But this observation does not
address the question whether European Union ('EU') Directives may impose
mandatory rules of law that impact, for instance, contracts formed under national law.
Cf. French law, which provides that parties who have agreed that their agreement be
governed by a treaty, which is not \textit{ipso inre} applicable, may not exclude mandatory
provisions from the treaty by contract.

\(^{11}\) Cf. Chapter 1 paragraph 1.1.1.2. Re contract law in general, see, e.g., Adams, Browword
1995.

\(^{12}\) The contention is not that the fact that the parties enter into an agreement may be a

\(^{13}\) Re inequality of parties and contract negotiations, see also Cartwright 1991.

\(^{14}\) Cf. Chapter 5 for a description of the role of the national regulatory authority ('NRA').

\(^{15}\) As is the case with material contract law, the rules of civil procedure have not been
harmonized throughout the EU. On this topic, see, \textit{inter alia}, Vranken 1988, Vranken
1999.
Interconnection Regulation and Contract Law

First, as was seen in Chapter 3, the law provides for a duty to negotiate interconnection. In other words, TOs and OLOs are obliged by law to try reaching an agreement. It is therefore also interesting to see whether contract law could help an OLO to act against an unwilling TO, in the absence of a duty to negotiate.

Besides, TOs who are deemed to have significant market power ('SMP') must offer access and interconnection on terms that are consistent with obligations imposed by the NRA. The latter obligation tends to a duty to grant access or a duty to contract.

Second, a duty to negotiate is not the same as a duty to contract, or a duty to grant access. In the first situation, the law may impose a good faith duty on the parties to establish an agreement. The law does not impose performance obligations (which it does in the second situation). In other words, even where there is a duty to contract, there still may be some room for the parties to reach an agreement on the terms amongst themselves.

Third, in light of the fact that this topic concerns telecommunications law, a distinction must be made between ex post intervention from ex ante intervention when performing this exercise. The contention is not simply that competition law should or could not play a role in interconnection agreement formation and performance. Indeed, it is likely that OLOs could rely also on general competition law, in particular Article 82 EC Treaty. This means that there must be a determination whether the party refusing to provide for interconnection (in this case, the TO) would be in a dominant position, and if so, whether the behaviour as such constitutes an abuse of a

---


17 Cf. Chapter 3 paragraph 3.3.3.1, supra, this paragraph.


19 Cf. Chapter 1 paragraph and Chapter 2 for a description of the difference between ex ante and ex post regulation. See Smits 2004, p. 490, who observes that the EU approach to contract law was functional: it concentrated heavily on specific agreements, for instance, travel or electronic agreements. Smits counted seventeen directives in the field, all based on Article 94 EC Treaty; Smits 2004, p. 492. The view in Germany was expressed by the German NRA, the Regulierungsbehörde für Telekommunikation und Post ('RegTP'). RegTP held that the non-discrimination provision laid down in § 33 of the German Act against restraints spun of competition (Gesetz gegen Wettbewerbsbeschränkungen, 'GWB') also applied directly to interconnection agreements, RegTP activity report 2000/2001, p. 83.
dominant position. As the market develops further, it becomes more difficult to establish dominance, although this hurdle is presumably taken easier than the next, notably the establishment of an abuse.

This book does not aim to establish a harmonized approach to the negotiation, performance and termination of interconnection agreements. Contract law and civil procedure law have not (yet) been harmonized across the European Union ("EU") and variations as regards the law on the formation, performance and termination of contracts in general – and thus interconnection contracts as well – will occur.

The Commission acknowledged in terms of required non-sector-specific measures the absence of uniformity with respect to contract formation. The fact that contract law has not yet been harmonized was not a consideration for the EC regulator, when it established the regime for access and interconnection. The Commission conceded that the lack of harmonization of contract law posed problems in the uniform applicability of Community law, yet it could not be expected that the EU would succeed in harmonizing the diverging rules on contract law soon. But, this did not stop the EC from issuing regulations that impacted on national contract law.

20 There is no case law on this question, so the analysis must be performed by analogy. Besides, the notion of dominance is something different than the notion of significant market power ("SMP").

21 Cf. Larouche 2000, 165ff. on the ECJ case law on refusal to deal; Coudert 1995, p. 82-120, in particular on the refusal to deal.

22 One reason for not propagating such harmonization at a sector-specific level is that it would again lead to fragmented regulation. Cf. Smits 2004, p. 494-495 who labelled EU efforts at harmonizing contract law as 'fragmented, random, (partly) inconsistent and (partly) incomplete.'


24 See Communication, nr. 26 and 32 on rules of mandatory law; and rules 33-36 on the conclusion of contracts, although this referred mostly to formal requirements and not divergence in issues such as offer, acceptance and intention to be bound. None of the contributors apparently addressed commercial law (other than commercial agency, transport) in general or interconnection agreements in particular.

25 See Communication from the Commission to the European Parliament and the Council (Continued)
To facilitate the comparison of interconnection agreements, the contract law principles applied in this chapter, refer to comparative contract law instruments, such as the Principles of European contract law ("PECL") and the Unidroit principles ("UP"). Admittedly, the PECL and the UP are primarily aimed at contributing towards cross-border commercial transactions; besides it is not altogether clear how they combine common law and civil law principles; whereas it has been argued in Chapter 1 that interconnection agreements are national agreements. Moreover, the practical usefulness and validity of the PECL and the preceding UP are not uncontested. Finally, these conventions have no direct effect on contract law in any of the Member States.

Nevertheless, reference is made to these principles in this Chapter, exactly for the reason that they concern principles; it can be assumed that they will have relevance to relevant national law principles surrounding negotiation — such as, the negotiation in good faith —, the formation — such as the notions of offer and acceptance —, and the termination, —such as the grounds for termination —, of interconnection agreements; and as such, may constitute helpful points of reference. It is not argued that contract law regarding interconnection (or in general) for that matter has been or should be harmonized across the EU. Nor does this book take any position on the usefulness of the PECL or the UP.

### 6.1.1 Conflicting interests and purpose of the agreement

The purpose of entering into an interconnection agreement for the parties was to obtain legal certainty with respect to the content of the agreement,
the terms, the duration and the characteristic performance. Free negotiations would normally enable the parties to bridge the divergent commercial interests. The inequality of the parties to an interconnection agreement, resulted not only from the fact that the TO initially controlled the infrastructure. The commercial interests of the parties diverged as well. Whereas the TO wished to protect its business interests and maximize profits by allocating company resources efficiently, the OLO sought to do the same by getting the lowest pricing, asking for a detailed service description, as unbundled as much as possible and allowing for considerable flexibility in terms of ordering. An example might be a mobile virtual network operator ("MVNO"), which invested only in marketing and not in the infrastructure roll-out.

The key contractual – and most contentious – issues between the parties prove to be the interconnection cost and charges and the scope of the services. 

6.1.2 Scope of work

In paragraph 6.2, the interconnection agreement is qualified. In the following paragraphs the interconnection agreement will be discussed under Dutch law and juxtaposed with the PECL and the UP to obtain an indication as to whether Dutch law is different or not from other systems when it comes to interconnection agreements, and to place these agreements in a European perspective. Although the regulation of interconnection agreements appears to place emphasis on stimulating their formation, the contract itself will be discussed, to match the effectiveness of regulatory intervention with the possible effectiveness of court intervention.

To combine the discussion of contract law aspects in as much as possible with the consequences of sector-specific regulation for interconnection agreements discussed previously, the discussion revolves around the

---

30 See Chapter 2, paragraph 2.5 for a limited economic analysis and Chapter 7, where the Telecommunications Operator's ("TO's") reference interconnection offer ("RIO") will be discussed.
31 See Chapter 8.
32 See Lando, Beale 2000, and for the Netherlands, the analysis by Busch et al. (eds.) 2002 was used. The English translation used by Busch et al. (eds.) 2002 was sometimes amended. See also Smits, Stijns (eds.) 2000 on performance.
33 The open network provision ("ONP") framework and the new regulatory framework ("NRF") contained extensive provisions for the situation where the parties could not agree amongst themselves, see Chapter 3.
following elements: (1) the obligation to negotiate interconnection and the principle of good faith negotiations, distinguishing between the pre-contract commercial negotiations phase and the failed negotiations phase (paragraph 6.3); (2) how does an interconnection agreement come about, in particular offer and acceptance (6.4); (3) what is the effect of the standardization of interconnection contract terms by means of the reference interconnection offer (‘RIO’) (6.5); (4) what are the rights and remedies in case of non-performance taking into account issues of good faith; do the ONP principles (transparency, non-discrimination, cost-orientation and accounting separation) have an equivalent under contract law, (6.6); and, (5) what issues are presented by termination for convenience (6.7). Paragraph 6.8 contains the interim conclusion.

6.2 Qualification of access and interconnection agreements

An interconnection agreement is a bilateral, reciprocal legal act between two professional parties.34

National law in the EU, including the Dutch Civil Code (Burgerlijk Wetboek, ‘BW’), regulates certain specific agreements – such as (consumer) sale, lease, employment, and agreements for the assignment of rights. It does not regulate sector-specific agreements, such as telecommunications agreements, and thus, does not specifically regulate access or interconnection agreements either.

Sector-specific legislation does not refer to the legal principles applicable to contracts either. Specifically, national telecommunications law addresses certain aspects of access and interconnection agreements, although it does not concentrate on the general contractual aspects. Like most unspecified agreements, access and interconnection agreements will thus be subject to the general provisions relating to contracts.

It may be assumed that the interconnection agreement is predominantly constructed as a services agreement (although, arguably, it contains elements of a results obligation, too).35 As such, it may also qualify as a commission agreement (‘opdracht’) within the meaning of Article 7:400ff. BW. Even though the granting of access to a public telecommunications network and the provision of services in connection therewith are examples of mutual

---

34 On reciprocity, see, e.g., Asser-Hartkamp 4-II 1997, nos. 63 and 506. In an agreement between the TO and an OLO, the OLO is likely to be more on the ‘receiving’ end.

35 Re service agreements, see Van Dam, Wessel 1994. See also Schuster 2005, p. 731ff.
Contract law aspects

service provision at the wholesale level, between and amongst electronic communications networks ('ECN') and electronic communications services ('ECS') providers, it could be argued that the party requesting access or interconnection commissions the other party.\(^{36}\) If the interconnection agreement qualifies also as a commission agreement, this would entail that the law requires a special duty of care from the TO.\(^{37}\)

Under Dutch law, it is often assumed that a commission agreement implies that the party accepting the commission is predominantly obliged to use reasonable efforts to complete the commission. However, many commission agreements (compare this with, for instance, service level agreements) will include specific results, for instance, as regards technical availability. There may also be arguments that point at a results obligation, for instance, the mere fact that unless the parties provide for interconnection facilities, the underlying result, i.e., end-to-end connectivity cannot be achieved.

The law does not provide a definition of efforts and results obligations, and the distinction is not relevant in every jurisdiction – e.g., not in England – and will not be explored in detail.\(^{38}\)

As regards the statutory duty to negotiate interconnection, the legislator made no distinction between either the type of infrastructure or the market power of the provider.\(^{39}\) All parties exploiting fixed and mobile (land and satellite) infrastructure with their own subscribers must negotiate with one another to bring about network interconnection. It made no difference whether it concerned new technology or the interconnection of, say, fixed infrastructure with a mobile network. Interconnection of existing

---

36 Cf. Articles 7:400 BW. Clearly, the interest of the end-users - who want to communicate with one another - would be present, see also Chapter 3.

37 Cf. Article 7:401 BW, which provision is an open norm.

38 In the Netherlands, the issue was discussed in the context of another utility contract, notably energy, in the decision of the Dutch Supreme Court, ('HR') 16 May 1997, NJ 2000, 1 (with note Brunner) (Consumentenbond/EnergieNed). According to the author of the note to the Supreme Court decision, every contractual obligation of delivery should be qualified as a results obligation. The act of delivery is essential. I have my doubts as to whether this reasoning can be applied to interconnection agreements as well, due to the nature and scope of such contracts. However, it may be argued that these agreements constitute agreements for delivery (of PoCs) as well.

39 On this duty, see Chapter 3 paragraphs 3.4.3.2 and 3.4.4.2 and Chapter 4 paragraph 4.3.2.
Infrastructure must be offered. In the end, it was left predominantly to the parties to reach an agreement as per the technology on offer. This also applied in case both parties were OLOs, in which case there still might be important divergences in the bargaining power between the two, for instance due to divergent business goals and technological aims. In sum, the scope of the mutual service provision was largely a matter of negotiations.

Additionally, the NRA could impose specific obligations (presumably more akin to a duty to contract) as regards access provision to an SMP undertaking.

Like any private business bilateral agreement, the agreement would be characterized by the fact that both parties subjected themselves to – often reciprocal – contractual rights and obligations, which were laid down in technical detail. It should be borne in mind that the Commission considered the level of detail to be relevant, as both the Interconnection Directive and the Access Directive contained lists with recommended provisions that must be regulated in interconnection or local loop access agreements. The scope of this regulation was probably unique, since there are not many areas in the law, where the legislator provided beforehand which topics must at least be agreed between parties that are acting as commercial undertakings with each other.

See also Chapters 2 and 3. It is the question whether the legislator reached its goal. The definition in respect of interconnection appears to be technology independent, since it is broad. It should be borne in mind that the legal framework initially was based on the ONP voice telephony regime. Internet was not mentioned anywhere by the legislator, but, peering agreements likewise felt under the regulatory regime.


Arguably, by imposing minimum standards, the EC regulator applied a form of contract coercion even if it concerned the primary interconnection rule only. The TO and the OLO are not free to decide what areas they would and what areas they would not regulate in their interconnection agreement.

6.3 Duty to negotiate interconnection and the principle of good faith

The duty to negotiate as imposed by both the Interconnection Directive and the Access Directive can be considered as an intrusion on the freedom of contract. Reference is made to the negotiations models for interconnection as devised by the International Telecommunications Union (ITU), which differentiated one model for negotiation interconnection agreements from another. These models ranged from completely commercial negotiations to set negotiations, and it would seem that the EC could have opted for a different model of establishing interconnection.

Although contract law provides justifications for duties to contract, to the best of my knowledge, it does not really concern itself with duties to negotiate, which presumably leave more freedom to the parties. Therefore, the considerations for the duty to negotiate remain embedded in the EC's regulatory objectives. They have no basis under contract law.

The observation made beforehand is that it must be seen whether the good faith duty enshrined in private law, would work out differently, had the EC regulatory framework not imposed a duty to negotiate interconnection on the parties. Otherwise put: it is possible that the TO would be free to simply turn down a request to negotiate from an OLO, without providing any reason, even though it controlled a facility essential to achieve interoperability of networks. This situation would then match most closely with a free commercial negotiations regime.

In the absence of specific regulation, the OLO would have to defer to Article 82 or Article 86 EC Treaty, or the essential facilities doctrine, if the TO would refuse to deal. Some authors doubt whether general competition

---

43 See, Houben 1999, who first considers that this notion interferes with the freedom to decide with whom to contract. Houben refers to other utility sectors where this applies, such as energy and post, in the context of end-user agreements. See also on party autonomy Vranken 2000/1, p. 146ff.
44 Cf. Chapter 3 paragraph 3.2.2.1.
45 Article 86 (1) EC Treaty provides, basically, that public undertakings entrusted with (Continued)
Interconnection Regulation and Contract Law

rule extends to all parties: OLOs are bound by the duty to negotiate in their agreements just as well. In such a situation, there is no weaker party.

When negotiating, each party must act in accordance with good faith. In the context of contract negotiations good faith is an open norm. In some jurisdictions, this basic principle of contract law evolved over time to govern the contractual performance and spilled over to the formation and the contractual enforcement of rights and obligations, at least in the Netherlands. Arguably, the good faith obligation could not be excluded contractually. Good faith does not only govern the agreement, it extended to the full system of rights and obligations.

---

54 This notion is to be distinguished from the 'good faith' of a party who purchases goods from a person who has no title to those goods, see Article 3:11 BW. See also HR 15 November 1957, NJ 1958 67 (Baris/Riezenkamp).

55 Re good faith and contract law, e.g.: Hesselink 1998, Mason 2000.

56 Cf. Article 2:15 UP, which provide that: (1) A party is free to negotiate and is not liable for failure to reach an agreement; (2) However, a party who negotiates or breaks off negotiations in bad faith is liable for the losses caused to the other party; and (3) It is bad faith, in particular, for a party top enter into or continue negotiations when intending not to reach an agreement with the other party. See also Article 2:301 PECL.

The concept of good faith is the common thread in Dutch contract law, even though the BW does not mention the term as such (other than in Article 3:11 BW referred to above); cf. Busch et al. 2002, p. 48ff. The term used in the BW is 'reasonableness and fairness' instead of good faith. The same term is used in Article 6:248 BW, where it is stated: "(1) A contract not only has the legal effects agreed to by the parties, but also those which, according to the nature of the contract, result from the law, usage or the requirements of reasonableness and fairness." The test is objective, see also Asser-Hartkamp 4-II 1997, no. 2001. Thus, under Dutch law, the term good faith is used intermittedly with reasonableness and fairness. See also Article 1:201 PECL and Article 1.7 UP. But Article 1:201 PECL does not expand how substance must be given to the principle. Cf. Article 6:2 Section 1 BW. Article 6:248 BW also provides an important remedy for clauses that are against such reasonableness and fairness: "(2) A rule binding upon the parties as a result of the contract does not apply to the extent that, in the given circumstances, this would be unacceptable according to the criteria of reasonableness and fairness." Thus, the civil court has the right to set aside a contractual clause. See for Germany, §§ 305 and 241 BGB-KF.

57 In contract practice, the opposite could often be seen, i.e., parties committing to negotiate or act in accordance with good faith. Often, a good faith obligation to negotiate renewals of the agreement is also agreed upon. Cf. RIO 2004.1.0, which did not contain such clause. Whereas Articles 2.4 and 2.5 of British Telecom's ('BT's') 2004 RIO, Public Electronic Communications Networks ('PECN') (C7) Standard Interconnection Agreement ('SIA') did contain such wording.

58 Cf. Article 6:2 BW.
Contract law aspects

Since good faith is considered to be an open norm in most legal systems, it leaves room for what is reasonable and fair in specific circumstances. The method used to determine good faith usually consists of grouping positions to which good faith must be applied.

By way of comparison: with respect to English law, there is a clear contrast with the Dutch regime – at least there was prior to 12 August 2005 – in this respect. The principle of pre-contractual responsibility was traditionally regarded ‘with great suspicion’ and the traditional view was that there was no duty to negotiate in good faith. Hence, it is very difficult to establish a notion of good faith in negotiations under common law, as English law emphasizes the adversarial position the parties have during contract negotiations. This adversarial position is very evident in interconnection negotiations. An express agreement to use reasonable or best efforts to agree on the terms of a contract, under English law, would amount to no more than an agreement to negotiate. The requirement to negotiate interconnection should be read in that context only: it is a requirement to negotiate, not to reach an agreement.

The German Civil Code (‘BGB’), on the other hand, contains a provision that agreements must be performed in good faith, but does not provide explicitly that negotiations must be done in good faith as well.

The determination of good faith is based on an objective assessment of the facts surrounding the negotiations. The good faith obligation is expanded in specific obligations, e.g., where it concerns the pre-contractual phase, the duty of party not to negotiate a contract if it has no real intention to reach

---

59 Hesselink 1998, p. 37. Hesselink opines that good faith has become a completely open norm and, hence, no norm at all the courts can apply. Good faith, in his view, can be applied to every situation and loses the character of norm, rather giving courts absolute freedom a cover for judicial law making. See also Mason 2000.

60 Cf. the German legal notion of ‘Fallgruppen’. An example other than information duties may be a cooperation duty in case of interconnection. Cf. Busch et al. 2002, p. 50-51.

61 See, infra, paragraph 6.3.6.


65 On the burden of evidence, see, e.g., Civil Senate, BGH NJW 1974, 991, VIII.
an agreement with the other party, but also—and this may have relevance for the topic under consideration where one of the parties is the TO—the duty not to take unfair advantage of the other party’s dependence, economic distress or other weakness, and the determination of the implied terms of a contract. In case law regarding negotiations, the notion has been understood to mean that each party must take into account the justified interests (or reasonable expectations) of the other party. In practice, this meant that TO must definitely assume that the OLO was interested in: (1) the speedy availability and delivery of points of connection (‘PoCs’); (2) quick, high quality delivery and quality of service (‘QoS’) of all required interconnection services, during which process, arguably, the TO was deemed to be more expert than the OLO on the local market; (3) quick connections with the maximum of commercially acceptable quality and service levels; (4) against the best possible rates; and, (5) with the greatest possible flexibility for the benefit of the OLO, since the OLO wanted to gain market share.

---

66 See, e.g., Article 2:301 PECL. This provision has no counterpart in the BW but is dealt with in the context of pre-contractual liability for breaking off negotiations; see, infra, paragraph 6.3.6. An example in the context of interconnection agreements—perhaps farfetched—is where the TO requires the other licensed operator (‘OLO’) first to incur cost to register as a provider of public electronic communications services and then breaks off negotiations on the basis that in its assessment, the OLO cannot be considered a public provider; and thus, does not qualify for interconnection negotiations; cf. Beale et al. (eds.) 2002, p. 238ff.

67 See, e.g., Article 3:44 BW, which is not immediately apparent to be of relevance for the negotiation of interconnection agreements, as it concerns very subjective criteria, such as abnormal mental condition. Article 4:109 PECL, which deals with excessive benefit or advantage; Article 3.10 UP (‘gross disparity’). It is probably this type of situation exactly that the legislator wants to prevent from occurring. An example in an interconnection agreement might be an unclear service description in the Operations and Maintenance Manual, effectively amounting to a disclaimer, leading to the OLO not getting the services it expects.

68 See, e.g., Article 6:102 PECL, which deals with implied terms; Article 2.20 UP considers ‘surprising terms’, a rather unfortunate term at least from a Dutch law perspective. The equivalent would be Article 6:248 Section 1 BW. An example in case of an interconnection agreement is the assumption of a minimum service level, in accordance with benchmarking with other TOs, if the TO is unwilling to be specific. See also, infra, paragraph 6.6.1.

69 See Supreme Court 15 November 1957, NJ 1958, 67 (Baris/Riezenkamp); Rijken 1994, p. 52ff.

70 This is a somewhat tricky consideration, since an OLO in one market may well be a TO in another. For instance BT enters into an interconnection agreement with KPN Telecom B.V.
Finally, in the context of good faith negotiations, the phase in which the parties are, is also of relevance. It is mostly a sliding scale, which means that as the negotiations progress the good faith obligation may increase.\(^7\)

Applying this to interconnection agreement negotiations, the TO will probably have to be more sensitive to an OLO’s interest with whom the TO has conducted several extensive negotiations sessions, than with an OLO who has merely requested a copy of the reference interconnection offer (‘RIO’). Moreover, OLOs could be subject to a ‘lower’ good faith standards than TOs.

6.3.2 Good faith in the Access Directive

In the recitals to the Access Directive, the Commission stated:

`Undertakings which receive requests for access or interconnection should in principle conclude such agreements on a commercial basis, and negotiate in good faith.`\(^7\)

As was seen above, both the Interconnection Directive and the Access Directive specifically provided for a duty to negotiate.\(^7\) In addition, Article 12 (1) Access Directive specifically empowered NRAs to require TOs ‘to negotiate in good faith with undertakings requesting access (emphasis added).\(^7\) The provision ended by stating that NRAs could attach to this (and other) obligation conditions covering ‘fairness, reasonableness and

\(^7\) Cf. De Kluiver 1992, p. 50.

\(^7\) Cf. Chapter 3 paragraphs 3.4.1.2 and 3.4.2.2.

\(^7\) For completeness’ sake Articles 4 (1) Interconnection Directive and 4 (1) Access Directive are repeated here: “Organizations authorized to provide public telecommunications networks and/or publicly available telecommunications services as set out in Annex II shall have a right and, when requested by organizations in that category, an obligation to negotiate interconnection with each other for the purpose of providing the services in question, in order to ensure provision of these networks and services throughout the Community. On a case-by-case basis, the national regulatory authority may agree to limit this obligation on a temporary basis and on the grounds that there are technically and commercially viable alternatives to the interconnection requested, and that the requested interconnection is inappropriate in relation to the resources available to meet the request. Any such limitation imposed by a national regulatory authority shall be fully reasoned and made public in accordance with Article 14 (2),” Article 4 (1) Access Directive: “Operators of public communications networks shall have a right and, when requested by other undertakings so authorised, an obligation to negotiate interconnection with each other for the purpose of providing publicly available electronic communications services, in order to ensure provision and interoperability of services throughout the Community (…).”

\(^7\) See for the Netherlands, for instance, Parliamentary Notes (Kamerstukken II 1997/1998), 25533, nr. 5, p. 78.
Interconnection Regulation and Contract Law

timeliness'. This presumably points towards the Commission also considering that the TO would be subjected to a heavier good faith duty than the OLO, was argued above.

The recitals were silent on whether the Commission envisaged a notion of good faith as embedded for instance in contract law of civil countries – such as the Netherlands – or a broader, perhaps competition-related notion. Nor did the Commission qualify according to what principles a NRA should determine – for instance, as stipulated in national law or at its own discretion – whether the TO or the OLO was negotiating fairly and reasonably.

The Commission was possibly intent on having Member States were there is no statutory duty to negotiate in good faith in contract law – for instance, in England, Germany – to provide that interconnection agreements were different from this.

As was seen, like the NRF, in the Netherlands the 2004 Tw contained a provision only ordering the TO to negotiate access in good faith. Since the Commission did not describe whether interconnection implied a contract law good faith notion, a civil court, when addressed by a OLO that argues that the TO has negotiated in bad faith, or has acted unfairly/unreasonably, would raise the question whether a specific meaning (other than the meaning of good faith under contract law) must be attached to the provisions contained in the Access Directive regarding SI?or whether it would simply decide that the notions must be applied only from a civil law perspective. The question that might be thus answered differently across the Member States is whether there would be a duty in contract law on the parties to negotiate (or perform) interconnection in good faith.

75 See Access Directive, Article 12 (1) sub (b) and final. Cf. with Article 6a.6 (2) b 2004 Telecommunications Act (Telecommunicatiewet, 'Tw'), infra, paragraph 6.3.4.

76 Cf. Article 6a.6 (2) b. 2004 Tw which concerned obligations of SMP parties and provided that the duty applied to SMP parties to comply with reasonable requests for access includes, inter alia (...): “b. to negotiate in good faith with providers of electronic communications services who request access.” Specific duties attached to interconnection negotiations besides the general notion that both the TO and the OLO must take into account each other’s justified reasonable interests, were the information duty and the confidentiality obligation of the TO. Cf. Hesselink 1999, pp. 90-93 and 258-262. See Articles 5 Council Directive 2002/21/EC of 7 March 2002 on a common regulatory framework for electronic communications networks and services, [2002] OJ L 108/33 (‘Framework Directive’) and Article 9.2 Access Directive. Cf. Article 6.1 (2) 2004 Tw re the confidentiality duty. Information duties may be found in Article 6a.9 (1) Tw regarding tariffs, technical characteristics, and 6a.9 (2) Tw regarding the publication of the RIO.
Prima facie, it appears that courts (at least in the Netherlands) would accept a good faith notion in light of the duty to negotiate combined with the terms of the RIO even though the Access Directive did not mean to harmonize the notion. This would leave discretion to courts also in jurisdictions that do not recognize a duty to negotiate in good faith, to consider applying the principle as set forth in the recitals Access Directive to failed interconnection negotiations in their jurisdiction. But even in this rather unlikely event, it is an open question whether courts would thus interpret the principle as a contract or an administrative law principle, although the fact that the recitals refers to undertakings points at even the Commission thinking of a contract law principle rather than an administrative principle (which would be directed at the NRA).

6.3.3 Good faith in the absence of a right and duty to negotiate interconnection

Assuming that the law would not have included a right/duty to negotiate interconnection (in this book, the emphasis lies on the duty), the question arises whether the stakeholders in interconnection would then be free to stop the negotiations at any time. Indeed, it follows from the same good faith principle that any party — acting in good faith — would be free to decide whether or not it would enter into an agreement.77 Otherwise put: what if the EC regulator had not introduced an obligation to negotiate interconnection in the law?

If there would be no statutory duty to negotiate, then OLOs amongst themselves would be free to decide whether or not they would want to enter into an interconnection agreement. It was argued in Chapter 2 that sensible OLOs would find ample economic reasons to do so.78

However, if it concerned negotiations with the TO or another SMP undertaking, civil law to some extent could still deter the TO from simply negotiating with the OLO without having the legal intention to reach an agreement with the OLO, for the good faith principle cited above: it would be under a duty not to take advantage of the OLO's weaker position.79 Yet, the reverse could apply to the OLO as well. In a rapidly opening market, where many OLO's would start negotiations, they could do so without

77 Cf. Article 2:301 Section 1 PECL, which has no counterpart in the BW.
78 See Chapter 2, paragraph 2.5.1.
79 Cf. Article 2:301 Section 3 PECL, which provides: “(3) It is contrary to good faith and fair dealing, in particular, for a party to enter into or continue negotiations with no real intention of reaching an agreement with the other party.”
having an intent to reach an agreement with the TO, for instance, simply not to miss out, or to attract investors. Hence, the TO could be keen enter into an agreement sooner rather than later. Nevertheless, because of the scope of interconnection and the position of the TO, it would probably be acceptable sooner for an OLO to terminate interconnection negotiations that it had requested, taking into account the justified interests of the other party.  

There is no real convincing case to be made for obliging the OLO simply to negotiate, based on contract law principles only. Only if the OLO were to negotiate with some parties and not with others could the party being confronted with a refusal to negotiate probably argue that such refusal would be against good faith.

As regards a refusal by the TO or another SMP undertaking, the OLO would probably have to base itself on the essential facilities doctrine or argue that the TO would be acting against the obligation of non-discrimination, although it remains difficult to see whether this could be successfully upheld before a civil court. Still, it should be remembered that, in the absence of a primary interconnection rule, the law could still stipulate specific SMP obligations that might be justified even in the absence of a duty to negotiate.

In my preliminary view, in the absence of a duty to negotiate under the primary rule, it is not all that certain that the TO would be better off, i.e., would be able to walk away and simply deny an OLO access or interconnection at all times, as long as the law contained specific secondary rules (which would become less 'secondary' then).

Finally, note that the law provided for foreign providers who requested interconnection. The party who had the duty to interconnect could file for

---

80 The TO controlled an essential facility, and if refusal to deliver could be considered an abuse of a dominant position, dependent on the state of the market, additionally, it could also be considered bad faith if the TO would not continue negotiations. Obviously, the Commission felt this doctrine provided not enough protection to the interests of the OLO, having introduced the specific notion of SMP and the negotiations duty, see Chapter 3, especially paragraph 3.3.2.3.

81 It must then be assumed that this obligation would apply. See on the ONP non-discrimination principle, Chapter 3 paragraph 3.3.2.1 and, infra, paragraph 6.6.2.

82 In terms of regulation, the negotiations model would differ: the regulator would have to accept a commercial negotiations model of interconnection with regard to the rules of competition law. This was model (1) set forth in chapter 3, paragraph 3.2.2.1 (1) and not the one that is currently applicable, model (3), commercial negotiations made subject to a regulated framework.

83 See Article 6.3 (3) 2004 Tw. See Articles 6 sections 2 and 4 1998 Tw.
an exemption from this duty, based on technical or economical grounds.84

6.3.4 Good faith and the efforts or results obligation to provide interconnection

An important issue that arose under the 1998 Tw was whether there existed a duty not only to negotiate, but also a legal obligation to provide for interconnection.85 This would be akin to the notion of Kontrahierungszwang explored by Houben.86 Probably, this question arose due to confusion regarding the difference between the primary and the secondary interconnection rules, even though the NRA in the Netherlands clearly thought every party was under a duty to interconnect.

It was not literally explicitly stated anywhere that the parties had a results obligation to bring about interconnection whether or not through negotiations. Since Article 6.1 (6) 1998 Tw provided for the duty to negotiate an agreement, the necessity to have to agree to a contract was there. Most Dutch authors agreed that Article 6.1 1998 Tw established first and foremost a duty to negotiate.87 Yet, the provision implied — if applied in connection with Article 6.9 1998 Tw (but that clause was applicable to SMP only) — that a TO simply could not refuse, preliminarily, a request for access.88 This would then

84 But the law no longer provided an exemption based on the foreign party not wanting to offer interconnection on a reciprocal basis, which could point at the aforementioned right. See Article 6.1 section 3 1998 Tw. The TO could request being exempted from the duty to negotiate interconnection. Such exemption could be given, for instance, in case of a discrepancy in the offers. The law initially required the TO to assert that there exist technologically or commercially viable alternatives, or as the law provided: 'if there are insufficient means of interconnection available'. This has now changed and the exemption does not appear to be available any longer.

85 The BW does not define the notions of efforts and results obligations. Article 5.4 UP describes the consequences of the classification as a results or efforts obligation: "(1) to the extent that an obligation of a party involves a duty to achieve a specific result, that party is bound to achieve that result. (2) To the extent that an obligation of a party involves a duty of best efforts in the performance of an activity, that party is bound to make such efforts as would be made by a reasonable person of the same kind in the same circumstances."

It is unlikely in the current stage of the communications market that the TO will encounter nationally a party that is of the same kind and faces the same circumstances, so this test is not very helpful.

86 See Houben 2005.


88 Unless this was an exception to Article 6.1 (3) Tw.
translate in a *best efforts* obligation to negotiate the terms for access or interconnection for all concerned. The NRA went further: it expressed the view that the law should be interpreted as requiring from the TO a *duty to interconnect*, no matter what (with a possible spill-over of this obligation to OLOs). The possibility that the NRA was to intervene if the parties were unable to agree thus hung as a Damocles’ sword in the background.

That way, even the clear efforts obligation (to negotiate) under the primary interconnection rule could become a results obligation (to contract).

A question arising in this context was whether the duty to negotiate (or to interconnect, dependent upon how one sees this) was fulfilled once the parties reached an agreement, or only once the TO made the facilities available to the OLO. The Dutch NRA took the view that the agreed facilities must have been provided. Its policy view entailed that the OLO had an interest to complete the interconnection negotiations as soon as possible (at least if the other party was the TO), so it could file an order for interconnection capacity. The TO could have a conflicting interest described above: it could want to stretch the negotiations, or, once the negotiations were complete, perform the order incompletely as long as no specific access obligations were imposed.

In my view, the 1998 Tw tended towards imposing a stronger than intended (on the EU level) results obligation on all parties (including the TO and the OLO) to *provide for* interconnection. The wording was, after all, stronger than that of Article 4.1 Interconnection Directive. And the crux of the matter lay reading Articles 6.1 (1) and 6.1 (6) 1998 Tw conjointly. Although the Access Directive maintained Article 4.1 Interconnection Directive, the 2004 Tw was slightly less specific than the 1998 Tw.

Article 4.1 Access Directive still referred to an obligation to negotiate for networks operators. This clause was mirrored in Article 6.1 (1) 2004 Tw

---

89 This observation is based on a comparison of Articles 6.1 and 6.3 1998 Tw. See also Dommering 1999, p. 450-451. See also the T-Mobile/Yarosa case, discussed, *inter alia*, in Chapter 4 paragraph 4.4.3 and Chapter 8 paragraph 8.2.2.1.
91 And Article 4 Interconnection Directive – which does not conflict with this - remains in force, pursuant to Article 7.1 Access Directive.
which mentioned: "(...) will enter into negotiations (...)", "(...) with a view to enter into an agreement (...)" with the aim to bring about "end-to-end connectivity". It must be noted that the words "with a view to enter into an agreement" still went beyond what the Access Directive required.

Article 6.1 (1) 1998 Tw was replaced; but reappeared to some extent supporting secondary interconnection obligations in Article 6a.6 (2) i. 2004 Tw where it imposed on the SMP TO that it: "takes care of interconnection of public electronic communications networks or network facilities". But, both the context and the scope of the obligation changed, so arguably the need for secondary intervention had lessened as well.92

In my view, the law confusingly retreated from a general duty to contract for or to achieve interconnection, or a results obligation to reach an agreement in the broadest sense, where it concerned the TO (whilst the primary interconnection rule remained intact). The question whether the party who would be unwilling to enter into the agreement, in spite of the duty to negotiate, would thus have to be answered under the primary interconnection rule (and possibly contract law).

6.3.5 Good faith and parallel negotiations
Conducting parallel bi-lateral negotiations is not considered to amount to a lack of good faith in negotiations.

At any rate, this would be the normal course of affairs for TOs establishing interconnection agreements at the time markets are opening for competition: they were supposed to conduct parallel negotiations with many parties at once. The interconnection agreement itself was not the coveted good, but the facilities were. Whether the TO would act against good faith or not, would depend also on what transpired from the parallel negotiations process. It is not unlikely that a TO may be held liable, if it gave way to another OLO that, for instance, promised not to contest the interconnection rates. Again, in light of the efforts obligation to reach an agreement, it would not be easy for either party to break off negotiations if the TO or the OLO were negotiating with another party in parallel.

6.3.6 Good faith and failed negotiations
If the parties would jointly decide to break off the negotiations, there would be no issue. To avoid misunderstanding, Article 6.1 (3) 2004 Tw provided they had the right to terminate by joint decision.

---

92 See also Chapter 4.
Interconnection Regulation and Contract Law

Besides, and this also confirmed earlier case law, other circumstances could also make it unacceptable that a party would break off negotiations. The extent to which the party breaking off the negotiations raised expectations and the manner in which the negotiations were broken off would have to be weighed in considering the coming into existence of the reasonable expectations of the other party and its justified interests. In this respect, the Supreme Court appeared to confirm to a large extent earlier case law.\[^{104}\]

In the main case rendered earlier, the Supreme Court distinguished three phases in negotiations: (1) the initial stage, during which the parties may break off the negotiations without incurring any liability; (2) the phase of continued negotiations, during which a party may break off the negotiations but must compensate the other party for its expenses; and (3) the final stage, where the breaking off would give rise to a duty to compensate the other party for its expenses and even the profits that party could have made.\[^{105}\]

Subsequently, the reasoning of the Supreme Court was somewhat qualified, for instance, when the Supreme Court accepted that a party could break off negotiations in the event of unforeseen circumstances, even if the other party could have the justifiable expectation that the parties would reach an agreement.\[^{106}\]

The third phase construed by the Supreme Court has been subject to criticism in literature. It was felt that, if this would be accepted, a duty to contract would be imposed on the party wishing to break off the negotiations. This could be countered by saying that the parties reached this phase of their own free will.\[^{107}\] It is not entirely certain whether the Plas/Valburg decision has been overridden by the CBB/JPO decision.

In the context of interconnection, the question then arising is whether either party still had some form of autonomy to break off negotiations, since it had a right and a corresponding obligation to negotiate (thus effectively tying it to the other party – but, the question is also relevant in the absence of the duty to negotiate). This would at least render the initial phase developed in Plas/Valburg obsolete for access or interconnection negotiations. The fact

\[^{104}\] Cf. Drion 2005, p. 1781, who thinks it is the other way around: he believes the Supreme Court did away with earlier case law, such as the above-cited decision in HR 18 June 1982, NJ 1983, 723 (Plas/Valburg).


Contract law aspects

that the law now specifically mentions the right to terminate the negotiation may point in the direction of the regulator accepting that the parties were by and large autonomous in establishing the contract and deciding whether or not to continue negotiations; but with some motivation; which motivation would be subject to a higher standard in phase (2) as identified by Plas/Valburg, and which is – in my view – by and large sustained by CBB/JPO.

If phase (3) would still apply, they would serve OLOs well, also in negotiations with other OLOs: it would give them a ground to sue, for instance, if an OLO at the last moment would increase its terminating tariffs, or otherwise pose unreasonable new demands. In my view, it would be more difficult for the TO to break off negotiations in the second or third phase, although this would depend on whether specific access obligations had been imposed on it.

Admittedly, case law did not deal with the situation where the TO would not break off the negotiations, but rather stall them, or impose unrealistic demands. I believe that courts would be willing to consider the special position of the TO or an SMP undertaking in that situation, too, especially if the duty to negotiate was preserved in the telecommunications law.

Absent a duty to negotiate, case law could be applied mutatis mutandis and the specific facts of the access or interconnection situation could probably still lead to pre-contractual liability, although it might be difficult to act effectively against stalling tactics of the TO.

Good faith would be the presumption. This meant, in principle that the burden of evidence lay with the party alleging the other party did not act in accordance with good faith. But in a case of dependency, such as an interconnection agreement with the TO, it seems plausible that a civil court would fairly soon consider the contractual relationship in light of the good faith presumed to exist on the side of the OLO, since the TO was in a different position: it was faced with numerous requests and it had a stronger market position.

6.3.7 Application of good faith to failed interconnection negotiations

Applying the most recent case law to interconnection negotiations from the perspective of the OLO: (1) where there is a statutory duty to negotiate it will be easier for a party to argue that the other side cannot terminate these negotiations, as the duty already implies an expectation on the side of both parties and the justified interest of the OLO is immediately clear: achieving network interconnection. The TO would continuously have to state it was
negotiating against its free will; and (2) in the absence of the duty to negotiate, there could still be circumstances where breaking off negotiations would be contrary to good faith.

Ad (1): The TO (or, alternatively, in negotiations between OLOs the OLO) would have the burden of evidence to demonstrate why – if this occurred – terminating the negotiations was justified. Examples of a conflict situation could be disagreement on a fundamental aspect, perhaps the service provision or the scope of operations or maintenance. In my view, termination could not really be justified due to disagreement on, e.g., interconnection charges or rates, as these are heavily regulated. Breaking off negotiations based on the OLO's refusal to accept these, could amount to predatory pricing practices.

Ad (2) In addition to the justified interest of the OLO (which would be the same whether or not there would exist a duty to negotiate), special circumstances would be the position of the parties, the business plan and/or expected customer base of the OLO (for instance, if it already had a significant foreign customer base), the way in which negotiations occurred, investments made already by the OLO and the scope of its technical offering, common usage between the TO and the OLO, for instance if they have already concluded interconnection agreements with respect to different technologies, or countries, and other circumstances, such as whether the OLO was a large ECN or ECS provider or an MVNO.

An example of the TO terminating the negotiations, might be special access. Under the 1998 and the 2004 Tw, (special) access requests must be handled by the TO, provided the requests were reasonable. The TO argued several times that the request of the OLO was not reasonable, on the grounds that the OLO did not take into account the network specifications of the TO. However feeble the arguments of the TO, a mere denial – without motivation – could amount to bad faith. This could, arguably, lead to pre-contractual liability towards the OLO. Otherwise, it would be necessary to provide specifically in the telecommunications regulation that the party breaking off the negotiations (the TO) would be liable for the financial damages of the other party.

110 See Article 6.9 1998 Tw. Article 6a.6 in conjunction with 6a.2 (1) 2004 Tw contains a new, more elaborate clause on how the TO must deal with access requests generally. The distinctive definition of special access no longer exists.
This brings the issue of what remedies apply. It should be borne in mind that the remedies under the Tw and the Civil Code (hereafter referred to as: Burgerlijk Wetboek, 'BW') would be different, if only due to the fact that the competent authorities would be the NRA and the court.

Under the Tw the other party could request from the NRA: (1) to set a timeline; or ultimately, (2) fix the terms for interconnection. A damage claim would not be possible under the Tw. Under the BW, the other party could, for instance: (1) ask for an order against the party who did not negotiate in good faith (or broke off the negotiations) to continue negotiating on pain of recognizance (within a certain time frame); (2) ask the court to set the terms; and/or: (3) sue for damages.

6.3.7.1 Regulatory intervention by the NRA

What role should the NRA play, as opposed to the courts, in the pre-contractual phase? It was discussed in Chapter 4 whether the NRA was equipped to deal with contract law issues during the formation and its competencies were reviewed.

Turning the issue around, from a contract law perspective, an important concern to be addressed to determine what intervention is foreseen by law is the meaning of the phrase ‘where justified’ in Article 5 (4) Access Directive. Otherwise put, did these words give the NRA full authority to intervene during on-going negotiations at its own discretion, at any time? As we know, this was not the case.

Fixing timelines and contract law

Only if one of the parties complained they were unable to reach an agreement (for instance, should the TO be unwilling to complete the negotiations) the NRA was granted a broadly described opportunity to set conditions for the manner in which the negotiations must be concluded. This could include

---

111 See Chapter 3 paragraphs 3.4.3 and 3.4.4 and Chapter 4 paragraphs 4.3 and 4.4.
112 For further discussion see, infra, paragraph 6.6.5.
113 But, in such case, the NRA must overcome a number of hurdles and will bear the burden of evidence that regulatory policies are at stake, cf. Article 5 (4) Access directive with Article 9 (3) Interconnection Directive. For a more detailed discussion, see chapter 5, in particular paragraph 5.2.4-5.2.5. Farr, Oakley 2002, p. 67.
114 See also Farr, Oakley 2002, p. 63ff., p.111ff.
115 Article 6.1 (3) 2004 Tw kicked in. Note that these provisions apply also to negotiations between two OLOs that control end-to-end connection (access to end-users). See Chapter 5, paragraph 5.2.5.3.
the possibility of setting a term within which the negotiations must be completed.\textsuperscript{116}

If the term imposed by the NRA expired, then the TO was in default. It is an open question whether the default as meant in telecommunications law qualified as a default within the meaning of contract law.\textsuperscript{117}

It is uncertain if the NRA by law must take into account the good faith principle as developed in case law on contracts.\textsuperscript{118} I believe this is not the case, since the NRA is an administrative body instated by law and the delineation of its competence was laid down in the ONP framework and the NRF and not in the legislation concerning judicial organisation. What followed in practice was a very broad discretion for the NRA to decide as it deemed fit. In this respect, the NRF introduced the principle that measures taken by the NRA must be objective and proportionate.\textsuperscript{119}

\textbf{Setting the terms and contract law}

If one party was unwilling to negotiate (further), then the desired agreement could be brought about upon request vis-à-vis the issue of guidelines or rules or could even be replaced with a public administrative order.\textsuperscript{120} This was a rather unprecedented administrative sanction.\textsuperscript{121} In the Netherlands, the NRA did not ever set access terms generally.\textsuperscript{122}

It could be assumed that the NRA would take the RIO as the starting point and would set aside any unfair terms.\textsuperscript{123} It would then consider the service

\footnotesize{\textsuperscript{116} For the Netherlands, \textit{cf.} Article 6.3 1998 Tw, Article 6.1 (3) 2004 Tw and Article 6:80ff. BW.}\n
\footnotesize{\textsuperscript{117} See, \textit{infra}, paragraph 6.6.3.}\n
\footnotesize{\textsuperscript{118} See, \textit{infra}, paragraph 6.6.1. Sitompoel argues that the discretion to apply reasonableness notions is larger for an NRA than it will be for the court, since the court will be reticent regarding this principle, as it will have regard for what the parties have agreed on. I do not believe this argument applies here, since there has been no agreement.}\n
\footnotesize{\textsuperscript{119} See Article 6.4 2004 Tw. \textit{Cf.} Article 5 (3) Access Directive. See for an argumentation that proportionality, along with subsidiarity as administrative law principles could also be applied to contract law, Hartlief, Stolp 2000, in Smits, Stijns (eds) 2000, p. 256-257.}\n
\footnotesize{\textsuperscript{120} See Article 6.2 2004 Tw. \textit{Cf.} Article 6.3 1998 Tw.}\n
\footnotesize{\textsuperscript{121} As will be seen below, the courts could also set the terms at the request of one of the parties. The feeling was they would be less inclined to do so, if there was another competent instance to do this, namely the NRA.}\n
\footnotesize{\textsuperscript{122} In England and Germany no decisions were found either.}\n
\footnotesize{\textsuperscript{123} See Decision RIO 2000, to be discussed in Chapter 7.}
request by the OLO and order the TO to deliver the service. But, although the administrative law contains provisions on reasonableness of administrative decision-making, the provisions are aimed at the NRA's behaviour and it is not certain that the NRA would be equipped to apply contract law principles such as good faith and reasonableness to the failed interconnection negotiations.

6.3.7.2 Court intervention
As discussed, it would be the simplest to claim against the TO, where the Tw provides for a duty to negotiate. Even in the absence of such a provision, a claim could be based on unlawful behaviour (onrechtmatige daad).

According to Dutch legal doctrine, if a party breaks off the negotiations leading to an agreement, then the non-defaulting party has a number of options. Note that the available actions could be cumulated. It is observed that these remedies are not common to all EU jurisdictions hence they may offer an interesting insight in how the law could work and could perhaps be exported if fitting in the national legal system. This book does not propose to analyze the differences and possibilities in appellate proceedings either.

Continue negotiations
First, the party that wanted to conclude an agreement could ask the court to order the other party to continue or conclude the negotiations. Alternatively, a prohibition would be enforced to terminate the negotiations. In the

---

124 Article 6a.6 (1) 2004 Tw contained an equally broad right for the NRA to impose a specific access obligation on a party with SMP, provided again the access request is reasonable. Cf. Article 6.9 1998 Tw. See, for instance, OPTA 6 May 2004, (Versatel, bbned et al./KPN Telecom); in this case the TO did not break off the negotiations; it simply refused to sign a specific agreement (Telco-Telco migration) that had been signed by various OLOs and required a signature from the TO.

125 Cf. Houben 2005, Chapter 5 paragraph 5.4.3.

126 Cf. Houben 2005, p. 300ff. As discussed supra, Houben also considers that in the absence of a duty to contract, recourse could be had, for instance, to Article 82 EC Treaty.

127 Cf. Article 8:102 PECL and - somewhat different - Article 7.2.5 UP. Dutch law acknowledges accumulation of actions as well, Busch et al. 2002, p. 329.

128 See, e.g., Vranken 1999 on different jurisdictions, including England and Germany. This chapter does not discuss the possibility of appeal before the civil courts. For an interesting take on the object of appeal in civil matters, see Vranken et al. 2002.

129 For a comparative study that includes the Netherlands, England and Germany, see Hovens 2005.

130 See Article 3:296 BW. Article 2:301 (2) PECL and 2.15 (2) UP relate solely to liability for breaking off negotiations. They do not provide for other remedies.
Netherlands, for instance, it would be possible in both cases to obtain an injunction in summary proceedings to force another party to continue negotiations. At the request of a party the court could also determine the date for completion of the negotiations; failing which, it could impose a penalty on one of the parties.

A court would take into account the following circumstances: (1) the phase of the negotiations; (2) the relationship of the parties; (3) whether one party held a special (monopolistic) position; (4) other interests of the parties; (5) and the manner in which the negotiations were conducted.

With respect to interconnection agreements, under Dutch law the plaintiff must to some extent demonstrate that it was likely that the parties would have reached an agreement, had they continued to negotiate. Because of the duty under the Tw to negotiate – which goes on indefinitely –, combined with the obligations that apply to the SRF TO, it would be simple for an OLO to demonstrate this. Thus, this type of action would have the same effect as filing a complaint with the NRA and waiting for it to set a date. However, the OLO could additionally ask a court to set a cognisance on continued non-performance of the duty to negotiate, which remedy is not readily available before the NRA.

Second, the non-defaulting party could rescind the (partially executed) agreement. This option is not very relevant in the process of interconnection contract formation, unless the parties would have started performing partially. In case of rescission, the parties would need to undo their performance. This means that PoCs would have to be disconnected, facilities would need to be closed.

Contrary to a court, the NRA would not have any competence to rescind the agreement between the TO and the OLO.

As said, these options to take civil action have not been harmonized under European law. In many other jurisdictions, for instance, there would be no

---


132 See case law discussed, supra, paragraph 6.3.6; De Kluiver 1992, p. 62-76.

133 Conversely, it should not be that difficult for the TO to obtain an injunction against the OLO as well.

134 The option of a penalty was not available under Article 6.1 (3) 2004 Tw. But the NRA could exercise coercion, by later imposing a penalty for non-compliance with legal obligations under Article 18 2004 Tw. This has not happened. See Chapter 5 paragraph 5.4.4.
room to order the other party to continue negotiations. Rather this would lead to a claim for damages. For example, in Germany, the Supreme Court decided that a party that broke off negotiations against good faith might not be ordered to continue negotiations. So this claim would not be available under contract law, in principle, to an OLO in Germany, although it remains to be seen whether German courts would diverge from Supreme Court case law, where the German Telecommunications Act, the Telekommunikationsgesetz ("TKG") provided for a duty to negotiate.

**Setting the terms**

Unless the OLO included draft terms and specifically requested this the court would not, in principle, be inclined to determine the conditions of the contract, although strictly speaking, these could be based on an awarded claim by the OLO of bad faith or non-performance by the TO.

However, in this case, the civil law example should be distinguished again from the common law. In England, such a court order could be more difficult to obtain, where the right to claim performance in the event of a breach of contract is a discretionary remedy; more often damages are claimed in case the other side does not perform its obligations properly.

Note again, that the regulatory framework for telecommunications provided for explicit jurisdiction of the NRA to set the terms, absent a commercial agreement.

**Damages and lost profits**

At least in the Netherlands, the non-defaulting party could claim financial damages, due to the other party's breaking off the negotiations. Such claims must always be instated before the civil courts. The basis for the claim for damages could be unlawful act. The OLO would have to demonstrate...

---

135 See, BGH, 19 October 1960, LM BGB § 276 (Fa) no. 11; NJW 61.169.
138 Under Dutch law, this type of remedy is the compensation of the "negative contract interest" (negatief contractbelang), as opposed to compensating the plaintiff for the "positive contract interest" (positief contractbelang). See for a recent overview, Hesselink 2004, p. 15ff.
Besides, both a claim for performance and a claim for rescission may be combined with a claim for damages.
139 Alternatively, the plaintiff could claim that the behaviour was against the reasonableness principle in the BW. Authors disagree on what is the best ground for this claim. Cf. Rijken 1994, p. 55.
Interconnection Regulation and Contract Law

its damages. This should not be that difficult if the OLO had an established, elaborate business plan for its market, although of course it would need more than just a business plan.

The option of claiming damages when the other party inadvertently breaks off contract negotiations was not available under the Tw. Yet, the possibility of numerous claims from different parties should in itself be a deterrent for the TO to act in bad faith. As is the case in normal business practice, the likelihood of claims from market parties should encourage the TO to act in good faith when negotiating.

As is discussed in Beale, the damages remedies are different in the different EU Member States.  

Owing to the different view at good faith under English law, the notion that a TO or an OLO would be liable for breaking off the interconnection negotiations, is more unlikely. But there may be other theories for establishing liability in such a case and it is likely that the courts would also take into account the special position of the TO or SMP undertaking.  

In this respect, reference must be made to the *Tacchoni SpA/HWS GmbH* case, where the European Court of First Instance (CFI) was asked to address how pre-contractual liability for not having negotiated in good faith would be construed. The CFI gave a fairly broad interpretation to the notion.

---


141 See Beale *et al.* 2002, p. 251ff. Beale concentrates on the larger Member States and I have not investigated what applies across the EU. It may be assumed that overall differences occur.

142 Cf. legal principles such as negligence, estoppel or restitution. It falls beyond the scope of this chapter to discuss these.

143 Court of First Instance (CFI) 17 September 2002 (*Tacchoni SpA/HWS GmbH*), C 334/00. See, in particular the verdict, which provided: "In circumstances such as those of the main proceedings, characterised by the absence of obligations freely assumed by one party towards another on the occasion of negotiations with a view to the formation of a contract and by a possible breach of rules of law, in particular the rule which requires the parties to act in good faith in such negotiations, an action founded on the pre-contractual liability of the defendant is a matter relating to tort, delict or quasi-delict within the meaning of Article 5(3) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (…)"
6.3.7.3 Arbitration
If the assumption is that courts would be competent to decide on failed commercial negotiations regarding interconnection, and impose remedies on the party refusing to deal, then the question arises, why not referring such matters to arbitration. The EC regulatory framework did not consider either measures by a court or an arbitration panel as a possible remedy against an unwilling ECN operator or ECS provider. Having discussed court intervention, it is merely mentioned here that there would be good reason to consider referring such matters to arbitration. The prime advantage evident in relying on arbitration rather than court intervention would be the possibility to appoint an arbitration panel member with specific knowledge, for instance as regards the telecommunications market, in particular the technological or cost-accounting aspects. Other advantages generally thought to exist when adhering to arbitration, such as confidentiality, cost, language etc. appear to be less evident. In case of national interconnection conflicts, moreover, there would be no necessity to consider possible enforcement problems. Mediation could be a viable alternative, although that would bring the parties back to the NRA probably being the most suited mediator.

6.3.8 Summary
As seen above, civil law probably offers the OLO the opportunity to go to court and obtain an injunction against the TO forcing it to continue negotiations also under the new regulatory regime. Specifically if the duty to negotiate remains embedded in the law for the TO or SMP undertaking, a court was likely to consider this a good faith obligation on behalf of the TO. Since the duty to negotiate applied reciprocally neither side could break off the interconnection negotiations unilaterally that easily. In this respect, given the statutory duty to negotiate, it can be said that the obligation of the parties tended towards a duty to contract.\textsuperscript{144}

Based on the legal requirements under the Tw, which would be taken into account by civil courts as well, there would be no incentive for the TO to terminate negotiations, nor to stall the negotiations for too long. From the perspective of available remedies if the TO was unwilling to negotiate, or broke off the negotiations, the option to obtain an injunction in court claiming continuation of the negotiations would certainly be available in some of the EU Member States, such as the Netherlands. Civil law also

\textsuperscript{144} Cf. Houben 2005, p. 251.
provided more elaborate remedies for the OLO, as it included options for penalty claims and/or a claim for damages.

However, in England, even if a duty to negotiate exists, it is unlikely that recourse could be had to the civil courts based on pre-contractual good faith if the TO would be unwilling to complete negotiations; although perhaps, the basis of the claim could be breach of a statutory duty in that case. Thus, remedies might be available under a different legal theory in English contract law. Interestingly, I found no indication that the obligation to negotiate interconnection provision caused controversy in England, where it was implemented in the 2003 Communications Act (CA).  

In terms of having a third party setting the actual terms of interconnection, if courts would be competent, they would likely act in a more restrained manner than the NRA. The reason is that the provisions in the law were addressed at the NRA, not to the market parties. These provisions contained specific competencies for the NRA to set the conditions for access and in light of these provisions; a court would likely defer to the NRA and hold a claim from the OLO to be inadmissible in this respect. If the Tw would explicitly empower the court to take the same measures or to empower the court instead of the NRA, this would be different.

The notions discussed above should provide the OLO with adequate civil law protection in respect of access and interconnection negotiations and it is difficult to see why intervention by the NRA in this respect would be required.

6.4 How the interconnection agreement comes about

Contract law in general provides that an agreement is formed when the following requirements have been satisfied: (1) an offer, (2) an intention to create a legal relationship, and (3) an acceptance. These requirements will be discussed briefly.

In some jurisdictions, such as England, the law requires a consideration as well. If a consideration would be required, it is easy to envisage the

---

145 See Chapter 4.
146 Cf., e.g., Article 6.1 (3) and 6.2 (1) and (2) 2004 Tw.
147 See Articles 3:33, 3:35 and 6:217 (1) BW; Article 2.2 UP; see Bonell 1994. Cf. with Article 2:101 and 2:103 PECL: there must be 'an intention to be bound' and 'sufficient agreement', see Busch et al. 2002, p. 75ff.
148 Consideration is the *quid pro quo* of the contract: what is done in return for the characteristic performance. Civil law does not require a consideration in order for an
consideration in an interconnection agreement. As was seen above, the access or interconnection agreement can be considered a services agreement. The TO provides services to the OLO and in return receives services from the OLO. The parties would reciprocally – in as much as possible – charge each other for the services – for instance originating and terminating calls – provided as part of the agreement so that the requirement of a consideration would most likely create no legal issue.

6.4.1 Offer

An offer is an expression of willingness to contract on specified terms, made with the intention that it is to become binding as soon as the person to whom it is addressed accepts it.\(^{149}\) It can be made in any form.\(^{150}\)

In English law the question whether a statement constitutes an offer will depend on the intention of the parties making the statement. This intention must be ascertained objectively, which should presumably not be that difficult when it concerns interconnection.\(^{151}\)

An offer might be a simple offer, the acceptance of which would lead to the contract, or an invitation to tender, i.e. an offer made to the public, for instance, an advertisement.\(^{152}\)

It is precisely this distinction that is relevant to the formation of interconnection agreements. In case of interconnection, the offer could be

---


150 See Article 3:37 BW. Cf. Article 2:201 PECL, which consider when a proposal amounts to an offer: (a) it is intended to result in a contract if the other party accepts it, and (b) it contains sufficiently definite terms to form a contract; cf. Article 2.2 UP.

151 See Court Of Appeal [1971] 2 All ER 183 (Bigg/Boyd-Gibbins Ltd.). See also Beale et al. 2002, p. 180. See also [1979] 1 WTLR 294 (Gibson/Manchester CC), in which the city council of Manchester changed its policy on selling council-owned property, after it had sent a letter to an occupant who was a potential buyer. The court held that the occupant could not interpret the letter sent by the council as an offer capable of acceptance.

152 This is also described as the distinction between preliminary dealings and the offer to enter into a contract, see Beale et al. 2002, p. 178ff.
issued as follows: (1) The OLO contacted the TO – or another OLO – with an offer, or request, to negotiate interconnection; (2) the TO contacted the OLO with an offer to negotiate interconnection.

The main distinction is that in the first situation, the OLO could put its (standard) interconnection agreement on the table, whereas in the second situation, the offer would be the TO's standard agreement. However, in both cases, the TO likely would (have to) issue a reference offer ('RO'), which consisted of at least its general terms and conditions, i.e., the RIO, its current version of the model interconnection agreement ('MIA'), its available services and the charges pertaining thereto. (For convenience the offer will be referred to jointly as the RIO). The process therefore was somewhat different because of the existence of the RIO. Paragraph 6.5 describes how the RIO is qualified and what its effect is on the negotiations process. It is, however, fairly certain, that few OLOs would accept the RO directly, as this would not amount to best business practice.

6.4.2 Intention to create a legal relationship

The question could arise whether in case of interconnection, wherein the parties were supposed to negotiate a contractual relationship – possibly against their will – there must also be some indication of an intention to create such legal relationship. Indeed, the requirement of an intention appears to be at odds with the duty to negotiate.55

Usually, parties would lay down their intention to create a legal relationship in a pre-agreement, such as a letter of intent or a memorandum of understanding and/or in the recitals to the final agreement.

The legislator takes no straightforward position when determining how legal subjects are bound by their declarations of will. For instance in the Netherlands, the BW provides a multiple basis for the existence of agreements. First, article 3:33 BW formulates a number of requirements to which statements made by legal subjects must conform. According to this

---

153 Whatever the offer, the way in which it would be tabled is considered crucial, probably in all EU Member States, since the offeror could choose between making a very weak to a moderate commitment. See, e.g., O'Connor 1990, p. 5ff.

154 See Article 2:102 PECL: “The intention of a party to be legally bound by contract is to be determined from the party's statements or conduct as they were reasonably understood by the other party.”


156 The Dutch RIO contains some language of expressing the parties' intention in the recitals, see Chapter 7.
Contract law aspects

provision, there must be some expression of a will. Second, the expression of the will must be aimed at having legal consequences. Third, the will must have been expressed through a statement. And the law protects third parties who are relying on such an expression of will.157

If the terms of the offer and acceptance are similar, then an intention to create a relationship is the assumption. Applying this to an interconnection agreement, it would predominantly be the OLO, who expressed its will first to enter into an agreement with the TO. The TO – either through the publication of a RIO or through making available its RIO to the OLO –, would in response express its willingness to enter into an interconnection agreement. Or it may if even be said that the fact that the TO publishes a RIO is an expression of its intention to create a legal relationship, even if this publication is prescribed by law.158

It would still be too simple to conclude that, by accepting the offer of the TO to enter into an interconnection agreement, an agreement automatically came into existence.

Article 3:35 BW contains a provision for situations where there is a discrepancy between the will and the expression thereof.159 An example in case of interconnection is where the OLO interpreted the publication of the RIO as a custom-made offer, which could be readily accepted. For this reason, when the Dutch TO, KPN Telecom, published its RIO for the first time in 1996, on orders of the then competent Minister, it expressly stated in its advertisements that the publication of its offer was not aimed at establishing any legal effect. Rather it should be interpreted as an invitation to start negotiations. It remains to be seen whether this approach was entirely correct under the then applicable telecommunications law. If the foregoing assumption of negotiations is indeed correct, then this means that – in normal contract practice – the OLO could present a counteroffer or proposal.

157 Cf. Article 3:36 BW which reads: “The party whose statement of behaviour is involved, cannot invoke the incorrectness of the presumption made by the person, who as a third party has assumed the given, existence, or annulment of a legal relationship in accordance with the meaning he could normally attach thereto under the circumstances, and who has acted in reasonableness on that presumption being correct.”

158 See also Houben 2005, p. 221 who holds the same view.

159 Article 3:35 BW provides that if a party has interpreted a statement or behaviour by another party as a statement directed towards it with a certain scope, and if the first party could reasonably attach meaning under the circumstances to such statement or behaviour, then the other party cannot argue that its statement is devoid of will. On Articles 3:33 and 3:35 BW, see Houben 2005, p. 221, footnote 15.
Interconnection Regulation and Contract Law

Whether originated by the TO or the OLO, and once the will to enter into a legally binding interconnection agreement was expressed, the negotiations phase should begin and the TO should not prevent this simply by putting its RIO on the table.

Another matter is how a counterproposal would reconcile with the principle that the TO must not discriminate among the numerous OLOs wishing to achieve interconnection. In other words: citing their experience with the TO, OLOs could feel that they had no choice really but to accept the terms of the RIO as presented, especially if they were in a hurry to establish end-to-end connectivity. Since the process of forming the agreement was likely to be preceded by a protracted negotiations’ process, it would be sometimes difficult to ascertain at which moment the parties reached an agreement. Special circumstances therefore determine at which moment the parties’ obligations were taken on and were thus enforceable by the other party.

In sum, the requirement of the intention to create a legal relationship never posed issues and would not likely create any in respect of interconnection agreements. On the contrary, whether or not there is a duty to negotiate, the parties are better off when they express their will to reach an agreement in a written contract.\(^{160}\)

6.4.3 Acceptance

Dutch law merely stipulates that agreements come about through offer and acceptance, without defining the term.\(^{161}\)

In English law, acceptance is considered to be a final and unqualified expression of assent to the terms of an offer.\(^{162}\)

There are numerous provisions that deal with, for instance, late acceptance, and diverging acceptance. Both the PECL and the UP discuss acceptance, in terms of the modes of acceptance and the time of concluding a contract.\(^{163}\) In short, a declaration of acceptance can occur in any form, and acceptance may also occur through conduct, although silence or inactivity may or may not be deemed to amount to acceptance.\(^{164}\)


\(^{161}\) Article 6:217 BW and Article 3:37 BW regarding the working and expression of a statement.

\(^{162}\) Cf. Treitel 2003, p. 16. See also O’Connor 1990, chapter 2, Acceptance, p. 33ff.

\(^{163}\) See Article 2:204 PECL; Article 2.6 Section 1 UP. Cf. this with Article 3:33 BW.

\(^{164}\) See Article 2:204 Section 2 PECL; Article 2.6 Section 1 UP. See Beale et al. 2002, p. 213ff.
Contract law aspects

To constitute an effective acceptance, the communication must indicate assent to the offer. In principle, acceptance should be unqualified. Nevertheless, in some circumstances, if the offeree can indicate assent by performing an act, this may be deemed to constitute acceptance.

An example – to be explored below – is where the OLO placed an order with the TO (which order the TO performed), even if neither party signed and executed the interconnection agreement yet.

The offeror may control the process by prescribing a particular manner for acceptance, – that acceptance must be expressed in writing, for instance. Thus, the TO, who will most likely be the offeror or counter-offeror, may require formal acceptance in writing by the OLO.

The requirement of acceptance is relevant to the interconnection agreement formation and although they bear relevance for OLOs, it will be discussed focusing on the situation of the OLO wanting to contract with the TO.

166 See, for instance, Article 3:35 BW, which provides: “The absence of intention in a declaration cannot be invoked against a person who has interpreted another's declaration or conduct, in conformity with the sense which he could reasonably attribute to it in the circumstances, as a declaration of a particular tenor made to him by that other person.” Cf. with Article 2.6 UP and Article 2:205 Section 3 PECL: “However, if by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act without notice to the offeror, the acceptance is effective when the act is performed.” The PECL also contain a specific clause on late acceptance, Article 2:207 Section 2: “If a letter or other writing containing late acceptance shows that it has been sent in such circumstances that if its transmission would have reached the offeror in due time, the late acceptance is effective as an acceptance unless, without delay, the offeror informs the offeree that it considers its offer as having lapsed.”
168 Probably less relevant is the rule regarding the time of conclusion of the contract. Not because it does not occur or may or may not be difficult to establish. Rather, the rules do not seem to have practical relevance in the context of interconnection negotiations, as the parties will want to formally and without uncertainty establish the time of conclusion of an agreement, for instance, by entering the signing date for both on the agreement, or by including an effectiveness clause: “This agreement shall become effective at the date first written above.” I found no such clause in the RIO, but the BT RIO concluded with a statement: “(...) this agreement was entered into the day and year first above written.” See, for instance, Article 6:223 Section 1 BW: “An offeror can treat a late acceptance as a timely one provided that he communicates this decision to the other party without delay.” Cf. with Article 2:205 PECL, which relates to time of conclusion of the contract: “(1) If an acceptance has been dispatched by the offeree the (Continued)
A binding agreement would be formed between the TO and the OLO, once the offer was accepted – whether integrally or inclusive of modifications – by the other party. Taking into account that the basis for negotiations and, thus, the agreement would be the full RIO (i.e., the second situation described in paragraph 6.4.1, rather than an offer issued by the OLO), then in the negotiations process, the following are possible scenarios: 169

1. the OLO accepts the RIO integrally without modification;
2. the OLO and the TO reach a partial agreement, i.e., on certain, but not all, clauses;
3. the OLO accepts the RIO without modification, but under protest, for instance by issuing comments in a side letter against specific clauses;
4. the OLO issues a counter proposal. In this proposal it suggests amendments and modifications to the RIO;
5. the OLO rejects the RIO in full, and
6. the OLO does not respond to the RIO, but places an order for access with the TO, and the TO performs the order.

A distinction must be made between accepting the RIO – whether in part or in full – and acceptance of the (core) terms of the access or MIA. These will include such topics as cost and pricing, service description and service levels. In my view, only if and when the parties have reached an agreement on the full RIO, would they have an agreement.

6.4.3.1 The OLO accepts the RIO without modification
In principle, acceptance of an offer results in a final and unqualified assent to the contractual terms and conditions. In other words: if the OLO accepts the RIO and the financial terms for interconnection, an agreement is reached at the moment acceptance of the terms is communicated to the TO.

In the different legal systems, there are different legal theories as to when the exact moment of acceptance occurs. 170 What is essential is that there is a communication of acceptance (in this case: from the OLO to the TO) at some point, in order for an agreement to be executed.

169 Cf. Treitel 2003, p. 20 on the battle of forms and p. 52 on when further agreement would be expressly required.

170 It goes beyond the scope of this research to explore these different moments, whether the moment the acceptance is communicated (the send theory) or the moment the acceptance reaches the other party (the reception theory). See, e.g., in respect of electronic agreements, Prins, Gijrath 2000, p. 135 ff.
Contract law aspects

Under this scenario, the terms of the interconnection agreement would thus consist of the RIO (which included the MIA) and the accompanying order form, which would refer to the applicable rates.

Notwithstanding an agreement, under the secondary interconnection rules, there would likely be room for the OLO to obtain ex post intervention by the NRA in respect of the charges agreed upon with the TO, if the OLO could demonstrate these were not cost-oriented in line with the applicable policy.

Moreover, both the TO and the OLO would then probably also have recourse to civil law remedies to contest the validity of the agreement. Most importantly, Article 3:40 BW would provide the OLO with the possibility to argue that the interconnection agreement should be (partially) voided, as it contained terms that as their content or scope ran counter either with the public order, or a mandatory provision of law.\(^\text{171}\) As regards interconnection, the OLO could thus invoke the mandatory provisions under the Tw, such as the obligation of non-discrimination or cost-orientation, thus attempting to bring about better interconnection rates.

The important nuance between NRA or court intervention in this respect is that in a reciprocal legal relationship, if a provision is aimed at protecting one party, the provision is not per se void, but can be voided by a Court. The consequence would therefore be that a cost provision that ran counter of the Tw would be voided, but that such a decision would not apply retroactively for the benefit of the OLO.

The OLO could also invoke, for instance, error or deceit if it transpired that the TO misinformed it on the terms of access, such as those relating to service levels or tariffs.\(^\text{172}\)

What if it transpired after acceptance that the TO did not apply equal terms to the OLO as it did to its affiliates? First, the OLO would have recourse to the Tw. Article 6.4 2004 Tw provided that the TO must conform to

---

\(^{171}\) See Articles 1:103, 15:101 and 102 PECL. Cf. Article 3:40 (1) BW and Article 3:40 (2) BW. Article 3:40 (2) BW contains a caveat. A provision cannot be voided if this follows explicitly from (the context of) the provision. This does not, however, follow from the relevant provisions in the Tw.

\(^{172}\) See for error and mistake: Articles 3:33 and 35 BW in conjunction with Article 6:218 BW, which take an approach very different from Article 4:104 PECL and Articles 3.4-3.6 UP. The PECL consider a mistake caused in communication in the same manner as a fundamental mistake. Dutch law does not. See for deceit: Article 3:44 BW. Cf. Article 4:107 PECL and Article 3.8 UP.
Interconnection Regulation and Contract Law

non-discriminatory terms. The OLO would have two options to obtain a remedy: (1) file a complaint with the NRA, and/or (2) start civil proceedings against the TO, again including on the basis of Article 3:40 BW.

At first sight, it would appear a good strategy to file a complaint with the NRA. The OLO could choose to submit whatever evidence it considered appropriate. The NRA's policy considerations and insight in the commercial arrangements of the TO — albeit limited — would likely cause it to more actively police the TO, if the OLO could provide an indication of deceit or incorrect information. On the other hand, one of the downsides of using the NRA would be that the NRA could not issue a penalty and did not necessarily have a clear understanding of contract law issues surrounding the OLO's acceptance of the RIO.

Timing would be an issue. It is likely that the TO would attempt extending the decision-making process — although it would probably be able to do the same in civil proceedings — and that the procedure was going to be lengthy and tedious. In comparison, submitting a conflict to a court would entail that the OLO would likely incur the burden of evidence that it was deceived. It would be up to the OLO to provide the evidence that the TO had provided incomplete or incorrect information. Given that risk, and the fact that the civil court might consider a claim inadmissible since the Tw provided for NRA recourse, perhaps it would be less likely for the OLO to address the civil court. In sum, if the RIO were accepted, the most likely recourse for the OLO, if a conflict emerged, would be ex post intervention by the NRA, although recourse to the civil court was available.

However, it is probably not that likely that an OLO would accept the terms without making any kind of reservation.

6.4.3.2 The OLO and the TO reach a partial agreement

Contract law does not consider partial agreements separately.

In the event that the TO and the OLO reached an agreement on several terms, but other terms were left open for further negotiations or

173 On the non-discrimination principle, see, extensively, Chapter 3 paragraph 3.3.2.1, and Chapter 4 paragraphs 4.3.3 and 4.4.4. But the principle has not often been the subject of administrative complaints, cf. Chapter 8.

174 See Dommering et al. 2003 on the lead times in dispute resolution.


176 Cf. Article 2.14 UP on reaching an agreement with terms deliberately left open. According to section (2), the existence of the contract is not affected by the fact that subsequently (a) the parties reach no agreement on the [specific] term; or (b) the third
determination by a third party, it might still be the case that the parties reached an agreement, either to a large extent or in part.\textsuperscript{177}

What does this mean in terms of the TO providing interconnection services? In practice, it was somewhat cumbersome for the TO to actually provide the service if there was no full agreement.\textsuperscript{178} Yet, if the parties agreed, say, on the provision of some services under the RIO, the OLO probably had good cause to demand that those services be delivered without delay, while negotiations regarding the provision of other services continue.

It is not immediately clear whether the OLO then had a strong position in turning to the NRA, arguing that negotiations failed. The most effective way to turn to the NRA in this scenario would be to issue a request for intervention with respect to those terms that the OLO wished to have determined and/or amended. The NRA could establish the interconnection terms, but in light of Article 6.1 (3) and 6.2 2004 Tw, the NRA could be expected to restrain its judgement. It would likely take the view that negotiations were still ongoing, unless both parties would declare that the negotiations were completed and that no agreement could be reached on certain terms. Thus, notwithstanding the NRA's right to intervene at its own discretion in this situation, it is unlikely the NRA would do so.

In sum, unless there are specific circumstances that justify this approach (for instance if the OLO were under commercial pressure to roll-out some of its services - but did not agree to all terms of the MIA) there seems to be limited merit for either party in following a partial agreement course.

6.4.3.3 The OLO accepts the RIO without modification, but under protest

Contract law does not regulate this situation either. Again, reference is made to the provision in the UP, which does not have a counterpart in Dutch law.\textsuperscript{179}

\begin{itemize}
  \item person – to whom they have left the discretion to determine the terms – does not determine the [specific] term. The UP require that there is an alternative means of rendering the term definite that is reasonable in the circumstance, having regard to the intention of the parties. See also, infra, paragraph 6.6.1.
  \item See Busch et al. 2002, p. 84.
  \item Although, for instance, the UK TO provided for partial agreement, by accepting the inclusion of a side letter in its standard interconnection agreement, see also Chapter 7 paragraph 7.4.3.
  \item Article 2.14 UP reads in full: “(1) If the parties intend to conclude a contract, the fact that they intentionally leave a term to be agreed upon in further negotiations or to be determined by a third person does not prevent the contract from coming into existence. (2) The existence of the contract is not affected by the fact that subsequently (a) the
\end{itemize}
This course of action would create a rather uncertain situation for the OLO. There have been instances where OLOs have issued separate letters to a RIO, indicating they accepted the terms under protest, for instance in respect of certain provisions such as bank guarantee, liability, or forecasting. The TO did not acknowledge or respond to such letters. The parties then started performing the agreement and the TO would make PoCs available for use by the OLO. In a normal situation where parties agreed on the terms of a contract, the value of a side letter that was not accepted by both sides would be quite doubtful. A side letter is nothing more than a further agreement, requiring acceptance from both parties. Besides, the RIO provided that amendments must be agreed upon in writing and such term would conflict with a side letter. It is doubtful therefore, that the OLO would be able to argue successfully that the TO agreed with the terms of the side letter through acquiescence, or that the side letter would as such would form part of the interconnection agreement between the parties through a unilateral statement.

But, the position of the TO in this situation would nevertheless not necessarily be that strong either. As was seen, the NRF and the Tw provided for intervention in the agreement if the terms were not considered reasonable and, dependent upon the circumstances, refusal to accept the terms of the side letter might be considered unreasonable. Again, the NRA would be unlikely to use that authority to intervene on a case-by-case basis, where the OLO simply issued a protest. Given the circumstance that an NRA must value the principle of freedom to contract, it was likely to be reticent in intervening in what could become a messy situation. Rather – as has happened – the NRA would generally provide for changes that must be made to the RIO in advance, or afterwards, if these fell under its competencies. Hence, it is not the best decision for the OLO to depend too much on a unilateral side letter. If the TO specifically agrees with the terms of the side letter, then it will be bound by it. Depending upon what the

parties reach no agreement on the term; or (b) the third person does not determine the term, provided that there is an alternative means of rendering the term definite that is reasonable in the circumstances, having regard to the intention of the parties.” Cf. this provision with Articles 20.2, (c) and 21.4 2002 RIO.

180 Cf., e.g., Article 2.105 PECL and 2.17 UP. Both provide that the parties’ prior statements may be used to interpret the agreement. There is also the issue of the ‘entire agreement’ clause, which is not uncontested under Dutch law. This clause generally provides that the contract states the terms agreed upon between the parties and replaces prior documents and discussions. The RIO did not contain an entire agreement clause.

181 See Article 25.1 2002 RIO.

304
Contract law aspects

parties agree, the side letter may run the risk of being voided through a third party complaint, for instance, if it would be deemed to contain discriminatory provisions.

6.4.3.4 The OLO issues a counter proposal

According to the law, an acceptance, which deviates from the offer, is considered to form a new offer and a rejection of the original offer. 182

As was discussed in paragraph 6.4.1, there was the possibility that the OLO issued its own set of terms and conditions for interconnection. That could lead to a battle of forms. 183 In this case, the parties would clearly enter the pre-contractual negotiations phase. Legal obligations could arise for either party as a result of the negotiations process. 184

How then could the principle of good faith be applied to interconnection negotiations when the OLO issued a counterproposal to the RIO? For one thing, the TO was known to make numerous reservations, for instance, the reservation that the final result of the negotiations was subject to board review and approval; the right to perform a regulatory review; the right to

---

182 See Article 6:225 Section 1 BW. Article 6:225 BW contains an arrangement for the response to such modification, where Section 2 provides: "Unless the offeror objects to the differences without delay, where a reply intended to accept an offer only deviates from the offer on points of minor importance, the reply is considered to be an acceptance and the contract is formed according to the latter."

In the practice of interconnection agreements, the latter clause is probably without meaning, as parties are likely to express themselves carefully and include general reservations in their response or mark-up of the contract such as "for discussion purposes only", "subject to agreement", or even "subject to board approval." Article 2:208 Section 1 PECL and Article 2.11 UP contain a similar provision. Albeit that Article 2:208 Sections 2-3 PECL contain a rather peculiar clause worth mentioning, even though not necessarily of relevance to the formation of an interconnection agreement: "(...) (2) A reply which gives a definite assent to an offer operates as an acceptance even when it states or implies additional or different terms, provided these do not materially alter the terms of the offer. The additional or different terms then become part of the contract. (3) However, such a reply will be treated as a rejection of the offer if: (a) the offer expressly limits acceptance to the terms of the offer; or (b) the offeror objects to the additional or different terms without delay; or (c) the offeree makes its acceptance conditional upon the offeror's assent to the additional or different terms, and the assent does not reach the offeree within a reasonable time."

183 The provision in the BW on battle of forms in the context of general conditions, Article 6:231 BW, will not be explored, as it probably lacks relevance. Cf. with Article 2:209 Section 2 PECL and Article 2.22 UP, which also provide no agreement is formed in case conflicting terms are issued.

184 The notion of good faith negotiations was discussed, supra, paragraph 6.3.
reconsider amendments that could run afoul of competition law; and, the right to review any amendments to determine that these were non-discriminatory.\footnote{185}

A comparison can be made here with procurement law, where it is difficult to negotiate contract terms differently, once selected by the other party. There is some controversy as to whether the EC procurement law allows for diverging negotiations between the procurer and the selected party, for instance, on price, once the procurement has been completed successfully.\footnote{186} Otherwise put: there is no freedom to contract in that situation anymore, and the terms are (somewhat) cast in stone. However, contrary to interconnection, where several parties will enter into similar agreements with the TO and the rates will need to be applied across the board as much as feasible, in a procurement situation there can no longer be any discrimination amongst the contestants, as the party that was selected is the only that remains.\footnote{187} Arguably, there would thus be room to renegotiate contract terms after being selected, provided, however, that the actual scope and the core of the assignment do not change as a result of such further negotiations.

Did the law allow the NRA to play a role in assessing the counter proposal, or in assisting the OLO in completing the negotiations, whilst ensuring that its requirements were met to some extent by the TO? It did not. The relevant provisions in the legislation enabled the NRA to intervene once it was established — upon complaint of one of the parties — that the parties were unable to reach consensus on the terms. Indeed, if the OLO issued a counter proposal and this counter proposal was subject to consideration by the TO, it would be practically impossible for the NRA to intervene. The parties were still negotiating and complying with their statutory duty to negotiate.\footnote{188} The sector-specific ex ante regulation under the secondary interconnection rule simply did not allow for any intervention then.\footnote{189}


\footnote{186} See, for instance, Pijnacker Hordijk, Van der Bend, Van Nouhuys 2004, p. 404ff.

\footnote{187} This is the opinion of Pijnacker Hordijk, Van der Bend, Van Nouhuys 2004, p. 404.

\footnote{188} Cf. Article 4.1 Access Directive.

\footnote{189} Arguably, Article 5 Access Directive could leave some room for the NRA. This provision — whilst referring to the aims set forth in article 8 Framework Directive — orders the NRA to advance and, where necessary, warrant adequate access and interconnection. Dependent on how this clause is implemented or interpreted in
Hence, the NRA could be involved only once it had been unequivocally informed that there was no agreement as regards the headlines. It is unlikely the NRA would get involved in solving detailed issues during this phase, where there could be a mismatch of the counterproposal and the RIO. It could be argued that this competency would not fall under its right pursuant to Article 5 (4) Access Directive to intervene in the absence of an agreement. This would entail that the NRA would have to demonstrate a justification to intervene on its own initiative. Likewise, it is unlikely that a court would be competent to intervene.

6.4.3.5 The OLO rejects the RIO in full
This scenario would be somewhat unlikely, as the OLO would probably agree with at least a number of the terms and conditions set forth in the offer. The cost for interconnection charged by the OLO was and would probably remain the main unresolved issue. These cost normally constituted elements of the interconnection agreement and not the RIO. Did this then mean that the fastest way to obtain NRA intervention pursuant to Article 5 (4) Access Directive would be to simply inform the NRA that no agreement could be reached? Not necessarily. It would be too simple to conclude that the OLO could in all reasonableness immediately reject the RIO or the terms for interconnection (this was probably especially the case if the negotiations occurred between two OLOs).

Recital 5 Access Directive appeared to be addressed predominantly to the party (in most cases the TO) receiving a request for access and interconnection, so it would appear that there was a heavier duty of good faith on the TO and, thus, it would be easier for the OLO to issue a simple rejection. In the absence of any norm to expand on this general observation, I maintain that the Commission was not in a position to override the national law; the NRA may consider it has room to intervene during the negotiations. In practice, this has not occurred. Besides, the TO will stand a chance of success in arguing that Article 5.1 Access directive provided a restricted right for the TO only, considering how the last sentence has been written. See also Farr, Oakley 2002, pp. 111-112, who consider the addition of the words ‘where appropriate’ to this competency, which are not included in Article 9.1 of the Interconnection Directive, to constitute a restriction on their power to intervene prematurely (since they state: ‘NRAs are now only required to ensure adequate access...’ emphasis added).

See Chapter 2 paragraph 2.5.

It should be noted that some Member States have implemented the duty to negotiate in a reciprocal manner, i.e., obliging both parties to negotiate in good faith. And, as will be argued below, the contract law principle of good faith negotiations should also apply to both parties here, notwithstanding if one were to accept the special position of the other.
contract law principle. But, in case the parties were unable to reach an agreement on the terms that were essential as regards the interconnection cost and charges, then it was likely to transpire sooner than later.

It should be noted that the OLO could choose to accept the terms of the RIO, during a conflict situation, i.e., when a complaint was filed with the NRA.\textsuperscript{192} Where tariffs were regulated heavily by an NRA and were publicised, discussed and accepted by many market parties, it was difficult for the OLO to build a case for arguing these tariffs were unacceptable, especially where the agreed services were standard.

In sum, it would be too simple to conclude that one-step rejection would immediately lead to a successful argument of failure to reach an agreement, or, alternatively, a dispute. But, if the OLO kept an accurate file – which should consist of notes of meetings held with the TO and copies of correspondence regarding the negotiations – the other party would have a somewhat difficult case in arguing that the OLO did not negotiate in good faith and that the NRA would probably consider itself competent to intervene. This meant that the NRA could then establish the terms for interconnection.

6.4.3.6 The OLO does not respond to the RIO, places an order with the TO and the TO performs the order

Under the principles of contract law, if the contract is performed, this constitutes a binding agreement between the parties. Notwithstanding that no specific terms are agreed upon.

The law did not state that the parties were obliged to explicitly negotiate or agree on the terms of the RIO; they were obliged to negotiate interconnection. So the law did not require that the parties formally execute an interconnection agreement. However, it was likely that the TO wanted to have a written agreement, signed by the OLO. The TO could not discriminate against the different OLOs, and so to claim that there was no evidence that discrimination occurred, it would likely want to have all OLOs execute the same contract. In the situation where the OLO placed an order for PoCs and such an order was performed by the TO, it would be possible to enter into a simple, straightforward interconnection agreement.\textsuperscript{193}

\textsuperscript{192} Article 6:223 BW contains a clause dealing with late acceptance. The choice as to whether confirm the late acceptance lies with the TO as the offeror in this case. Article 2:207 PECL and 2.9 UP provide the same.

\textsuperscript{193} See Houben 2005, who distinguishes between a direct and an indirect duty to contract, which I am not sure can be applied here. This issue was discussed also, supra, paragraph 6.1.
In other words, once the TO confirmed it would make available PoCs at agreed costs and the OLO agreed on to the payment terms, there existed an agreement. There seemed to be little room for the NRA to intervene under either Article 5 (4) – unless on its own initiative – or 8 Access Directive. The *prima facie* conclusion in this scenario must be that parties reached an agreement, which provided no cause for intervention.194

Yet, in this scenario it was not that simple either. There have been no instances recorded where the NRA required the parties to also reach an agreement on the terms of the RIO that needed to be incorporated in the order form. Consequently, only if the circumstances justify this, the NRA could intervene. This, for instance, would be the case where a third party would file a complaint with the NRA that the limited terms agreed upon were discriminating against it, since the OLO obtained interconnection, faster, easier, against better terms, or even – although this may be difficult to demonstrate – the mere fact that the RIO terms were excluded, constituted discrimination.195 Second, the OLO could file a complaint with the NRA once the TO started executing the agreement.

It would be difficult, however, to establish competence for the NRA in this case. Article 5 (4) Access Directive did not provide for intervention at the request of one of the parties, if an agreement had been reached. The twist would be that the OLO would first reach an agreement with the TO, then argue that the TO needed to include – favourable – terms of the RIO, then argue that refusal by the TO to include RIO terms, would constitute evidence that there was no, or partial, agreement, which would satisfy the requirement ‘in the absence of agreement between undertakings’ as provided for in Article 5 (4) Access Directive.

The position could be different under contract law; there was an agreement it was being performed, so a court would likely hold claims on, for instance, the TO’s performance and/or the interpretation of the terms of that agreement admissible.

---

194 Initially, under the ONP framework, the NRA required the deposit of the interconnection agreement Article 6 sub c) Interconnection Directive; cf. with Article 16 Access Directive, where the requirement no longer existed. If the NRA was pro-active, the parties could expect it to review the terms of the order form, particularly in terms of ensuring transparency, non-discrimination and cost accounting. Having conducted an interview with the Dutch NRA in 2004, I found no such evidence.

195 As was seen in paragraph 6.4.3.1, in such case the OLO would also have civil law recourse under Article 3.40 BW if it would transpire that the TO had imposed obligations that ran counter of the Tw.
6.4.3.7 Summary
In the scenarios described above, contract acceptance would not always be established that easily and that there would be room to manoeuvre, either for the OLO or the NRA. Indeed, it appears that only if acceptance could be established clearly could there be no reason for the NRA to intervene at the request of one of the parties. The negotiations process was completed. In situations that depend upon the manner in which the negotiations unfolded, could there be partial acceptance of the RIO and specific access terms and the freedom (although limited) for the NRA to intervene, either on its own initiative or at the request of one of the parties. In the fifth scenario an undertaking could request the NRA to intervene and the facts would lead to the conclusion that there was no agreement. The sixth situation was the blurriest. There was an agreement on the main terms and consideration, but not on specific terms. Negotiations might not have occurred. In this situation, both parties risked a complaint by a third party, but, it would be harder for them to demonstrate NRA competence to intervene at the request of one of them.

6.5 The RIO
The fact that the NRA could beforehand influence the terms of the RIO also constituted a major intrusion in the rights of parties to private contracts to privately negotiate the terms of their contractual relationship.\(^{196}\)

The NRA wanted to ensure there would be enough transparency on the market. Accordingly, OLOs should be better informed when negotiating interconnection. If one were to take into account principles of private contract law, arguably, the requirement to publicize a RIO could be dictated by the desire to have an offer to be adequately clear, and to suggest that the TO had the intention of being bound by the RIO if accepted one-on-one by the OLO.

The 'O' in RIO meant 'offer'.\(^{197}\) This at least suggested that the RIO was supposed to form the basis, the starting point for the contract negotiations between the TO and the OLO (and obviously, since it was a statutory requirement on the TO to publish one).\(^{198}\)

\(^{196}\) Although the Directives did not explicitly provide for a right of the NRA to establish the terms of the RIO, this competence was embedded in Article 9 (2) in connection with 9 (3) Interconnection Directive. These clauses provided that the NRA could beforehand determine the general terms and conditions for access and interconnection. See Chapter 3 paragraph 3.4.1.4, Chapter 4 paragraph and Chapter 7.

\(^{197}\) See for the elements of the RIO, more extensively, Chapter 7 paragraph 7.3.5.1ff.

In this paragraph and attempt is made to qualify the RIO in light of the fact that it cannot be seen as a simple offer.

6.5.1 Qualification of the RIO

There may be different ways to qualify the RIO and these are not mutually exclusive. Rather, they may be complementary. The following will be discussed: the RIO as general terms and conditions (6.5.1.1), the RIO as an invitation to treat (6.5.1.2), the RIO as a minimum standard package (6.5.1.3) and the RIO as a substitute for a freely negotiated contract (6.5.1.4).

6.5.1.1 The RIO as general terms and conditions

The national regimes have implemented numerous approaches to protect consumers against unfair contract terms.\textsuperscript{199} Does the RIO qualify as general terms and conditions? It is safe to assume it does: the terms have been drafted in such a manner that they can be used in different circumstances and with different parties, and the core clauses that regard the consideration have been drafted clearly. Therefore they fall under the definition given in the law.\textsuperscript{200}

The statutory provisions aimed at protecting the weaker party in case a supplier uses general terms and conditions, may or may not apply. Usually, the consumer is considered the weaker party. In some countries, including Germany and England, the scope of protection extends to businesses, so that OLOs could have recourse to these statutory provisions. However, not only are the regulatory objectives different (the emphasis lies on the protection of consumers); also the remedies are other than remedies provided for in respect of refusal to provide access.

In case of unfair contract terms, the remedy would either be nullification or voiding of the respective term. Such argument would have to made

\textsuperscript{199} For instance as a result of the `Unfair Contract Terms Directive', which does not require further analysis here, since it concerned consumer terms not relevant to access and interconnection.

\textsuperscript{200} See Article 6:231 Bii. Cf. with Article 2:104 PECL, which takes a different approach: "(1) Contract terms which have not been individually negotiated may be invoked against a party which did not know of them only if the party invoking them took reasonable steps to bring them to the other party's attention before or when the contract was concluded. (2) Terms are not brought appropriately to a party's attention by a mere reference to them in a contract document, even if that party signs the document." The first requirement would not create issue, since the RIO is published and executed by the OLO. See also Chen-Wishart 2005, p. 399 on one of the problems of standard form contracts that are relevant to the RIO as well: they diminish the possibility of negotiation.
afterwards by the party confronted with the onerous provisions; it would have to bring the matter before an ordinary civil court of law. The court could nullify or void the provisions, replace them with other provisions, and this type of action would occur after the fact.

The courts would apply notions typical to contract law, such as regarding contract formation, good faith negotiations, guarantees, liability, reasonableness and fairness. These must be predominantly analysed from the national perspective.

In all EU Member States, the civil codes contained special provisions related to the use of standard terms and conditions, but variations occur nationally, especially if legislation focuses predominantly on the protection of consumers and this protection is then extended to businesses.201

In Germany, for instance, the Standard Contract Terms Act ('AGB-Gesetz', 'AGBG') contains a general provision prohibiting contract terms that are considered unreasonable and contrary to the requirements of good faith, which also applies to companies.202 Just like the BW, the AGBG specifies contract provisions that are void per se, and that were void subject to the default reasonableness test. The German regulation of standard forms is based on three main principles. First, it establishes a general test of reasonableness and good faith. Second, it specifies the terms that, as a matter of law, are invalid and those terms that are presumptively invalid. Third, the law applies only to those terms that conflict with or deviate from the contract code principles.203

Although there is no literature on the issue, it may be assumed that the AGBG could be applied to the RIO.204

This is different to some extent from the Netherlands, where the clauses that deal with void or voidable general terms and conditions do not apply between businesses.205

201 See, e.g., Articles 6:231ff. BW. These provisions are aimed mostly at consumers.
202 Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen ('AGB-Gesetz').
203 Provisions that were void or voidable included provisions giving the offeror an unusual long period to accept an order (paragraph 10 (1)); unusually long periods to correct a default (paragraph 10 (2)) both voidable; void were, inter alia, short term price increases (paragraph 11 (1)).
204 Perhaps, due to the specific definition of clauses that could be voided or were void, it would be necessary for the German legislator to determine this specifically.
205 Cf. Article 6:236 and 6:237 BW.
In England, the most important provisions related to the use of standard terms and conditions are contained in the Unfair Contract Terms Act 1977 (‘UCTA’), which renders some exemption clauses ineffective and subjects others to a requirement of reasonableness. The reasonableness test resembles the test applied under the civil law; as it takes into account, *inter alia*, bargaining strength, familiarity with an onerous term, and exclusion of liability upon the fulfilment of a condition, if at the time the contract was entered into, compliance with that condition would be practicable. There are further regulations dealing with standard contracts between commercial providers and consumers. As such, their relevance to the RIO is probably more limited, and BT’s RIO did not contain extensive exemptions anyway.

It was odd to read in the EC Directives on electronic communications that the EC regulator appear to take into consideration such non-harmonised principles of contract law in its consideration of the market liberalization. It was unclear whether the EC regulator was applying these principles merely from a regulator’s perspective; or whether it implicitly ordered NRAs to apply these principles as a matter of contract law, but in accordance with EC regulation.

6.5.1.2 The RIO as a public offer or an invitation to treat

In most instances were a duty to contract is imposed on a party, such party will publish a public offer which will form the starting point for the contract formation and there is usually not much room for negotiations. Not every case where a duty to contract applies involves a public offer. Conversely, not every case where it concerns a public offer is a case of duty to contract.

---


207 For an instance where the English courts set aside a limitation of liability clause in an ICT agreement between professional parties as it was considered unreasonable under the UCTA: see [1996] 4 All ER, 481 (ICL/St. Albans), and [1997] CA 8 (British Sugar/NEI Power Projects). But, according to some, the English courts have not always been consistent in their treatment of limitation of liability clauses, see, for instance a case where a limitation of liability successfully passed the reasonableness test under UCTA, [2004] EWHC 1502 (Frans Maas UK/Samsung Electronics UK).


209 See Chapter 7 paragraph 7.4.4.


211 See Houben 2005, p. 234-235, who provides the following examples: a public notary may be required to provide certain services, she is not bound by a public offer; and a merchant may place a public offer by means of an advertisement in a newspaper, but this does not mean he is required to contract with everybody who responds.
An example of a combination of a public offer and a duty to contract with the party based on that offer, which again is different from a duty to contract *per se*, is formed by procurement procedures. In case of procurement, it is not always clear whether the public offer should be regarded a starting point for negotiations or as the definite contents for the contract body.

In light of the difference between the primary interconnection rule (the duty to negotiate, which extends to the OLO and the TO) and the secondary interconnection rules (which included rules that tend to a duty to contract and which included a duty on the TO to publish a RIO) the question arises whether the RIO would qualify as a public offer and the starting point for negotiations, rather than the definite offer for the contract body. Subsequently, the question arises whether the existence of the RIO in combination with a statutory duty to negotiate amounts to a form of *Kontrahierungszwang*.

At least in practice, the TO's approach was not very consistent. On the one hand, it argued sometimes that the RIO should be seen as an invitation to tender. On the other hand, in practice it applied the terms of the RIO in a rigid manner. In no jurisdiction, did the NRA make available a standard reciprocal interconnection agreement. Nor did the legislator go as far as to make public or available to interested parties the checklist provided as Annex VII to the Interconnection Directive. Besides, the regulator did not consider the RIO in light of the civil law equivalent of standard terms and conditions. What made the negotiations' process cumbersome for OLOs was that the TO's RIO was rigid.

In some jurisdictions, such as the Netherlands, it was difficult for OLOs, for example, to reach fully reciprocal agreements in which: (1) a divergence from the existing infrastructure or services package offer was obtained from the TO, and (2) the necessity to deal with requested modifications in a flexible manner was taken into account.

From a legal perspective, in order for the RIO to qualify as an offer and not merely an invitation to treat, it must be: (1) sufficiently specific, (2) addressed

212 See Pijnacker Hordijk, Van der Bend, Van Nouhuys, p. 129ff. They do not discuss the issue how the procurement offer qualifies under contract law.

213 In case of procurement, this issue was discussed briefly in paragraph 6.4.3.4.

214 In 1998, the European Commission published The Indicative Reference Interconnection Offer. See Decision RIO 2000, p. 11.

215 BT's RIO was clearly more flexible than KPN's RIO in this respect. See Chapter 7 paragraph 7.3.5.3.
to a specified group of persons, and (3) made with the intention of the party making that offer being bound by acceptance by the other party. These requirements are discussed now:

**Is the RIO sufficiently specific?**

According to the BW, the obligations, which the parties assume, must be determinable. Roughly, this means that the terms must be in a form definite enough, so that a court can enforce them, if necessary.

In the Netherlands, the TO's RIO contained 25 provisions and five extensive annexes. Annex 1 to the RIO contained 179 pages and set forth what services were available. This Annex was subject to constant change, according to market conditions and technological requirements and developments. It contained a type of service, service quality, service tariff, and configuration or call routing and management description.

---

217 Article 6:227 BW. Cf. with Article 2:101 (1) and 103 PECL the terms must have been sufficiently defined or subject to determination under the PECL. The UP take a different approach. Article 2.13 UP provides that, if one of the parties insists that the contract is not concluded until there is agreement on specific matters in a specific form, no contract is concluded before an agreement is reached on those matters or in that form.
218 For the purposes of this analysis, model RIO Draft 1.0, model 2000.1.1 and 2004.1.0 were used; see also Chapter 7.
219 Note that Part 1, Annex VII of the Interconnection Directive is more specific; it lists not less than 26 elements that must be contained in a RIO. It would go too far to accept that the RIO must contain these elements; such is not the purpose of the regulation. It contains advice on the body of a RIO and was not created in view of the legal requirement of specificity. When studying the terms required by Annex VIII Interconnection Directive, it could likewise be argued that these are too detailed. They do not appear to be aimed at determining what constitutes a legally binding, sufficiently determined offer within the meaning of the law; rather they provide a checklist for interconnection agreements.
221 The 1997.4.2.1 version which was based on fixed to fixed interconnection provided for the following: Under the heading Interconnect Services: PTT Telecom 2048 kbit/s Network Interconnection Service, Telco 2048 kbit/s Network Interconnection Service, PTT Telecom PSTN Terminating Access Service, Telco PSTN Terminating Access Service; under the heading Special Access Services: PTT Telecom PSTN Selected Carrier Connect Service, Telco PSTN Selected Carrier Connect Service, PTT Telecom PSTN Outgoing International Connect Service, Telco PSTN Outgoing International Connect Service
Most of the Services were offered on the basis of reciprocity, i.e., for each service offered by the TO a type of service must be offered by the OLO. The service description listed in detail what service was available. For instance 'the 2048 kbit/s Network Interconnection Service comprises one or more single 2048 kbit/s Network Interconnections each at a standard speed of 2048 kilobits per second between the KPN Telecom Access Point and the corresponding Telco Point of Presence'. In order for the interconnection to work, the PoCs must be described in the agreement. Besides, the rates and service levels should be adequately clear, even though the law did not require clarity on this aspect.222

On the other hand, the performance obligations of the TO in terms of the services were not immediately apparent from the RIO. Rather, the services to be provided were presented as a generic menu of choice, containing numerous exclusions.223

It could be argued that the RIO was an incomplete offer. However, the BW does not require that the offer be complete. It merely states that the offer will be valid, void or voidable and that the normal contract law rules must be applied.224 The law does not require either that an offer be suitable for integral acceptance by the other party, or that its terms be reasonable. It simply requires sufficient specificity. It may therefore be argued that the RIO as such is sufficiently specific.

Is the RIO addressed to a specified group of persons?
An offer can be made to: (1) one party, (2) a group of persons or (3) nobody in particular. The latter may also be considered as an invitation to treat: an invitation to the other party to make an offer.


222 This appears to be the absolute minimum.
223 This was a customary way of describing obligations in Dutch made agreements drafted by the provider. Rather than stating what would be done, the agreement listed extensively what will not be done.
224 Article 6:218 BW.
The RIO was aimed at no party in particular, although it obviously was intended for OLOs only. In practice, when an OLO showed an interest in obtaining interconnection, the TO would issue its offer by way of providing the OLO with a copy of the RIO. From that moment, the RIO would satisfy the criterion of being addressed to a specific party.

The offer must be non-discriminatory and aimed more or less at an unspecified group of potential contracting parties. Even though in case of interconnection agreements the potential group of contractors was somewhat limited, and the offer was extended to any party wishing to interconnect with the TO, this condition was also satisfied should a RIO be published.

A published RIO could very well qualify as a public offer even though it had the potential of turning into a single offer upon demand. The consequence of qualifying the RIO as a public offer would be, that it was more easily suited for immediate acceptance. Conversely, there would be less room for negotiation, since the offer would take on the attributes of an adherence contract. The NRA did not explore this issue in-depth, and it presumed that options were open and subject to negotiations.

Dependent upon the specific circumstances, in most contract law systems, an offer may be revoked, provided that the revocation reaches the offeree before it has expressed its acceptance. An offer cannot be revoked if the offer averts it is irrevocable, or stipulates a fixed term for acceptance. In some legal systems, it would be reasonable for the offeree to rely on the fact that the offer would be irrevocable and to act in accordance therewith.

---

225 An offer within the meaning of Article 2:219 BW. See also Dries, Gijrath, Knol, 2003, p. 40-42.

226 The BW is reticent in qualifying a public offer. There are two main conditions that must be met for an offer to qualify as public: (1) again, it must be sufficiently specific, and (2) an agreement must come into existence immediately upon acceptance of the offer. First and again, the offer must specify in adequate detail what the kernel provisions are of the agreement to be entered into. If this is not adequately clear, then there is simply an invitation to tender. See, e.g., Asser-Hartkamp 4-I 1997, nr. 140. Although – as argued in paragraph 6.5.2 – the RIO was specific, numerous issues were left open.

227 See Decision RIO 2000, p. 5, where it considered that the purpose of the RIO was to enable the OLOs to be better informed when entering into negotiations with the TO.

228 See, for instance, Article 6:219ff. BW. Cf. with Article 2:202 PECL; Article 2.4 UP, see Beale et al. 2002 (eds.), p. 194ff. Also: Articles 2.3 (withdrawal) and 2.4 (revocation) UP. Cf. this clause with Article 2:202 PECL. Both systems accept that offers are revocable. The BW does not deal with the revocation of public offers.

229 See, for instance, Article 6:219 Sections 1 and 2 BW. Revocation must be distinguished (Continued)
Arguably, the publication of the RIO entailed that the TO had the intention to stand by its offer if accepted without change by the other party. The TO in the Netherlands did not generally state that the RIO was irrevocable and neither did it stipulate a term for acceptance. On the other hand, the TO usually specified the offer was subject to negotiation. This approach was not illogical. Because a number of essential elements must be discussed by the parties, and elaborated on during negotiations (such as the types of services provided and at what prices and rates) in practice it was difficult to reach an agreement immediately without any issues first being discussed. As long as the law accepted that an agreement could be reached based on the modified new offer, this requirement posed no problems in the context of interconnection negotiations.

In sum, the RIO was addressed to nobody on particular and as such could be considered an invitation to tender, with the main difference that the party who made the offer by law was also under a duty to negotiate with the tenderer, thus decreasing the freedom to be bound by the minimum public terms.

Is the RIO made with the intention of the TO being bound by acceptance by the OLO? Was the TO intent on being bound by its RIO? The NRA decided the RIO constituted a binding (minimum) offer of the TO. From a contract law perspective, perhaps the NRA's position was not that tenable. The Tw was

___

from withdrawal. A withdrawal is intended to prevent the proposal from becoming effective. It must therefore reach the offeror, before it expresses its acceptance. An example might be where the TO has modified its RIO, but has just sent the previous RIO to an OLO that requested to receive a copy. If the TO wants to negotiate the later version, it must immediately withdraw the previous RIO. Note that, according to Article 6:220 Section 1 BW an offer for a fixed term can also be revoked for 'serious reasons'.

This was the case, e.g., in the Dutch legal system.

See paragraph 6.4.3. See, for instance, Article 2.2 UP which provides: "A proposal for concluding a contract constitutes and offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance." Article 2:101 PECL contains a similar provision.

___

See, infra, Chapter 7. Dommering 1998, p. 474 takes the same position. KPN Telecom argued differently, for instance, at the time it was ordered to publish a reference offer for main distribution frame (MDF) access. In its advertisement in the national gazette, KPN Telecom stated that it did not consider its MDF access reference offer to constitute a binding offer within the meaning of the BW, see Notification regarding reference offer MDF Access (Bekendmaking inslche Referentieaanbod MDF Access), Stat. 1998, 25.
Contract law aspects

not that specific. Neither the ONP framework nor the NRF provided an adequate legal basis for accepting that the RIO constituted a binding offer.

It will be briefly investigated how the principle that an offer may be revoked in case it is not accepted by the other party affected the process of contract formation based on the RIO. The TO could withdraw the RIO. It is likely that should the TO elect to withdraw its offer, it would be acting in direct contravention with its duty to negotiate. The TO could also withdraw its RIO if it was specified that it was made for a fixed period of time (although the TO would then be under an obligation to issue a new RIO).

If an offer based on the RIO had been made for a fixed period of time, it will lapse automatically once that period expires. In principle, the TO could argue it had fulfilled its duty to negotiate and it was the OLO who failed to respond. Yet, it is unclear what would happen then, since there was no real alternative to the RIO. Moreover, the TO could argue that the terms of its offer based on the RIO, if made for an unspecified period of time, could still lapse after a reasonable period had expired, without the OLO accepting the terms. What is reasonable would very much depend on the specific circumstances of the case. If the other party rejected the terms of the RIO it would lapse. Rejection of an offer would terminate it. Any further communication in respect of the rejected offer would then be considered a counter offer. So it would be more dangerous for the OLO to do nothing.

Finally, the RIO could fail in case it contained certain conditions. These could be conditions precedent, which must be fulfilled for the offer to be satisfied, or those, if fulfilled, would lead to a lapse of the offer. It is unclear what would happen then, especially, if the OLO would have agreed with conditions precedent applying to the TO.

6.5.1.3 The RIO as a minimum standard package

Based on the requirement to publish a RIO and the active role played by the NRA in considering its terms either under the *ex ante* intervention regime

---

233 See, for instance, Article 6.221 BW. Cf. with Article 2:206 PECL which contain a clause also if no term has been fixed by the offeror. Article 2:206 Section 2 PECL provide: “If no time has been fixed by the offeror acceptance must reach it within reasonable time.” Cf. this with Article 2.8 UP, which do not contain such a provision. The relevance of Article 2:206 PECL – which, it must be remembered, does not apply directly or indirectly to negotiations between the TO and the OLO in the Netherlands or elsewhere in the EU – is not clear. Under the 1998 Tw the NRA could impose a deadline for reaching an agreement. Article 6.3 (1) 2004 Tw is broader: it enables the NRA to set the terms of interconnection in general.
prescribed under the Interconnection Directive, or dispute resolution (where, presumably, the RIO would be part of the dispute)\textsuperscript{234}, it could be argued that the RIO constituted the minimum package on offer by the TO.\textsuperscript{235} This would then mean that the TO would be free to diverge from the offer at the request of the OLO and even, that the TO could only diverge if this would lead to more favourable terms, provided, however, that this would not discriminate others. This argument does not take into account technical and infrastructure considerations caused by the OLO. If the OLO would want special technical support or infrastructure, the parties could well have to agree on different terms that might impact the RIO in full. Hence, it does not appear practical even to consider the RIO as a minimum basis for an eventual interconnection agreement.

6.5.1.4 The RIO as a substitute for a freely negotiated contract

Bearing in mind that, at least under the ONP framework, the NRA had strong powers to intervene in the terms of the RIO – even before there was any request from an OLO to negotiate interconnection – it could be seen whether a case can be made for the RIO being the pinnacle of regulated interconnection: an agreement negotiated by the NRA for the benefit of all OLOs as a substitute for a freely negotiated contract by each OLO independently.\textsuperscript{236} The rationale behind this is that, presumably, the NRA is in a better position where it can negotiate on behalf of all OLOs. It would not mean that no modifications to the RIO would be possible (for instance if requested by the OLO). But in this case, the RIO as approved by the NRA would definitely qualify as the absolute minimum offer. It would thus apply likewise to all dealings between the TO and its affiliates that would want to enter into an interconnection agreement, leaving little room for flexibility. I find this a scary prospect, especially in light of the analysis provided in Chapter 7 on the RIO review process that occurred in the Netherlands. It would also render the duty to negotiate under the primary interconnection rule obsolete in relation to TO-OLO dealings. But, from a legal perspective, the underlying rationale for not only effectively setting a duty to contract, but even including a duty to apply only terms prescribed by a regulatory authority, would require a stronger justification than just negative network effects. In light of on-going market liberalization, it definitely does not appear to be justified.

\textsuperscript{234} See Chapter 3 paragraphs 3.4.3.5 and 3.4.4.5.

\textsuperscript{235} See also Decision RIO 2000, p. 14.

\textsuperscript{236} See Chapter 3 paragraph 3.2.2.1. This would be a fine example of the most regulated system: a set negotiations regime, with little freedom for the parties to negotiate.
6.5.2 Summary

Although the RIO should not qualify as an invitation to treat, it is also unlikely that it qualifies as a public offer, simply because it is subjected to negotiations and thus offers the TO some room to diverge from its offer. Hence it is neither.

The fact that the RIO may or may not qualify as a public offer does not really alter the position as to whether the TO would be under a duty to contract, rather than a duty to negotiate. Only if the Tw would be silent on the duty to negotiate could the obligation to publish a RIO perhaps be interpreted as an implicit duty to contract.

In many jurisdictions, even if the TO would not be under an obligation to publish a RIO, if the TO would by-and-large apply the same terms across the board then its terms would constitute standard terms and conditions within the meaning of contract law. In some jurisdictions, especially Germany, that would place the TO under a burden not to apply onerous terms on the OLO. Civil courts in Germany would be well equipped then to set aside one-sided terms and conditions. The same applies in England, where recourse would be had to the UCTA. However, in the Netherlands, courts would not under the BW be in a position to set aside one-sided terms unless a court would consider these to be unreasonable or unfair, and the extent of this possibility (to be discussed below) has been subject to much debate.

As regards the RIO as general terms and conditions, the approach and remedies chosen in unfair contract terms regulation is dissimilar from the approach taken in respect of access and interconnection agreements regulation. The RIO could well contain onerous terms for the OLO, if the TO convince the OLO in negotiations it could hardly change the terms, then this would deter the OLO to argue for their voiding and the telecommunications law did not foresee a procedure for changing the RIO's terms (although the OLO could ask for modification of terms of the interconnection agreement, once executed). Albeit that the system could serve an OLO well, if it would be clear in the civil law, which provisions in the RIO would be deemed onerous, void or voidable.


Cf. Article 6:2 and 6:248 BW. For a recent theoretical discussion on intervention in contract terms, see Reurich 2005, especially p. 65ff.
Interconnection Regulation and Contract Law

It is not impossible to argue that the RIO contained the minimum standard offer on behalf of the TO, although that viewpoint to some extent is naïve and impractical and would deter the TO from making a very concrete offer (absent any regulation).

In addition, the fact that the NRA actively intervened ex ante in the formation of the terms of the RIO, may point at the RIO becoming a substitute for a freely negotiated interconnection agreement. Conversely, this could again serve as a deterrent for OLOs to complain against the terms of the RIO as these had been subject to regulatory scrutiny already.

Since the TO was under a duty to negotiate, it must consider all requests for modifications by the OLO. In my view it did not follow from the principle of non-discrimination either, that, if and when the TO accepted modifications, it was automatically discriminating others. Equality is something different than equivalence, and every OLO could have different requirements.

Thus, the fact that the RIO contained standard terms should not necessarily hinder the parties in completing the negotiations. It would largely depend on the strategy applied by the OLO, to what extent and how active the NRA could intervene, if the parties could not agree on the terms of the interconnection agreement.

On the other hand, it is not immediately evident that the requirement of having to publish a RIO facilitated the contract formation process between the TO and the OLO.

6.6 Non-performance, damages and error

Once the interconnection contract is formed, the NRA will be competent to intervene in conflicts upon complaint by one of the parties to the agreement, for instance if the TO does not apply cost-oriented rates.239

A conflict could also arise in respect of its performance, or lack of performance, by one of the parties. Although the Directives vested broad powers on the NRA to intervene in interconnection agreements, as they provided for NRA intervention in case of a dispute, neither the Interconnection Directive nor the Access Directive contained any specific

---

239 See Chapter 3 paragraph 3.4.1.3; Chapter 5. Cf. Article 9.5 Interconnection Directive with Article 5 Access Directive.
Adequate thought was not given as regards the following questions: (1) should disputes regarding performance better be left with the civil courts, and (2) should remedies against, for instance, non-performance be imposed under civil law or under administrative law (such as the Tw). In other words: would the NRA be the best forum in which to deal with contract law issues, or should this be left to the courts?241

This section discusses how contract law principles affect the (non-)performance of interconnection agreements and how civil courts in the Netherlands are competent in deciding non-performance issues.242

In this paragraph, a number of principles and remedies derived from contract law will be discussed to determine whether the NRA would be adequately equipped to deal with performance issues: good faith and the interconnection contract, non-performance, withholding of performance, damages, force majeure, change of circumstances, and error.243

6.6.1 Good faith, reasonableness and the interconnection agreement

Neither the ONP framework nor the NRF specifically mentioned good faith or fairness and reasonableness in the context of already concluded interconnection agreements. As was seen, reference in regulation was made to the negotiation phase only.244

In some jurisdictions, contract law provides that agreements must be performed in good faith. Good faith questions arising during the execution of a contract may include: (1) the way in which the parties perform the agreement (i.e., the manner in which the TO delivered interconnection)245; (2)

---

240 Originally, Article 6.3 (2) 1998 Tw provided for dispute resolution: "(...) regarding mutual obligations existing between them with respect to interconnection, or the manner in which these are performed, are in contradiction with this act or decrees based thereon". Article 12.2 (1) and (2) 2004 Tw provided roughly the same. It afforded the NRA the right to decide on interconnection agreements disputes.

241 See also Chapter 5 paragraph 5.5.3.

242 The manner in which the NRA judged the performance of access and interconnection is discussed in Chapters 7 and 8.

243 There are many other notions that could be discussed, including suspension and deceit.

244 See, supra, paragraph 6.3.

Interconnection Regulation and Contract Law

the meaning commonly given to contractual provisions, which in the context of this book could be understood to include the many technical terms present in interconnection agreements; and (3) the prior interpretation of clauses agreed upon between the parties (i.e., TO and other OLOs; as in light of the secondary interconnection rule, ex post intervention in agreements between OLOs appears less likely).

Contract law takes varying views on the interpretation of contracts. One view asserts that the contract expresses the free will of the parties. As such there is less room for interpretation, other than linguistically. On the other side is the view that an agreement should be interpreted in light of the external facts surrounding the agreement and that there are various manners to interpret. The PECL provide that good faith is required in the formation and performance of the parties’ contractual obligations, but are fairly silent on the application of good faith in the interpretation of agreements.

In some countries, such as the Netherlands, courts are often requested to set aside contractual provisions based on the argument that their application would run counter to the principle of fairness and reasonableness. Learned authors have found that courts use the principle in several functions. Although a difference exists between the legal systems, in general the methods used for setting aside contractual provisions are: (1) the interpretation of agreements; (2) the definition of supplementary rights

---

247 This will include an interpretation of the standard terms of the RIO, but the interpretation will be done on a case-by-case basis; cf. HR 22 December 1995, NJ 1996, 300 (ABP et al./FGH et al.).
249 See Article 1:201 PECL. Article 4.8 UP does mention both good faith and reasonableness in the supplementing of omitted contract terms, see, infra, paragraph 6.6.1.2. Cf. Article 8 CISG, which contains language on, for instance, the interpretation of conduct of the other party.
250 Cf. Article 5:101 PECL and Article 4.1 UP, which have no counterpart in Dutch law.

In the Netherlands, interpretation of agreement must be made in accordance with the rule established by the Dutch Supreme Court in HR 13 March 1981, NJ 1981, 635 (Ernes/Harithx): the meaning each party in the specific circumstances could reasonably attach to the provisions of the agreement, having regard at what each party could reasonably expect from the other party. Cf. this with the Supreme Court decision of 19 May 1967, NJ 1967, 261, (Saladin/HBU) in the context of the question whether a party may invoke a limitation of liability clause. The Supreme Court applied the following principles: (i) the degree of the damage causing event, (ii) the manner in which the
Contract law aspects

and obligations, which have not been set forth explicitly in the agreement; and (3) the derogation or setting aside of provisions in the agreement which, under the circumstances, would be unacceptable.

This section will look predominantly into what a court could do when asked to decide in an interconnection contract dispute between an OLO and the TO.

6.6.1.1 Interpretation of the interconnection agreement

There are numerous cases in the different jurisdictions dealing with the interpretation of unclear or ambiguous wording in agreements and they need not be further analyzed here. The bottom-line is that courts are willing to interpret unclear or ambiguous wording, but take different approaches dependent upon whether they consider the agreement or the circumstances to be the leading force in such interpretation.

The contra proferentem rule provides that ambiguous wording will be interpreted against the party who was responsible for the drafting of the agreement. This rule could thus be applied in some jurisdictions against agreement was concluded, (iii), the nature and importance of the interests involved, (iv) the position of and relation between the parties, and (v) the extent that the other party was aware of the purport of the concerned disclaimer or limitation. This norm was further developed by the Supreme Court in HR 31 May 2002, NJ 2003, 110 concerning the interpretation of collective labour agreements and HR 20 February 2004, NJ [check] (DSM) concerning collective pension schemes. This further case law was necessary since the Supreme Court had ruled previously on collective labour agreements that the interpretation of their provisions must be done in light of the full agreement between the employer and the employee, based on the ground that the employee was not involved in the drafting of the collective labour agreement, see HR 17 September 1993, NJ 1994, 173 and HR 24 September 1994, NJ 1994, 174. Also very important is the decision HR 30 November 2001, JOL 2001, 709 and HR 30 November 2001, JOL 2001, 710. These decisions concerned the interpretation of provisions in general terms and conditions. Basically, the Supreme Court held that provisions in general terms and conditions cannot be interpreted solely in the context of the other general provisions.

The Dutch case law tends to an objective measurement of conflicting or vague terms. See also Reurich 2005.

252 See for the application of these to interconnection agreements, infra, paragraph 6.6.1.3. See also Hesselink 1999, p. 48-52.
253 Cf. Chapter 5 paragraph 5.5.3.
255 See Article 5:103 PECL. This principle is applied in Germany, for instance, BGH, 19 March 1957, BGHZ 24.39 (Gold Coast Cocoa); and in England, see Court of Appeal, [1954] 1 QB 247 (Houghton/Trafalgar Insurance Co. Ltd.). See also Tjittes 2005, p. 19ff.
the TO who drafted the RIO. An interesting question might be how to apply the rule, where the TO would have incorporated unclear wording at the request of the NRA. Would this be for the TO’s risk? That appears fair, as the TO was expert and could easily consider the consequences of insertion of the wording as requested.

In interpreting a performance conflict under an interconnection agreement, a court could not merely interpret the wording of the agreement; it would have to determine what the common intention was of the TO and the OLO: i.e., what were the underlying reasons for them to establish interconnection. The court would have to take into account the ONP principles, such as non-discrimination in this case. If there would be a disagreement, for instance with respect to what services were agreed to be delivered by the TO, the court could consider what the OLO reasonably could have expected, in comparison to what other OLOs had received; and whether it informed the TO of its interconnection requirements, both in the commercial and the technical sense. Specific circumstances also would be taken into account, such as what competitors of the OLO agreed in similar situations with the TO. This is sometimes called the ‘spill-over’ effect of the pre-contractual phase. But, it is not the custom in all Member States to interpret agreements also in light of discussions that took place prior to the execution of the contract.

Conversely, the NRA could be expected not to be interested in the interpretation of the agreement. It would probably argue that the TO’s acts or defaults should be seen in light of the RIO and the duty of interoperability only.

In Germany, the RegTP has explicitly approved onerous terms in interconnection agreements, whilst refusing others. This noteworthy, as here the NRA is applying a reasonableness test normally applied by a civil court.

---

256 The answer is probably affirmative, since the TO plays an active role in the RIO rewrite process, see Chapter 7.


258 In England, for instance, dealings prior to the contract will have little relevance. See the decision of the House of Lords, [1971] 3 All ER 237 (Prenni/Simmonds) and also Beale et al. 2002, p. 565, where the court disregarded what the parties had discussed on the unclear terms during the contract negotiations.

259 See Piepenbrock, Mùller 2000, p. 114ff. It considered the approval of limitation of liability clause with a cap of €5 million for direct damages. Conversely, RegTP refused to approve a provision that enabled unilateral termination for convenience.
6.6.1.2 Supplementation of the interconnection agreement

Supplementation deals with the question how to fill gaps in the agreement for which the parties have provided no solution.\(^{260}\) Supplementation may lead to terms being implied in the contract.\(^{261}\) The UP deal with omitted terms and provide these shall be supplemented by a term, which is appropriate in the circumstances.\(^{262}\)

In Germany, the notion of 'constructive interpretation' is applied in this respect.\(^{263}\)

Supplementing of contract terms could be a very important and practical consideration in respect of interconnection agreements. The court could fairly simply supplement the terms of an interconnection agreement, if there would be uncertainty as to the TO's contractual obligations. A court could supplement the terms, if the result was otherwise considered not to be fair or reasonable: this means that a civil court could determine the fees to be charged by the TO, on the basis of a decision or judgement issued by the NRA; it could also supplement the service consideration, for instance, if it transpired that the same TO were providing these services to its affiliates but was unwilling to provide them to the OLO in question.

However, perhaps the NRA could be competent to do the same, for instance on the basis of Article 6.2 (2) 2004 Tw, which extended the right to impose terms on behalf of an OLO beyond the situation of failed negotiations.\(^{264}\)

6.6.1.3 Derogation of the interconnection agreement

Courts seldom set aside a contractual provision between companies because it is (manifestly) unreasonable, although the practice appears to gain some ground.\(^{265}\) Besides, in light of the regulatory framework for interconnection, there appears ground to assume that a court could do so.\(^{266}\)

\(^{260}\) This situation must be distinguished from unforeseen circumstances. See Beale et al. 2002, p. 571 ff.


\(^{262}\) See Article 4.8 (1) UP. Article 4.8 (2) UP provides that in determining what is the appropriate term regard shall be had, among other factors to: (a) the intention of the parties; (b) the nature of the contract; (c) good faith and fair dealing; (d) reasonableness.


\(^{264}\) As the wording read: “The NRA may also ex officio, whether or not within the context of a request pursuant to section 1 (...).”

\(^{265}\) Cf. Article 6:248 (2) BW; see also Asser-Hartkamp 4-II 2001, no. 312, Hesselink 1999, p. 51-52.

\(^{266}\) By analogy, the NRA has done this, albeit based on a different reasoning. See, e.g., CBB 16 June 2005, LjN AT7789 (KPN Telecom/Versatel) to be discussed in Chapter 8.
Interconnection Regulation and Contract Law

If applied a provision, which is binding upon the TO and the OLO as a result of what they have agreed upon, is still considered not applicable by a court, because, in the specific circumstances, this would be manifestly unreasonable.

Other than price issues, in the context of a possible claim for damages by the OLO, it is not at all unlikely that a civil court would set aside a clause in an interconnection agreement, because it considered such a clause unreasonable; for instance, a clause on forecasting, a clause giving the TO the right to unilaterally change its service provision, a clause obliging the OLO to submit a bank guarantee.

It is difficult to predict whether they would attach importance to the specific nature of interconnection in this context, in particular the weaker position of the OLO and would consider these agreements to be atypical.

6.6.1.4 Summary
As there was no clear competence and courts were probably designed to look at contractual performance applying good faith better than NRAs, it would be preferable a priori that such courts would treat interconnection performance issues.

6.6.2 ONP Principles and non-performance
The principles prescribed by the EC regulator in terms of access and interconnection agreements, such as non-discrimination, transparency, cost orientation, cost accounting, etc. have no equivalent under contract law in (most of) the Member States.267

Consequently, they have to be applied and interpreted in accordance with EC law, in particular as regards the meaning given to them by the EC regulator.268 It must be noted first that the NRF aims the principles both at the NRA and the SMP undertaking.269

The question thus is whether an administrative court would be better able to apply these principles in case of non-performance. Conversely, the question could be whether it would be impossible for a civil court to apply principles that are not embedded in contract law.270

---

267 For a description of these principles, see Chapter 3 paragraph 3.3.2.1.
268 See Articles 10, 249 EC Treaty.
269 See Article 5 (3) Access Directive.
270 But, only as regards the SMP undertaking. The court will not be competent to determine whether the NRA has acted in accordance with the principles mentioned in Article 5 Access Directive.
The ONP principles will be briefly discussed to see if comparisons with contract law principles are possible.

Briefly put, the ONP principle of non-discrimination entails that a TO must not apply dissimilar conditions to equivalent transactions with OLOs.\(^{271}\)

Under civil law, there is no general prohibition on discrimination and matters involving discrimination are often based on the constitutional prohibition to discriminate private persons.\(^{272}\) It is unusual for the law to provide that a company may not discriminate among different other companies. The most closely linked equivalent can be found in procurement law, which also has its basis in EC law, and where it is provided that the party that tenders must treat all offerors equally. Thus, it could be against good faith if the TO would not treat all OLOs equally. OLOs could invoke the non-discrimination prohibition of the Tw directly before a civil court.

The ONP principle of transparency entails that a TO must make available to OLOs all information necessary for them to make business decisions in terms of interconnection. Contract law recognizes that a party to a contract may have certain information duties and it does not appear to be a stretch to far to assume that courts would apply the principle.\(^{273}\)

The principle of cost-orientation is embedded in the ONP framework and the NRF, but is subject to wide interpretation by the NRAs and further policy development.\(^{274}\) The NRA may order that the SMP undertaking make available its accounting records, including data and revenues, and may decide to publish such information, if certain conditions are met.\(^{275}\) A court would not necessarily have this competence, although it would not be impossible for a court to rule this upon request of a party, if such a party would demonstrate the need for such information.\(^{276}\)

It is unlikely that the Roman law notion of *instum pretium* would be applied instead of or in addition to the principle of cost-orientation when an OLO would be unhappy with the interconnection cost charged by the TO. Briefly put, the principle provides for a possible *ex post* consideration of the core

\(^{271}\) See Article 10 (2) Access Directive. See also Chapter 3.

\(^{272}\) For an example of equal treatment, see Article 3:277 (1) BW, on the equal treatment of creditors (without a preferential position).

\(^{273}\) Cf. Article 6:101 PECL on the status of information given during contract negotiations. For a description of pre-contractual information duties, see, e.g., Girot, 2000, p. 221 ff.

\(^{274}\) See Article 11 Access Directive. See also Chapter 2 paragraph 2.6.


\(^{276}\) Most likely in summary proceedings.
provision of the contract: was the price fair?\textsuperscript{277} This principle is not applied in any of the Member States and is unlikely to be invoked successfully by an OLO.\textsuperscript{278}

Thus, only the option of demonstrating that the TO had an excessive benefit or the TO took unfair advantage of the OLO as provided for in the PECL, might compare to this.\textsuperscript{279} But, it would be unlikely then that the court would set the prices for interconnection subsequently.

Decisions on price control and accounting obligations are reserved for the NRA.\textsuperscript{280} Interestingly, the Access Directive contains a provision that deals with the burden of proof: the SMP undertaking must provide evidence that its prices are derived from cost, including a reasonable return on investment.\textsuperscript{281} The requirement of accounting separation is not implemented in civil law.\textsuperscript{282} There are no bookkeeping rules, for instance, that dictate accounting separation for all or specific companies.\textsuperscript{283} Thus, this is a matter of sector-specific regulation.

In sum, the ONP principles have no direct equivalent under contract law. However, that does not mean that courts could or would not apply these principles in litigation. \textit{Prima facie}, there appears that civil courts should not have difficulty in applying EC ONP principles. A comparison can be made, for instance with general principles of procurement law (some of which are similar to the ONP principles. The principles of equal treatment and transparency have been incorporated into the EC procurement directives).\textsuperscript{284}

\textsuperscript{277} On the principle of \textit{iustum pretium}, see Grosheide 1996 and Hesselink 2004, p. 51 ff. \textit{Cf.} with Article 4:109 PECL on excessive benefit or unfair advantage and Article 3.10 UP on gross disparity.

\textsuperscript{278} \textit{Cf.} Hesselink 2004, p. 56.

\textsuperscript{279} \textit{Cf.} Article 3:44 BW re abuse of circumstances.

\textsuperscript{280} See Article 13 (1) Access Directive.

\textsuperscript{281} See Article 13 (3) Access Directive.

\textsuperscript{282} See also Article 13 (1) sub a Framework Directive, which provides that Member States must order undertakings with special or exclusive rights to keep separate accounting records, ‘to the extent this would be required if these activities were carried out by legally independent companies’.

\textsuperscript{283} \textit{Cf.}, \textit{e.g.}, Article 2:10 BW, which provides for a general bookkeeping obligation for corporations, but does not provide for an accounting separation obligation.

For instance in the Netherlands, in procurement conflicts, civil courts have applied EC principles as well as pre-contractual good faith. Although the case law is somewhat casuistic, the general feeling is that courts will be willing to directly apply procurement principles, including the transparency principle which has an equivalent in the ONP principles. Unless the competency would be strictly reserved for another dispute resolution authority (in this case probably the NRA), they would rule on the principles. The court would likely order an expert investigation, for instance, as regards how the principles should be interpreted and applied. This might bring delays in the dispute resolution process. However, since the NRA does the same, this would not be something where the NRA would compare positively to a court.

6.6.3 Non-performance

Non-performance (also referred to as breach of contract) is a somewhat open norm. It has a wide meaning across the different EU Member States. In the continental systems, the emphasis lies on the available remedies, i.e., what remedies are available in the event of a non-performance and what conditions must be met. In the common law systems, the emphasis lies on the substance, i.e., whether there has been a breach of contract. Liability for non-performance usually follows from a fault by one of the parties (the defaulting party). But, there is a wide scope of instances of liability without fault. A failure to perform contractual obligations may or

---

283 See the decisions cited by Pijnacker Hordijk, Van der Bend, Van Nouhuys 2004, p. 30.
284 See, for instance, Court of Appeals Amsterdam 3 October 2002, BR 2004, p. 551, with note Nijholt.
285 For an overview of the different approaches to fault, in particular the German and the English approach, see Beale et al. 2002, p. 659ff. In the Netherlands, the term is toerekenbare niet-nakoming and this term is translated as “attributable non-performance” or “attributable default” in this chapter.
286 See Beale et al. 2002, p. 659ff. On English law, see [1981] AC 1050 (Rainier/Miles), where it was held: ‘In relation to a claim for damages for breach of contract, it is, in general, immaterial why the defendant failed to fulfil his obligations and certainly no defence to plead that he had done his best.’ Ibid., p. 1086. Thus, the Supply of Goods and services Act 1982 stipulates in section 13: ‘In a contract for the supply of a service where the supplier is acting in the course of a business, there is an implied term that the supplier will carry out the service with reasonable care and skill.’ See also Chen-Wishart 2005, p. 589ff. who refers back to the basic principle that specific performance should be ordered if it would do ‘more and perfect and complete justice’ than an award of damages.
287 For instance rules on strict liability, see Beale et al. 2002, p. 868.
may not constitute default. The criterion is whether the default is attributable to the party under obligation. The law has different ways of dealing with this. As regards the question of fault, in some jurisdictions, the question whether the obligation under consideration is an efforts or a results obligation, will play a role in establishing whether or not there is a non-performance attributable to the party.290

The law provides for various remedies in case of a default, which, in some jurisdictions, may depend on the question, whether the default was material or not.291

For instance, under the BW, a party may rescind (terminate for cause) an agreement in case of non-performance, without going to court.292 In addition to claiming rescission, the non-defaulting party may claim monetary damages. The non-defaulting party may also claim performance, combined with a claim for (court) penalties and/or damages.293 The law also affords the non-defaulting party the right to suspend or withhold its own performance.

In principle, the party claiming termination for cause or damages as a result of non-performance must first serve a notice of default on the other party, in order for that other party being in default, although there are exceptions to this requirement.294 For instance, in the Netherlands, the principle of

---

290 See also, supra, paragraph 6.2. See on the efforts and results obligation Article 5.4 UP, which is different from English law. It appears that the parties view it an endeavour to keep their networks connected, albeit a best endeavours obligation. If the TO does not promise the result, it will be up to the OLO to demonstrate that a fault has occurred.

291 In the Netherlands, in principle, there is no clear distinction between material and non-material non-performance. The BW does not define the notion. Article 6:74 BW provides for obligations of the party failing to perform. Articles 6:81-83 BW describes the conditions for a default to exist. Article 1:301 (4) PECL describes non-performance as: "(...) any failure to perform an obligation under the contract, whether or not excused, and includes delayed performance, defective performance and failure to cooperate in order to give full effect to the contract." Article 7.1.1 UP contains a simpler definition: "failure by a party to perform any of its obligations under the contract, including defective performance or late performance." Articles 6.1.1-6.16 UP contain provisions related to performance.


293 For the Netherlands, see Article 3:296 BW. Claims for performance are discussed, infra, in this subparagraph.

294 Articles 6:74, 6:81-83 and 6:262 (2) BW. See also HR 4 October 2002, NJ 2003, 257 (Schwarz/Guatovici), in which the Supreme Court refined the necessity of sending a notice of default in the context of a claim for rescission; HR 11 January 2002, NJ 2003, 255 (Fraanje/Göttel), on the notice of default and the existence of a contractual default. See
reasonableness may well supplement or derogate from the requirement of sending a notice of default, although case law is mostly concerned with agreements where products or civil works are delivered and not services, so great care in translating this to the interconnection agreement is necessary. These claims will be briefly discussed together with the procedural issues (i.e. what court is competent).

There are, of course, many nuances to the rights and remedies of the parties and they will vary from one jurisdiction to another. It is safe to state that contract law offers numerous remedies to the party seeking performance of contractual obligations, which are also available for interconnection agreements.

6.6.3.1 Non-performance of the interconnection agreement
Non-performance of agreements between private persons is a matter of contract law, not administrative law. A court will, in principle, be competent to hear disputes on the non-performance of the interconnection agreement.

Whether non-performance of the agreement was occurring would depend to a large extent on the manner in which the contractual obligations were described and could include obligations prescribed by law, whether by statute or regulation.

Also the overview provided by Janssen, Van Rossum 2004 and Streufkerk 2004, for a different view. However, for a performance claim, a notice of default is not always required. See also the UP, which contain no requirement to serve a notice of default. However, the UP provide that the non-performing party must send a notice how it intends to cure the fault, Article 7.1.4 (1) a) UP. Article 7.1.4 (2) UP provides that the right to cure is not precluded by notice of termination. This is a different approach, giving the non-performing party a broad choice as to how to perform at a late stage. See, for Germany, paragraph 326 BGB.

For a divergent view on the requirement of a notice of default and claims for damages under Dutch law, see Streufkerk 2004.

See also Chapter 6 paragraph 5.5.3.1. In the Netherlands, the court confirmed its competency to hear contract claims in the decision of the Rb. Rotterdam, 29 November 2001, 156783/HA ZA 01-1308 (CLEC Netherlands, BabyXL Broadband DSL/KPN Telecom). Interestingly, the court considered that the NRA was not afforded a competency under the Tw to hear contract performance disputes. See also the discussion of three cases that were brought before the civil courts in the Netherlands in Chapter 6 paragraph 5.5.3.2. Note that these disputes all related to tariff and payment issues, not to non-price contractual issues.
The TO's obligations were described rather generically in the MIA. The interconnection agreement offered a menu for choice, and the optional services were described high level in the services schedule. Both the RIO and the MIA prescribed a notice of default and a cure period being given by the other party, in case of an alleged default.298

An issue is therefore what party has the burden of evidence when claiming non-performance. TOs do not generally provide any warranties as regards their service provision in the interconnection contract.299 At least according to Dutch civil procedure law, this means that the OLO has the burden of evidence that the TO does not perform adequately, or performs incompletely. This would be more difficult to establish in case of service provisions that qualifies as an efforts obligations (for instance phrased as follows: ‘The TO shall use reasonable efforts to provide the 2048 kbit/s Network Interconnection Service’) as opposed to obligations that qualified as result obligations (for instance phrased as follows: ‘The TO shall provide the 2048 kbit/s Network Interconnection Service on a 24/7 basis’). In case of contractual warranties, for instance, with respect to QoS, the burden of evidence would be on the TO to demonstrate that the service did perform in accordance with the warranty.

The NRA is not bound by the rules of evidence as formulated in the code on civil procedure. Whereas this could seem advantageous for the OLO, since it affords the NRA considerable discretionary powers in deciding how to weigh the evidence, the dispute settlement so far has not shown that the NRA has used this in enforcing strict performance orders against the TO.300

Claim of performance
A claim for performance usually accompanied by a claim for penalties, should the other party not perform its obligations within a reasonable time.301 However, there may be a compelling argument for claiming performance without adhering to the contractual requirements of the RIO: if the

298 For a broad discussion of the RIO and the MIA, see Chapter 7 paragraph 7.4.
299 See also Chapter 7 paragraph 7.3.5.3. The NRA ordered the TO to provide for service levels in the RO. These could probably serve as implicit service warranties.
300 There are hardly any examples of case were the NRA ordered the TO to perform. For examples, see Chapter 8 paragraph 8.2.2.6.
301 Cf. Article 9:102 PECL (where relevant): ‘(1) The aggrieved party is entitled to specific performance of an obligation other than one to pay money, including the remedying of a defective performance.’ The provision is a compromise between the status of the remedy under the civil and the common law systems.
end-users get disconnected due to default of the TO (or, alternatively, the OLO), then the time they were deprived from their connection cannot be corrected. Hence, if there would be an apparent urgency and the TO would not respond adequately, chances are that a court would award a claim for performance, even in the absence of a notice of default.\footnote{302}

In the Netherlands, a performance claim may also be instated in summary proceedings.\footnote{303} The law also provides a basis for enforcing a judgement in which the claim for performance is granted.\footnote{304}

There is a distinction between late and incomplete or incorrect performance and the remedies might vary. Thus, the OLO may consider whether or not it wishes to claim performance in the event of late performance; or rather damages. However, since the RIO and the MIA contain contractual reciprocal exoneration language for damages, including for late performance, this type of claim would face the hurdle that a court should set aside the exoneration, for instance, because it was considered to be unreasonable.

**Suspension of performance**
If a party does not perform its share of the obligations, the other party may suspend performance, provided there is a direct link between the non-performance and the suspended performance.\footnote{305}

\footnote{302} Cf. Janssen, Van Rossum 2004, p. 65ff; Streefkerk 2004, p. 4 and his take on liability for contractual damages in this respect.

\footnote{303} In summary proceedings, the presiding judge may decide not to award a performance claim, if the defendant has already performed in an alternative manner, see HR 15 December 1995, NJ 1996, 509 (Pampers/Huggies). In Germany, the Code of Civil Procedure provides for penalties in case the defaulting party does not perform, see paragraph 890 (1) Zivilprozeßordnung (‘ZPO’). But the penalties will be due to the court, not to the non-defaulting party, so it remains to be seen whether such penalties would be helpful for an OLO.

Also note that the NRA did not require that a notice of default had been served by the OLO against the TO to establish a default. This practice was an example of the NRA not adhering to principles of contract law.

\footnote{304} See Article 3:300 BW. It appears that in Germany, RegTP could issue an interlocutory order in the event of an interconnection dispute. However, this is not entirely clear from the discussion of the powers of the Decision Chamber of RegTP (especially as no mention is made of possible concurring competencies of the civil courts), in Wissman 2003, p. 1700, contradicted on p. 1712: “However, there would be fear of an – inadmissible – anticipation of the main cause in the case of the enforcement of an interconnection order by means of interlocutory judicial protection according to § 123 VwGO. To this extent, a corresponding obligation might only be successful considering a framework interconnection of the most necessary elements.”

\footnote{305} Cf. Article 9:201 PECL. The order of performance is relevant, see Article 7:104 PECL. Cf. Article 6:52 and 262 BW.
Interconnection Regulation and Contract Law

The example in an interconnection agreement is if the OLO does not pay for the agreed upon charges. In that case, the TO could, in principle, withhold the supply of the PoCs, until its invoices are settled. The issues has significant relevance since in many interconnection agreements, there will be on-going disputes regarding interconnection pricing. Thus, it is not inconceivable that the OLO would withhold payment if it would consider the charges to be too high.

The NRA considered this to be undesirable and ordered the TO not to suspend its obligations at any time when it reviewed the language in the RIO to this effect. The TO did not agree with the NRA.

It is not certain what a civil court would do if the OLO would withhold payments and the TO would then suspend service provision, but, it would be competent to decide on both a claim from the TO and from the OLO. In my view, a court should closely examine the reasonableness of a suspension, if it concerned the service provision by the TO. The danger of suspension would be that the end-users would suffer from a dispute on price between the TO and the OLO.

Rescission (termination for convenience)

There is no compelling reason to accept that an interconnection agreement is different when it concerns termination for cause. The requirements of

---

306 Note that the 2004 Tw provides for suspending service provision towards end-users. For instance, Articles 7.8 and 10.13 2004 Tw provides that conditions under which suspension can be done will be set out in a special decree. See on suspension of rescission of service provision under the Tw, Houben 2005, p. 267-271. See also Chapter 5 paragraph 5.5.3.2.

307 Cf. this with the position taken as regards the right of an electricity or gas supplier towards end-users: the Parliamentary Notes, book 6, p. 207, as discussed in Houben 2005, p. 258: suspension is not acceptable if this would cause irreparable harm to the other party. The case law is concerned mostly with the position of end-users. Admittedly, the position of end-users is relevant to in case the TO suspends the interconnection agreement, since the end-users will then be deprived from communicating with each other.

308 See Chapter 7.

309 This danger must be clearly distinguished from the issue that the end-user fails to pay its invoices. See Houben 2005, p. 256ff. Houben discusses the clauses in general terms and conditions of utility sector providers, who reserve the right to suspend service provision, in the event the end-user does not pay. At the wholesale level, the issue is bigger: the OLO is negotiating pricing on behalf of the end-user. Houben analyzes the position of the TO under its general terms and conditions on p. 267-271. This analysis cannot be applied directly to interconnection agreements at the wholesale level.
Contract law aspects

interoperability and end-to-end connectivity do not, in my opinion, justify that an interconnection agreement could not be terminated, for instance, also if the OLO defaulted knowingly. The TO should have the right to terminate the agreement for cause. Otherwise, the OLO would be afforded too much protection and the contractual imbalance would shift the other way. There is no role really for the NRA to play in this instance as neither the ONP framework nor the NRF dealt with this issue.

Contract law theories provide for adequate protection of the party allegedly in default, so that termination for cause should not occur light-heartedly. Conversely, as a remedy for the OLO, a termination for cause action would have little practical use really, because of the dependency on the TO’s infrastructure. Upon rescission of the interconnection agreement, the TO would no longer provide points of connection and provide for interconnection, thus making end-to-end connectivity no longer possible. Unless there were viable alternatives (such as an alternative provider) the OLO would be forced to continue working with the TO under the interconnection agreement. For this reason, the inclusion of service levels in the RIO is a good idea as to some extent it compensates for the practical impossibility of termination for cause.

Should the OLO nevertheless wish to rescind the agreement, under the BW, such rescission can be announced simply through an extra-legal notification (a simple letter will do). It is not certain whether the OLO would get back any of the charges already paid to the TO for its service provision until termination.

Other utility sectors

Having seen that the communications provider’s right to suspend service provision towards end-users is regulated in the Tw, what lessons can be learned from the other utility sectors? Looking at other utility sectors, it can be said that the provider of the essential facilities is somewhat restricted in its right to either suspend or rescind service provision towards the other party (mostly the end-user). This is the result of such a provider’s duty to

310 It goes beyond the scope of this chapter to expand on this in detail. See Hartlief, Stolp 2000, in Smits, Stijns (eds.) 2000, p. 245-269 on the principles of subsidiarity and proportionality with respect to termination for cause.
311 Cf. Article 9:301 PECL.
312 The MIA did not contain a clause describing how formal notices must be made.
313 See Houben, p. 263ff.
provide the service and not the duty to negotiate an agreement, so it is rather questionable whether the analogy would hold for interconnection agreements. A court would then specifically have to take the end-user interest into account.314

Competent court
If a conflict resulted as to the question whether the party that rescinded the agreement, did in the correct manner, it is not directly clear whether the NRA or the civil court would be the most suited forum to decide.315 Based on the 1998 Tw, it was clear, that claims for rescission did not fall under the NRA's core competences.316 Arguably, in terms of intervention in a claim of non-performance, a distinction could be made between (non-) performance of obligations not prescribed by law, and (non-) performance of obligations that followed directly from the requirements set forth in the Tw.317 If the provisions of the

---

314 The RIO and the MIA do not contain a third party beneficiary clause, stipulating that the interconnection agreement is entered into for the benefit of the end-user. The court would therefore have to find such a benefit being implicit in the agreement. The provisions of the Tw would not necessarily assist the court in this respect. Rather, the court would have to refer to the explanatory notes as regards, for instance, the NRF.

315 The overlapping competencies between the NRA and the civil courts were discussed in Chapter 5 paragraph 5.5.3.1.

316 The question that arises is whether the civil court must and would independently investigate whether the claim giving rise to damages resulted directly from an attributable default of the defendant. On the one hand, it would lead to a serious infringement of the competences of a civil court, if it would be accepted that a civil court would be bound by the decisions of an administrative court, which investigated a case based on different principles, competences and with a different policy goals. Even though the NRA may have decided that there was a breach of legal obligations, the basis for its decision would be rather narrow. On the other hand, taking into account the justified interests of the non-defaulting party, it would seem impervious to expect it to make its case completely from scratch again, simply because the civil court were competent to partially decide on the matter. As a consequence, it is reasonable to accept that the civil court should only marginally test the arguments of the plaintiff and the defendant as made before the NRA. To facilitate the process, to ensure the speedy conclusion, it would be advisable for the national governments to issue guidelines to civil courts to decide on the civil law aspects of interconnection agreements.

317 Cf. Sitompoel 2000, p. 127. Whether the OLO could evidence defective performance would also depend on the circumstances. An example might be the quality of services ("QoS"). But, it would be difficult for the OLO to prove this if it could not establish meaningful criteria for such a comparison. It would, for instance, have to get an insight either in QoS data from other OLOs and preferably from companies that the TO dealt with. It could then file a complaint with the NRA, requesting for a penalty.
Tw are at stake, then intervention by the NRA could be justified, if the civil courts' application of contract law principles would not offer adequate protection to the weaker party. However, in interconnection conflicts, the statutory provisions always are at stake. It was first established that the NRA viewed the performance of the TO under the interconnection agreement in light of the regulatory requirements set forth by the ONP framework and the NRF, such as non-discrimination and transparency. But the judgement on such issues is not exclusively the domain of the NRA, so there is no reason why the court would not be competent.

The determination whether the TO did not perform on time, predominantly would be a factual question, not an issue of non-discrimination or transparency. For example, just as for any contract, if timelines were set, and the TO not meeting them, it would have to be established whether that triggered an attributable default. In such a case, the TO would likely argue in defence that the OLO did not fulfil its obligations necessary for timely performance by the TO, for instance the making available of the specifications for its PoCs. Since the ONP principles are open norms, i.e., they do not have an administrative law meaning, courts should not encounter that much difficulty in applying them, where necessary, in cases involving claims from OLOs based on non-performance.

Can the remedies discussed in this paragraph be enforced both by the NRA and the court? 

As regards rescission, a court could confirm as a matter of law that the OLO had rightfully rescinded the interconnection agreement; whereas the NRA has no such competency.

As regards ordering the TO to perform, both the NRA (under the Tw) and the court (under the applicable code of civil procedure) are competent to make such an order. There is, however, a difference between the enforcement measures attached to such order, as a court could simultaneously impose a penalty, whereas the NRA could not.

As regards claims based on suspension, if the TO would suspend its service provision, then the NRA would probably consider it was competent to hear the OLO's complaint. In the reverse situation, where the OLO suspended its obligations, no such competence appears to exist. Conversely, a court

---

318 See, extensively, chapter 3.
319 See, for instance, Article 7.1.2 UP.
Interconnection Regulation and Contract Law

would in both cases be competent to hear the issue of suspension of contractual obligations, whatever the basis for the suspension.

6.6.3.2 Claims for damages as a result of attributable non-performance
The notion of what constitutes damages has not been harmonized across the EU Member States and notable differences exist, both in the definition of damage events and the possibilities to claim damages under the MIA.320

In case of non-performance by the TO, the OLO’s damages could consist of having to reroute PoCs, getting alternative locations, lost income due to client complaints (lost calls), inability to grow due to alleged scarcity etc. Assuming that the parties entered into the MIA, the liability for contractual damages is excluded for the most likely damage categories: financial damages, including lost profits.321 The NRA was very keen on the TO accepting some form of liquidated damages or penalties in case it did not meet service levels. The law is not harmonized in this field either.322 The TO did not accept contractual penalties. Therefore, the following question arises: what viable recourse does the OLO have as regards a damages claim?

In theory, an OLO could address the NRA to claim damages as a result of bad performance by the TO. But the NRA did not have the possibility to award damages. This meant the OLO should better address the courts. The

320 Cf. Article 4:117 PECL, which deals with damages as a result of, for instance, mistake or fraud, but not attributable default. See article 7.1.6 UP. Article 7.4.1 UP provides in general that any non-performance will give the aggrieved party a right to damages either exclusively or in conjunction with any other remedies except where the non-performance is excused under the UP. The UP confer a full compensation entitlement on the aggrieved party, Article 7.4.2, but require some certainty in assessing the damages, articles 7.4.3 and 7.4.4 UP. The UP are silent as to whether the parties may limit or restrict their liability by contract, the assumption is that this is acceptable. The UP are also silent on the question whether a court could set aside a limitation of liability clause, for instance, because the clause is considered unreasonable.

321 See Article 18.1 MIA. The TO did accept liability up to a maximum of € 2 million for property damages, but these were unlikely to arise.

322 See on penalty clauses, for instance, Article 9:509 PECL, which provides for moderation by courts; cf. with UP, which do not contain a provision on liquidated damages; see Article 6:91-94 BW, which defines penalty clauses. The BW here provides – not very helpful for access and interconnection and other ICT agreements, that the claim for a penalty comes instead of a claim for performance, Article 6:92 BW, unless agreed otherwise. Hence, the NRA should not only order the TO to accept penalties but require also that the MIA should provide these are without prejudice to a performance claim.

323 See Huisjes 2002, pp. 127ff. Huisjes discusses liability towards end-users. He does not discuss TO contractual liability towards OLOs.
courts would normally recognize the limitation of liability clause in an agreement. Some courts, such as in the Netherlands, could set aside a limitation clause, if this clause were manifestly unreasonable.324 Courts would take into account different circumstances, including the position of the parties, the manner in which the agreement was concluded, the severity of the default and statutory obligations.325 The following observations are made.

As regards the position of the party, if the courts would have regard to the Tw and the underlying policy principles, it is not unlikely the courts would weigh this in a conflict between the TO and the OLO.326

As regards the manner in which the agreement was concluded, the court would have different options to qualify the RIO (see above) and it might consider that the RIO left little room for the OLO to negotiate a more friendly liability clause, notwithstanding that the NRA pressed the TO to change its liability provision in the RIO.327

As regards the severity of the default, if the TO caused network downtime and could have avoided this by implementing state of the art technology, a court would be likely to find gross negligence on the part of the TO.328

As regards statutory obligations, the TA did not contain provisions dealing with exclusion clauses in agreements between TOs and OLOs.329

---

324 Article 6:248 BW.
325 See for ICT contracts, for instance, Court of Appeals (‘Hof’) Amsterdam, 22 November 2001 (Liebenwerk Kirche/CAP Gemini) court docket no. 441/94 and Stichting Geschillenoplossing Automatisering, 12 June 1997, Computerrecht 2001/6, p. 315 (Breikant). In the first case, the court set aside a limitation of liability clause. The court held that it was unreasonable for the defendant to invoke the clause, taking into account: (1) the manner in which the general terms, including the limitation of liability clause were concluded. The clause was contained in the general terms and conditions of the defendant and the plaintiff had had no influence on the adoption of the terms, (2) the relationship between the parties, mainly the dependency of the plaintiff on the defendant’s expertise, and (3) the severity of the default.
Conversely, courts have upheld limitation of liability clauses in ICT contracts, for example, in Rb. The Hague, 11 July 2001, Computerrecht 2001/5, p. 268 (Wiffhagen/Exact).
326 Cf. also Tjittes 1994, p. 193ff., who concluded for English law that the notion of inequality of bargaining power is hardly recognized by the English courts, p. 87.
327 See Chapter 7.
329 The law did initially provide for a limitation of liability for TOs in their service provision towards end-users, before the liberalisation, Article 12 1989 of the Dutch Telecommunications Facilities Act (Wet op de telecommunicatievoorzieningen, ‘Wtv’). See, also Van de Meent 1997, p. 224 and the Parliamentary Notes to the 1998 Tw, p. 45.
In my view, dependent upon the factual claim, it is not that unlikely and could even be desirable – dependent of course, on the circumstances described in this paragraph – that a civil court would set aside a limitation of liability clause imposed by the TO through the MIA, in the event the OLO suffered substantial damages due to attributable default of the TO.\(^{330}\) It would have to rely on the provisions in the Tw, in particular the obligation of the TO to provide interconnection, set forth in Article 6a.6 sub 1 2004 Tw.

If a court would receive a claim from an OLO for liquidated damages or penalties, the court would probably not award this claim, unless it would find specific provisions in the MIA. But it is unlikely the NRA would reach a different decision.

6.6.3.3 Excusable non-performance
The discussion of excusable or non-attributable non-performance is restricted to two areas: force majeure and change of circumstances. These situations may play a role in conflicts as regards the performance under the interconnection agreement.

**Force majeure**
Force majeure is defined differently in the Member States.\(^{331}\) There appears to be no strong reason to assume that in case of a duty to negotiate, or when SMP obligations are imposed a party would attempt to invoke force majeure sooner or under different grounds than already recognized in law or jurisprudence.\(^{332}\)

Alleged force majeure events relevant to interconnection agreements that could be invoked by the TO were: failing network connections, interference, unavailability of resources, overuse etc.\(^{333}\) It would then depend on the Member States’ definition or interpretation of the term, whether a court would accept that there was a force majeure event that rightfully prevented

---

\(^{330}\) See, for the court possibly moderating a damage claim – in the theoretical case that there is no contractual limitation of liability –, Huisjes 2002, p. 137-140.

\(^{331}\) Cf. Article 8:108 PECL and Article 7.1.7 CPE (‘excuse due to an impediment’) which place the onus of evidence on the party invoking force majeure; article 6:75 BV. These provisions do not define force majeure or provide what constitutes force majeure events, so this is always left largely to the discretion of the court.

\(^{332}\) See also Houben 2005, p. 280-281.

\(^{333}\) Note that the Decision on ONP Leased Lines (BOHT) [CHECK] allowed for the TO to suspend its service provision under certain circumstances, but this statutory definition of force majeure has no relevance for access and interconnection agreements.
the TO from performing its obligations. *Prima facie*, it appears that it would be more difficult for the TO to allege it suffered from a force majeure event. The ONP framework and the NRF did not consider the issue of force majeure at all, but there is no reason to believe it would be impossible for the TO to invoke it. The law requires the party invoking force majeure to give notice to the other party, so this made it somewhat an unlikely defence in the case the TO faced a non-performance claim.

Whether the TO could successfully invoke force majeure would be largely left to the discretion of the courts. From the manner in which the NRA treated the TO, I believe the NRA would be more likely to apply a restricted interpretation of what constituted force majeure on the side of the TO as it would sooner take the view that the TO's non-performance could not be excused and was really designed at preventing an OLO to deliver end-to-end connectivity.

**Change of circumstances**

In short, the civil law provides that a party may address the courts and request that (some of) the terms of a contract be set aside, on the basis of unforeseen circumstances that are of such serious nature that the party who has to perform the contract can no longer be reasonably expected to do so. The notion of a possible change of circumstances has particular relevance for interconnection agreements, where the NRA could intervene in the terms of the agreement, for instance, to amend the cost charged by the TO. The law did not, however, recognize this type of intervention as a change of circumstances that was excessively onerous on the TO – since the TA already provided for this possibility and hence the TO could have reasonably foreseen this – so this should normally not enable the TO to have a court change the terms of the contract based on a change of circumstances. Conversely, the OLO could want to invoke change of circumstances, for instance, to avoid being bound by previously made forecasts. It is unlikely that a court would consider this a change of circumstances that could not be reasonably foreseen, since the OLO would work with a business plan and

---

335 The Dutch NRA addressed force majeure in its Decision RIO 2000.
336 *Cf.* Article 6:111 PECL and Article 6.2.1ff. UP (defined as 'hardship'), which include a reasonability test: the change could not have been reasonably foreseen; *cf.* Article 6:258 BW. In any case, the court is awarded broad discretion and may either terminate the contract or substitute its terms, Article 6:111 (3) PECL; although Article 6:258 (1) and 6:260 BW provides not for termination of the agreement, but for setting aside the onerous terms.
the circumstances were probably not beyond its control. At any rate, the notion should be applied consistently and has been addressed contractually by the TO.\textsuperscript{337}

\subsection*{6.6.4 Error}

Error or mistake is an erroneous assumption relating to facts or to law existing when the contract was concluded.\textsuperscript{338} Error may occur where either party erroneously applies rates that later appear to be incorrect or service provision that is not available or required.\textsuperscript{339} A mistake must be fundamental to the contract, and it must be recognizable and excusable.\textsuperscript{340}

An example might be where the TO applied different rates to the OLO than it applied to another OLO or an affiliate. This would also be in contravention to its non-discrimination obligation. But the law also provided that if the risk of the mistake was assumed, or in the circumstances should be borne by it, then a party could not avoid being bound by the terms of the contract.\textsuperscript{341} In the case of the MIA, it would be difficult to invoke error then, except in the case that the NRA determined the interconnection rates \textit{ex post}.

\subsection*{6.7 Termination for convenience}

Both termination for convenience and termination for cause are recognized in contract law.\textsuperscript{342}

What if the OLO wanted to either terminate the interconnection agreement for convenience and the term had not yet expired? Or what if the OLO wanted to rescind the agreement, because of faulty performance by the TO? Did the Tw provide for this, or would recourse to the civil courts be the only option?

\begin{itemize}
\item \textsuperscript{337} Cf. Chapter 7, paragraph 7.3.5.3.
\item \textsuperscript{338} Cf. Article 6.103 PECL. There are three categories: (1) mistake induced by incorrect information, (2) mistake evoked by non-disclosure of relevant information and (3) shared error. Cf. Article 6.228 BW, which attaches annulment of the erroneous contract as the consequence of an error.
\item \textsuperscript{339} See Chapter 8.
\item \textsuperscript{340} See Busch \textit{et al.} (eds.) 2002, p. 196.
\item \textsuperscript{341} Cf. Article 6.103 PECL and 3.5 (2) UP.
\item \textsuperscript{342} See Article 8.103 and 106, 9.301-303 PECL as regards termination for cause; Articles 7.3.1-7.3.2 UP. Cf. Articles 6.267-268 BW. See for anticipatory non-performance Article 9.304 PECL, Article 7.3.3 UP and Article 6:80 BW.
\end{itemize}
6.7.1 Is termination for convenience possible?

Arguably, under contract law, interconnection agreements could be terminated for convenience, so an OLO should be free to terminate the interconnection agreement then. What if the OLO would decide to withdraw from the market altogether? If this had not been defined as cause for termination, then the OLO would need to rely on a termination for convenience clause. Consequently, it would be reasonable to afford the OLO a unilateral termination for convenience towards the TO.

A nuance is that such unilateral termination for convenience would be less logical in agreements between OLOs. However, conversely, there is an argument to be made under the secondary interconnection rule, which stems from the duty to contract notion: if it concerns SMP obligations imposed on a party (such as the TO), then this party should not be allowed to terminate this agreement for convenience. Thus, it appears reasonable to accept for interconnection agreements that the TO should not always be allowed to terminate for convenience. A court would probably be willing to consider this in light of the supplementation or derogation of good faith.

In any event, once the interconnection became an agreement for an indefinite period of time it is debatable whether it should be subject to termination for convenience. The RIO chose for automatic extension. This meant that either party (including the TO) could terminate the agreement for convenience prior to the extension. The NRF and the Tw did not explicitly provide that interconnection agreements must run indefinitely. Probably, this was not really required, since the duty to negotiate and/or SMP obligations would entail that if the OLO wanted to renew the agreement, then the TO would still have to negotiate such a renewal. A court would probably not play a role other than the NRA in case problems in this respect would arise.

In the Netherlands, this question was considered by the Supreme Court in a matter between a (forced) agreement between a doctor and the health insurance fund. The Supreme Court held that termination for convenience would be allowed only if this would be based on circumstances, had these been known at the time of the contract formation, would have led to an exception to the rule of the duty to contract. Applying this to the interconnection agreement, a circumstance could be that the OLO had no real infrastructure to speak off, for instance, although that example is unlikely to occur in practice; HR 16 December 1977, NJ 1978, 156 (with note ARB). See also Houben 2005, p. 254ff.

But it is not certain whether the NRA had any competence to decide on conflicts resulting from such termination in that case. Interestingly, in the Netherlands, the NRA in its consideration of the RIO sought to prevent the TO from terminating the interconnection agreement for convenience, and even for cause.\[^{345}\]

### 6.7.2 Consequences of termination

The consequences of termination are dealt with very differently in the Member States. Since the interconnection agreement qualifies as a services agreement with a specific description, in case of termination for convenience this meant, simply put, that the PoCs must be disconnected and outstanding invoices must be paid. The parties must work together to mitigate any cost or damages that might otherwise occur as a result of the termination. In case of termination for cause the same applied, but the aggrieved party could then also have a restitution claim and a claim for damages.\[^{346}\] A restitution claim on an interconnection agreement would be difficult to sustain as the services – whether faulty or not – would normally already have been supplied up until termination. A damages claim could not be brought before the NRA, since it lacked powers to decide in this respect. It did not follow from the different telecommunications regulations that the NRA had any competencies in the event the OLO terminated the agreement with the TO for cause (i.e., non-performance by the TO). Hence, any claim by the OLO would have to be brought before the civil court that would competent to hear on issues relating to the contract.

### 6.8 Interim conclusion

In this Chapter, the contentions that needed to be looked at were whether contract law could be an adequate means of warranting competition and whether there would be sufficient remedies available under contract law to the weaker party, both in terms of contract formation and performance. The major caveat was that contract law was not harmonized across the EU, so that it was somewhat difficult to make general statements across the EU. However, it is hoped that the points made from a Dutch law perspective will also prove valuable for other Member States.

\[^{345}\] See, *infra*, chapter 7.

\[^{346}\] *Cf.* Article 9:305 PECL, which provides for release of future obligations. *Cf.* Articles 7.3.5 and 7.36 UP. Under the BW, Article 6:269ff. the results of termination for cause are regulated somewhat differently. The rescission of an agreement has no retroactive effect, but an obligation occurs for the parties to undo the performance already received, if possible.
6.8.1 Negotiation of the interconnection agreement

Having performed an analysis of the principle of good faith under contract law, and as regulated under telecommunications law, it can be concluded that—considering that telecommunications law incorporated a duty to negotiate—contract law itself would be adequate to bring about interconnection, and adequate remedies would be available under civil law, if a party would be unwilling to enter into an agreement upon request of the other party. Besides, under the secondary interconnection rule, even stronger contractual obligations are imposed by law on the TO or another SMP undertaking. As a result, there would be no need for the NRA to continue playing a role in setting timelines and fixing terms for interconnection and this could be clarified by the regulator.

Conflicts in the pre-contractual phase could well be left to resolution by the courts, especially since courts would be competent to award financial damages due to the TO’s failure to negotiate in good faith, or breaking off the negotiations in good faith. It was established that, where there is a primary statutory duty to negotiate access or interconnection, a court would be competent to hear a matter where the TO would refuse to negotiate further and would be able to apply such statutory obligation.

Arguably, an OLO could have difficulty to force the TO into negotiations or an agreement, unless the secondary interconnection rule remained applicable to the OLO. If there would be no statutory duty to contract, a court would most likely have to consider a refusal to negotiate within the framework of EC competition law and a breaking off of the negotiations in light of the civil law principles applicable to good faith negotiations. The court would likely have the possibility to impose measures against, for instance, the unwilling TO, although for England, this would be less certain (in the absence of a duty to negotiate).

In agreements between OLOs, full reliance on contract law would be necessary and it was discussed in light of Dutch case law, that the situation is not clear-cut. This means then that parties could benefit from a continued statutory duty of negotiations (the primary interconnection rule) and that this is a justified intrusion on the freedom of contract.

It was briefly discussed whether general competition law would provide a means to obtain interconnection, and thus achieve interoperability, but it was not possible to provide a conclusive answer.

Unlike the NRA, the court would have considerable freedom to apply enforcement measures, such as the order to continue negotiations and the
imposition of a penalty against the TO, should it refuse to continue. This is probably not exactly the same for Germany and England, and perhaps the OLO would benefit from the legislator making clear what sanctions are available in the event there is a refusal to negotiate or continue negotiating.

Likewise, at the request of one of the parties, the court could fix the terms for interconnection. Although it has been argued that courts would lack the specialized economic and technological knowledge to do this, there is no good reason to assume that a court would not be able to impose the terms.

The drawback is that the court would not be bound by the timelines imposed under the Tw on the NRA for the settlement of disputes.

If it is accepted that a court has jurisdiction in deciding interconnection contract disputes, then the same applies for arbitration courts. This Chapter does not advocate what would be preferred: arbitration or court dispute resolution.

6.8.2 Realization of the interconnection agreement

It was explored whether there were peculiarities in the coming about of interconnection agreements in contract practice. The approach was to look at whether the provisions in the telecommunications law regarding interconnection agreements, when compared with principles of contract law, posed specific problems. No real problems were identified, albeit that it could be said that the existence of the RIO could create typical issues when parties would want to diverge from it. There was no reason to fear that courts would not be able to apply ONP framework or NRF principles, such as non-discrimination or transparency when considering the realization of interconnection agreements.

6.8.3 Standardization of the interconnection agreement

Having looked at the effects of the RIO and the efforts put in to establishing it – which will be discussed in the next chapter in more detail –, the preliminary view from a contract law perspective was that the RIO could be qualified in different (even cumulative) ways. As will be discussed in Chapter 7, regulation and process in the Netherlands did not appear to function well.

The legal basis under contract law for imposing a RIO on the TO appeared to be weak, and no real regulatory justification could be found for it. If the purposes of requiring the TO to publish the RIO was warranting non-discrimination and facilitating the negotiations process, this Chapter expresses doubts whether these goals could be achieved.
6.8.4 Performance of the interconnection agreement

As regards the TO's performance of the interconnection agreement, there was a clear discrepancy in telecommunications law. First, in comparison with the pre-contractual phase, the regulatory framework contained no clear rules for NRA's how to determine contractual performance, and their competences in the field were not clearly delineated from the civil courts.\(^{347}\) Second, it is likely that courts, probably in all EU Member States, would be better equipped than NRA's to deal with issues of contractual non-performance and, although not explicitly provided for, there settlement is left to the competence of the courts anyways. Only disputes regarding tariffs should be awarded to competition agencies or NRAs as their competency and expertise is quite clearly delineated in that area (although conflicts with the competition agencies could arise).

It was established that, where a dispute arises as regards the performance of contractual obligations under the interconnection agreement, the court would definitely be competent to hear the matter and impose measures against the TO (or whichever non-performing party). It was also shown that the competencies of the courts are better delineated in this area than the NRA and that the NRA in general considers that the courts should settle contract disputes.

As regards pricing issues, this is the most difficult area. In Chapter 5 it was discussed that price control is reserved to the NRA. Whether a party could enforce a price decision from the NRA before the civil court, would to a large extent depend on the specific facts.

6.8.5 Termination of the interconnection agreement

In respect of termination of the interconnection agreement, it could be established that the telecommunications regulatory framework provided no specific rules for problems arising, e.g., as a result of unilateral termination of the interconnection agreement by the TO. Only courts would be competent to deal with (post) termination issues.

6.8.6 Summary

The findings in this chapter were that contract law – minor exceptions left aside – provides an adequate and sufficient framework for these types of contracts and that, seen from a contract law perspective, their negotiation, formation, performance and termination is not completely a-typical, that is,

\(^{347}\) This was discussed in Chapter 5.
Interconnection Regulation and Contract Law

not different from other agreements between undertakings where no duty to negotiate applies. Although their negotiation is affected by a perceived and actual inequality of the parties (especially as regulated under the secondary interconnection rule), it is somewhat difficult to sustain that an administrative body should always be actively involved in their negotiation or dispute resolution, especially in respect of performance, from a contract law perspective.
7. The Reference Interconnection Offer

7.1 Introduction

As of the implementation of the new regulatory framework ('NRF'), the European Community ('EC') and the national regulator each considered that interconnection agreements must preferably come about through commercial negotiations.¹

In order to structure the negotiations process the national regulatory authorities ('NRAs') were conferred the (rather unprecedented) right under the Interconnection Directive to intervene in the access and interconnection contract formation process.² It concerned the reference interconnection offer ('RIO') to be drawn up by significant market power ('SMP') undertakings. The Access Directive changed the manner in which the NRA could intervene, but, the principle was maintained.³ It was left to the discretion of the NRA to decide what information must be made public.⁴ The NRA was empowered to ask for a copy of the RIO and to take 'measures' with respect to the RIO.⁵

Transparency of terms would, allegedly, serve: (i) to speed up negotiations, (ii) avoid disputes, and (iii) give confidence to market players that a service

¹ See Chapter 1 paragraph 1.2.2.
³ Significant market power ('SMP') undertakings were required to publish a RIO, to facilitate other licensed operators ('OLOs') in deciding what they required from the Telecommunications Operator ('TO') for interconnection negotiations. This was discussed in Chapter 3 paragraph 3.4, Council Directive 2002/19/EC of 7 March 2002 on access to, and interconnection of, electronic communications networks, [2002] OJ L 108/7 ('Access Directive').
⁵ Cf. Article 9 (2) Access Directive, and Articles 6a.9 (2) and 6a.9 (4) 2004 Telecommunications Act ('Telecommunications Act', 'Tw') with Article 7 (3) Interconnection Directive and Article 6.7 1998 Tw. In the Netherlands, the duty to deposit all interconnection agreements was laid down originally in Article 6.2 section 1 1998 Tw and went beyond the duty as incorporated in, since it applied to all providers, whereas the Access Directive referred to parties with SMP only.
Interconnection Regulation and Contract Law

was not being provided to them on discriminatory terms.\(^6\)

Besides, the NRA thought that the RIO would provide the market parties a better bargaining position, as it considered the RIO to be a minimum offer.\(^7\)

This approach of \textit{ex ante} intervention in the contract formation period could lead to tension with the principle of freedom to contract; for instance, if this meant that neither party would have the freedom to move and to take a position other than that as set forth in the RIO.

### 7.1.1 Practical importance

The practical importance of the RIO is unclear. Undoubtedly, it gave a rather accurate overview of the services on offer by the TO. But, the RIO was drafted by a formerly monopolistic entity that by-and-large still operated in a bureaucratic and rigid fashion. The TO did not always take into account market developments and the needs of new entrants and responded to new developments, such as voice over the Internet Protocol (‘VoIP’) slowly.

As a result, when looking at the RIO, there is a need to determine a balance between the interventionist approach taken by the regulator, possibly at the request of OLOs, and the normal business standard of free negotiations. Although any remarks made in this respect suffer from being \textit{ad hoc}, they nevertheless offer an insight not only on the issues at stake, but also an indication as to whether market parties can arrange for their treatment independent of a regulator.

A comparison between different RIOs may help in determining whether there were different approaches to market needs.

### 7.1.2 Scope of work

This Chapter focuses on the question whether in a recently and gradually liberalized market, \textit{ex ante} intervention in the RIO continues to be preferred over a more lighter form of regulated negotiations, by looking at how the NRA fared in respect of controlling the RIO in the Netherlands. It will be seen whether the NRA could justify its intervention in the contract formation process by reviewing and requiring changes to the RIO. Such justification would obviously follow first from the statutory right to

\[^6\] The aims of transparency were explained in Recital (16) Access Directive. It is unclear from the recital exactly how the Commission thought that transparency of terms would serve such varied aims. Neither the recital nor any other Commission communication contained qualitative or quantitative tools to measure whether aims could be met.

\[^7\] See Chapter 6 paragraph 6.5.1.3.
intervene; but, it would have to be supported by at least a restraint in that the NRA must use its competence only to warrant the regulatory objectives. Notably, it will be seen whether it can be said that the NRA's intervention was adequate from a regulatory perspective, both having regard to the effectiveness and the sustainability of its involvement.

Paragraph 7.2 introduces the NRA's approach towards the RIO. In paragraph 7.3, the RIO will be dealt with and the NRA's decision on the Dutch TO's 2000 RIO will be described, in order to analyse the scope of regulatory intervention. Paragraph 7.4 discusses the TO's RIO and the provisions that are relevant to interconnection agreements and contains a comparison of the standard, publicized access and interconnection agreements of two TOs. In paragraph 7.5 it will be attempted to draw conclusions as regards in what phase regulatory intervention can play a role in effectively ensuring that a competitive access or interconnection agreement can be executed and performed. This Chapter will also describe a number of practical issues that are relevant to OLOs in reviewing the RIO when considering and negotiating interconnection agreements.

7.2 The NRA and the RIO

The Dutch NRA's RIO was reviewed under the open network provision ('ONP') framework, when the market was less open for competition. The NRA relied heavily on Article 9.2 Interconnection Directive and Annex VII parts 1 and 2. This Annex contained an overview of crucial provisions that, according to the EC Commission, must be taken into account in such agreements.\^9

---

8 The RIO of Deutsche Telekom AG ('DTAG') was not readily available.


10 For instance dispute resolution, requirements regarding publicity and access to interconnection facilities, requirements for shared use, including co-location, requirements regarding the maintenance of end-to-end quality of the service; description of the interconnection services to be provided, conditions of payment, locations of points of connection ('PoCs'), technical standards for interconnection, intellectual property rights, definitions and limitations of liability including entitlement to damages, term of the agreement, maintenance and quality, the latter topics were advised to be included in interconnection agreements (Appendix VII, part 2 Interconnection Directive), but are now considered mandatory, See Decision RIO 2000, p. 14. See also Gijrath 1997, p. 279ff. These topics will be dealt with more extensively below.

353
Interconnection Regulation and Contract Law

In its Indicative Reference Interconnection Offer, the Commission had wished to express that the actual terms of interconnection could cover more than what the RIO contained. The assessment of the RIO should be considered in the context of what the bandwidth was. The Commission provided a generic seven-page list, describing these items at high level. The document had the status of a notice that was not intended to be binding on the Member States, NRAs or TOs.

Yet, the Dutch NRA (Onafhankelijke Post- en Telecommunicatie Autoriteit, 'OPTA') considered it in extenso in its Decision RIO 2000. According to OPTA, the result of this was that the minimum RIO as published could not be revoked or amended by the TO. It formed the basis for negotiations regarding access or interconnection and simply could not be diverged from to the disadvantage of the OLO.

7.3 Discussion of the Decision on the RIO

The Netherlands was one of the few countries where the TO had not immediately published a RIO. A number of developments led to the eventual decision on the RIO.

---


12 It included recommendations regarding: 'Geographical PoCs, Technical options of interconnection, Interconnection links, I/C services offered, Technical interface specifications, Types of calls and quality of service, Assistance services, Advanced services, Carrier selection, Number portability, General conditions (provisions on Procedure in case of proposed changes to standard terms and conditions; interoperability testing procedures; Procedures in the vent of alterations proposed to the network or service offerings of one of the parties, including procedure for accessing the notified organisation's new/amended services), facility sharing, switch reconfiguration, forecasting requirements, inter-operator billing and accounting requirements, requirements for special equipment or nodes.'

13 This was what the NRA seemed to imply, cf. Decision RIO 2000, p. 14, fifth paragraph and p. 42ff.

14 See Wall Street Journal 4-5 May 2001, p. 21. Other countries were Greece, Luxemburg and Portugal.

15 Until 2005, the national regulatory authority (NRA) did not reconsider the Dutch telecommunications operator's (TO's) RIO under Article 6a.9 2004 Tw. By 2004, the NRA had not had an opportunity to take into account the recommendations made by the European Regulators group ('ERG') in terms of remedies available to impose on SMP undertakings. See Chapter 5.
7.3.1 Publication of a RIO and NRA action

Once the 1998 Tw entered into force on 1 January 1998, the TO voluntarily published its first RIO. At the time of publication, this document did not have RIO status, as Article 6.7 1998 Tw stipulated the obligation to publish a RIO applied to SMP undertakings only, and, at the time, the TO had not yet been appointed as such.

Once the NRA ruled the TO had SMP, the TO published a new RIO.\textsuperscript{16} OPTA then invited interested parties to respond to the RIO by means of consultation which ran until 5 November 1999.\textsuperscript{17} During the consultation, several market parties expressed a need for a clear policy framework regarding the negotiations process, to enter into an access or interconnection agreement.\textsuperscript{18}

On 28 July 2000, OPTA issued a ruling with respect to the TO's RIO, in the meantime version 2000.1.1.\textsuperscript{19} It ordered the TO to publish a new RIO and to deposit this new version with the NRA not later than the 1st of September 2000.\textsuperscript{20}

7.3.2 Motivation for intervention

OPTA based its right to intervene by referring to Articles 6.1 (7) and 6.7 (3) 1998 Tw.\textsuperscript{21} Under the ONP framework, no decree on interconnection

\begin{footnotesize}
\textsuperscript{16} Cf. Sterr. 1999, nr. 164. It was published on 27 August 1999.
\textsuperscript{17} Version KPN 2000.1.1.
\textsuperscript{18} The consultation enabled competitors of the TO to provide comments to the NRA, thus helping it in setting its mind on what terms needed to be reconsidered. According to OPTA, no less than 24 operators had responded to the Onafhankelijke Post en Telecommunicatie Autoriteit's (OPTA's) request for consultation.
\textsuperscript{19} Decision RIO 2000, p. 10.
\textsuperscript{20} Decision RIO 2000, p. 55, no. 5.
\textsuperscript{21} See Decision RIO 2000, p. 4 and 10.

Article 6.1 (7) Tw read: "By or by means of a special decree, further rules with respect to the bringing about of interconnection can be established. These rules may differ with respect to distinct categories of public telecommunications networks and public telecommunications services."

Article 6.7 (3) Tw read: "If the institution is of the opinion that a reference interconnection offer runs counter to the provisions of or based on this act, then the institution will inform the respective provider thereof whilst notifying which elements must be modified in its opinion." Article 6.1 (7) 1998 Tw provided that further rules with respect to bringing about interconnection could be issued by or by means of a decree. In principle, this meant that it would fall under the competence of the Minister

(\textit{Continued})
\end{footnotesize}
Interconnection Regulation and Contract Law

agreements had been issued pursuant to Article 6.1 (7) 1998 Tw and OPTA had not been instructed in this respect either. However, this did not deter it from intervening. OPTA based its competency on Article 9 (2) Interconnection Directive, which referred to general conditions to be established by the NRA and which needed to be published. OPTA also mentioned the possibility to establish ex ante the conditions under which interconnection would be on offer, by reference of Article 9 (3) Interconnection Directive. In the NRA's view, it could order the TO to modify its RIO continuously, whether or not other parties had filed a complaint. OPTA defended its competency to apply enforcement measures under the 1998 Tw by considering that intervention might otherwise be without effect.

7.3.3 Criteria for consideration of the RIO

OPTA considered the RIO on the basis of the criteria laid down in the 1998 Tw and on the basis of European regulation, whether binding (such as the Interconnection Directive) or non-binding (such as the Indicative Reference Interconnection Offer and the European Interconnection Forum's Framework Interconnection Guidelines of April 1997). to determine this. The Explanatory Memorandum mentioned that the further rules to be issued could for instance relate to the safety of the network, interoperability of services, and confidentiality, or rules that would have to be dealt with in interconnection agreements.

22 Although the Minister had issues Guidelines for Interconnection by special decree prior to the entry into force of the 1998 Tw, see Stcr. 1997, nr. 104, p. 9.
23 Now that the 1998 Tw was not that specific, the NRA necessarily motivated its competence to intervene on the Interconnection Directive. See Decision RIO 2000, p. 10-11.
24 As discussed in Chapter 5, this does not necessarily have to be OPTA in the Netherlands.
25 As discussed in the previous paragraph, this provided that the NRA could always intervene at its own initiative, to decide what topics needed to be addressed in an interconnection agreement or to fix specific terms with which one of the parties needed to comply.
26 OPTA states this enigmatically in the second introductory paragraph of the introduction on page 4. It seems to refer to renewed decisions, if the TO were to amend its RIO.
27 This competence was founded on Article 15 1998 Tw. On 6 June 2001, the NRA imposed a penalty on the TO, when it appeared that the TO did not wish to voluntarily implement the binding recommendations from the NRAs ruling.
28 See Decision RIO 2000, p. 5 and footnotes 8-10 on the same page.
According to OPTA, the legal review of the RIO fell into an *ex ante* consideration of certain elements, such as the RIO itself, and an *ex post* consideration of others. An *ex post* review – of an existing interconnection agreement – was not part of the ruling, since apparently no complaint had been filed with respect to an interconnection agreement already executed. However, OPTA confirmed in its Decision that, generally, it would opt for *ex post* intervention.29

In Germany, the NRA (Regulierungsbehörde für Telekommunikation und Post ‘RegTP’) intervened in the RIO more as a result of interconnection disputes, and gradually transformed the standard offer by imposing changes in specific situations following complaints of OLOs.30

### 7.3.4 Draft Decision RIO 2000

The Decision RIO 2000 followed up on a draft decision of 22 March 2000, apparently intended to give the TO advance warning of the level and scope of intervention.31 The Draft Decision 2000 issued after the consultation round was designed to enable the NRA to reach a more definitive decision on how standard interconnection agreements must be designed in order to satisfy the legal requirements of the 1998 Tw. The Draft Decision 2000 did not yet constitute an administrative decision and was not capable of administrative appeal.

### 7.3.5 Decision RIO 2000

The Decision RIO 2000 qualified as an administrative decision within the meaning of the Act on Administrative Law (*Algemene Wet Bestuursrecht* ‘Awb’).32 This meant that both the TO and interested parties could appeal with the NRA against the decision, and in addition, ask for a preliminary

---

29 See Decision RIO 2000, p. 42, no. 3.2: “The NRA chooses for a repressive system of supervision based also on Article 6.2 (2) 1998 Tw and the parliamentary history regarding Article 6.7 1998 Tw. This means that interconnection agreements and agreements concerning special access must be considered by the NRA *ex post*, as a result of negotiations, and not *ex ante* as a reference interconnection offer. In this respect, the NRA considers it is supported by what the European Commission has stated in its Indicative Reference Interconnection Offer.”

30 See Steinwärder 2005, p. 84 and the case law referred to in footnote 4 of that article.


32 Article 1.3 Act on Administrative Law (*Algemene Wet Bestuursrecht* (Awb), ‘Awb’).
injunction with the President of the District Court Rotterdam. The TO did not do this, although it filed an appeal against the Decision RIO 2000. The results of the appeal are not known; apparently, it was withdrawn at some point.

7.3.5.1 What constituted the RIO?

In its draft decision, OPTA stipulated what it considered were the elements of the RIO. It did not distinguish between the wholesale services offered by the TO. According to OPTA, the TO's wholesale services catalogue formed the umbrella under which KPN Telecom published its conditions for interconnection, including: (1) the actual RIO, (2) 'other legal conditions', (3) the Model Interconnection Agreement KPN 2000.1.1 as published pursuant to Article 6.7 1998 Tw ('MIA'), and (4) the TO's special and optional service conditions and tariffs.

OPTA found it confusing that the TO submitted numerous documents with different names. Thus, OPTA categorized the documents under a heading 'Reference Offer' ('RO'). In OPTA's view, the RIO was considered the formal offer, the RO was a catalogue with the full offer, and 'other legal conditions' were conditions that did not fall under the RIO, although they fell under the RO. OPTA also categorized the MIA. OPTA's decision concerned predominantly the RIO and the MIA.

7.3.5.2 Formal assessment of the RIO

The third parties consulted in the review of the RIO took different positions as regards the formal status of the document. OPTA attempted to balance the different opinions of the parties to access and interconnection agreements by harmonizing the terms as much as possible. The TO argued the RIO amounted to a standard, reciprocal and non-binding offer. The TO felt that contractually agreed deviations were possible. A number of the third parties sort of agreed and were of the opinion that it should not be the intention of the NRA to harmonize interconnection agreements. However, in their view, the law was to warrant a minimum level of service provision.

---

33 See Decision RIO 2000, p. 16, also the drawing. Cf. with the current issue of the BT RIO: (1) the BT standard interconnection agreement ('SIA'); (2) the list of standard services – which are not identical to those offered by KPN; (3) the carrier price list; and (4) the network charge change notice, cf. Lloyd, Mellor 2003, p. 97.

34 See Decision RIO 2000, p. 17.

35 Decision RIO 2000, pp. 41-45, nr. 3.

They also stated that the principle of non-discrimination did not entail that in all cases the terms of an interconnection agreement needed to be identical. In their view, the circumstances and requirements could vary from case to case. Besides, since the TO had entered into different agreements in the past, the rights acquired under these agreements that were still in force, could not be set aside by an amended RIO. This last point does not appear to be untenable from a contractual perspective.

OPTA responded by first arguing that once a (new) RIO would be published, the TO would not be entitled to reconsider its interconnection offer unilaterally. According to OPTA, the offer was binding on the TO, in the sense that pursuant to Article 6:219 Dutch Civil Code (Burgerlijk Wetboek, ‘BW’) it could not be revoked. At the same time, it confirmed that changes would be allowed – provided these would not run counter to the TO –, but only if requested by the OLO.

Without providing any of the much needed clarification to the high level ONP principles, OPTA reiterated that the possibility to diverge from the terms of the RIO were restricted by the principles of non-discrimination and transparency. It is unclear what OPTA wanted to add in this respect and it did not limit this observation to the TO, thus suggesting that an OLO would have an independent obligation to consider whether a change it would request would entail discrimination against alternative OLOs (whereas this was really only an obligation imposed on the TO). The only example it could think of was where the OLO would be satisfied with a lower than standard service provision (against lower rates). This example was unlikely to transpire in practice, since the TO for reasons of service consistency was unwilling to go below a minimum level. It did not further consider the points made by the TO and the OLO in much depth; thus it did not clarify the position as to what amount of contractual freedom existed for either side.

OPTA then considered the relationship between the standard RIO and other OLO’s offers. OPTA determined that the TO was not allowed, as a matter of standard, to demand reciprocity of service provision. This meant that the OLO would be free to offer in return less than a standard minimum

---


38 The NRA also ordered the TO to distinguish between the topics that belonged in an interconnection agreement and the topics that belonged in a special access agreement. Since this distinction was no longer relevant under the 2004 Tw, this consideration will not be discussed in extenso.
offer without, e.g., considering how this could affect QoS and continuity of service provision to the end-users of both parties.39

OPTA went into much detail in respect of the RIO. For instance, next to requiring the TO to publish the standard RIO in the Dutch language, the NRA also found it necessary to order the TO to state what elements of the standard RIO would not be binding (apparently forgetting that it was of the opinion that the TO could not diverge from the standard offer to the detriment of the OLO anyway), what the order of precedence would be and to include definitions.40

OPTA observed that six topics prescribed by Annex VII Interconnection Directive were missing from the standard RIO, notably: (1) measures to conform with essential requirements; (2) intellectual property rights; (3) term of the agreements; (4) equal access; (5) confidentiality of the non-public parts of the agreement; and (6) training of personnel.41 No follow-up was given to this observation.

Finally, OPTA considered extensively the manner in which the TO was allowed to unilaterally amend the terms of its RIO or the legal terms.42 Having looked at detailed provisions regarding the change in service provision, it considered the scope of unilateral change unclear.43 According to OPTA, it would be necessary to have one general clause that dealt with changes. Besides, all changes in the RIO would have to be submitted to OPTA first. OPTA stated that the non-discrimination requirement did not entail that if the TO implemented a change in one interconnection agreement with an OLO, the TO would then have to change all of its other interconnection agreements as well.

7.3.5.3 Elements of the RIO that required changes

The ruling was specific and detailed in considering what elements of the RIO needed to be changed. The formal assessment of the RIO was

---

39 It cited as an example the determination of rates for the EnerTel public switched telephony network (PSTN) Terminating Access Service, where EnerTel wanted to charge a higher tariff to the TO. See OPTA 22 September 1999, OPTA/IBT/99/7866 (KPN/EnerTel).
40 Decision RIO 2000, p. 44-45, nos. 3.5 and 3.6.
41 A clause on intellectual property rights had always been present in the model interconnection agreement (MLA), Article 16.
42 Decision RIO 2000, pp. 45-49, nr. 37.
43 OPTA mentioned the following clauses in the 2000.1.1 offer: 2.3 (change in services), 3.6 (change in term of services), 3.7 (change in rates and conditions), 3.8, 4.1 (network changes), 4.3, 15 (change in information provision), 20.1 (termination for convenience) and 21 (amendments generally).
The Reference Interconnection Offer

contained in approx. 23 pages and covered five main topics regarding the content of the RIO: (1) KPN offer; (2) the services missing from the RIO; (3) the exploitation and delivery of services; (4) the provision of information; and (5) contract provisions.

The operative part of the judgement ordered the TO to amend and substitute the RIO in 36 aspects with respect to the content of the offer, and six aspects following the formal consideration of the RIO and the MIA. These topics were broken down in various considerations. OPTA went as far as to provide a mark-up version of the RIO, in which it commented on the terms. This was not always helpful. For instance, OPTA was concerned about the list of definitions. It did not explain why these caused concern, except that they needed to be in line with statutory definitions. But this remark made little sense, as none of the high-level statutory definitions (electronic communications network ('ECN') etc.) were applied in the RIO.

(1) KPN Offer

OPTA ordered the TO to make available the public switch telephony network ('PSTN') Terminating Access Service and the PSTN Outgoing International Connect Service. The NRA considered that the scope of the PSTN Terminating Access Service was unclear – given the definition of 'Call' and ordered the TO to clarify the offer. It also ordered the TO to add the PSTN Outgoing International Connect Service to its offer, since this was missing from its offer.

44 Just how much, confusing detail OPTA provided may follow from the following excerpt: “KPN must add both to the RIO and the RO a list with definitions in the Dutch language. In the English RIO and RO it suffices to refer to the Dutch language notions. The Dutch definitions must obviously match the statutory definitions. In an agreement (including the Model Agreement) only definitions may be introduced that are not already present in the RIO or RO (because otherwise, they must be described in the RIO or RO respectively). For the remainder, it will suffice to refer in the Model Agreement to the definitions in the RIO and RO. As regards the RIO the Dutch version shall prevail over the English version (...).”

45 Decision RIO 2000, p. 18, nos. 2.1.1 and 2.1.2.

46 OPTA referred to the Commission's Indicative Reference Interconnection Offer, which stated that the offer of the TO must include PSTN services and ISDN services, both nationally and internationally, see Decision RIO 2000 p. 18.

47 This absence ran counter of the non-discrimination obligation, since the TO did offer this service to its affiliates. The TO stated it offered the service at (what it considered) competitive rates to any OLO in the Netherlands. Source: Reaction of KPN Telecom B.V. to the review by OPTA of the reference interconnection offer of KPN Telecom B.V. dated 28 July 2000, 29 September 2000; not published; confidential letter not available for quotation.
(3) Exploitation and delivery of services
In this chapter, OPTA made a number of pressing observations as regards the way in which the RIO should be structured. In particular, the NRA considered the methods and procedures applied by the TO in respect of forecasting and ordering. These procedures were crucial to OLOs in that they effectively could lead to significant delays in the establishment of network interconnection and interoperability of services, when OLOs were not given speedy access to the TO's network and services. OPTA went beyond looking at the ordering procedures and also considered numerous practical issues in terms of the exploitation and services delivery and looked in more detail at, e.g.: (1) the need of maintaining end-to-end quality of service ('QoS') and the forecasting procedure prescribed by the TO; (2) procedures for the prognostication, ordering and delivery of services; (3) time limits; (4) interoperability requirements; and, finally, (5) liability issues.

These comments are discussed briefly, as they illustrate not only how far the NRA's intervention in the contract formation process went, but also what were considered bottlenecks from the market and business perspective.

The other issues OPTA considered – that will not be discussed in detail here – were: (6) additional orders/deliveries/fast procedure; (7) stock formation; (8) over ordering; (9) trading in interconnection capacity; and (10) operational consultation.

Sometimes, the topics covered by the NRA in its decision overlapped, so it is not always easy to digest the intention behind its reasoning.

63 Following the NRA procedure that led to the Decision RIO 2000, the TO had effectively improved its forecasting, ordering and delivery procedure.

64 Decision RIO 2000, p. 26-28, no. 2.3.1. Although there appeared to be no immediate legal basis in the law with respect to service levels, other than what is mentioned in Article 6.7 (2) 1998 Tw, OPTA appeared to base itself in its Ruling on the overview provided in Appendix VII part 2 Interconnection Directive. This appendix contains a category for 'maintenance and quality of interconnection services'. But this annex did not prescribe minimum service levels in detail. Unfortunately, the NRA did not provide detail on different technologies or infrastructure on offer.

65 Decision RIO 2000, p. 32, no. 2.3.6.

66 In a rather enigmatic deliberation, the NRA apparently considered it would be necessary to – contractually – agree on different levels and forums for consultation, i.e., on the RIO and the technical appendices. The NRA expressed its concern over the unclear status of the different interconnection contract documents and worried that different people would be involved at different levels, see Decision RIO 2000, p. 33, no. 2.3.9.
Ad (1) Maintaining end-to-end quality of service and the forecasting procedure prescribed by the TO

Although the RIO was almost fully reciprocal, the chapter on the forecasting of telecommunications traffic imposed contractual penalties on the OLO if it would order outside the bandwidth of its forecast. In practice, it would be difficult for an OLO to provide meaningful forecasts regarding the telecommunications traffic it would route over the infrastructure of an OLO, let alone the TO. The OLO would normally base its business plan on an exponential growth of its short, middle and long term traffic. Since this concerned projections only, the OLO had an interest in achieving a broad non-binding bandwidth as far as those projections were concerned. These should not be binding, but flexible. However, according to Article 11 RIO, the parties would adhere strictly to the procedure set forth in that clause. A contractually binding order procedure was set forth in a 52-page document. If an OLO’s projections were too optimistic, it risked incurring significant interconnection charges if its actual traffic stayed behind the projections. Conversely, an OLO projecting too conservatively, risked to be left out, as it could not demand interconnection services it needed as its business was growing. OPTA considered this requirement to run counter of the 1998 Tw. It also held that the TO could not avail itself of a forecast procedure to bypass its obligation to assure adequate service provision to OLOs. OPTA observed that a service level agreement might be a solution, but did not go into much detail. OPTA decided that the TO would have to accept sanctions if it could not satisfy its delivery obligation. The NRA stated that the service terms were to be constructed as a results obligation and that an efforts obligation would not suffice. Consequently, it ordered KPN to introduce flexibility into the procedure, to warrant reasonable delivery terms and a minimum level of QoS. In OPTA’s view, only a maximum of flexibility as regards forecasting would lead to an efficient use of the various networks.

67 See Article 6.1 1998 Tw.
68 OPTA academically discussed what constituted a service level agreement (‘SLA’) and referred to the Fifth Report on the implementation of the telecommunications regulatory package, November 11, 1999 and the Report of Information Society DG, explanatory note, access to fixed and mobile network infrastructures by operators as having significant market power, September 17, 1999.
69 Decision RIO 2000, Consideration 21.
Ad (2) Procedures for the prognostication, ordering and delivery of services

In the Netherlands, the TO's procedure caused delays in the delivery of services. According to the TO's funnel system, OLOs had to forecast their orders for five quarters. It was rolling order forecast, which meant that parties were allowed less divergence from their forecast as the quarters progressed. In an extensively motivated opinion, OPTA argued that there was no commercial or technical justification for this procedure. According to it, the procedure itself caused the delays. OPTA urged for a flexible system to adjust the forecast based on actual market developments. According to the OPTA there would be two systems to achieve flexibility: either by shortening the forecast procedures, or by providing that parties would be entitled to amend the forecasts during their term. OPTA preferred the first option. Alternatives would be acceptable, provided the parties would agree on them beforehand. OPTA also considered that the TO would have to clarify the connection between the length of the forecast period and the acceptable bandwidth. The longer the period was, the larger the bandwidth.

Ad (3) Time limits

OPTA ordered the TO to establish clear delivery milestones for the various services (for instance the delivery of new PoCs next to the extension of existing PoCs. The NRA did not go as far as to order the TO to contractually agree that delivery times should be fixed to the extent that they would be fatal.

70 Decision RIO 2000, p. 28, no. 2.3.2.
71 In the new RIO this term had been extended to eight quarters.
72 The NRA considered that various systems could be used simultaneously, referring to Switzerland.
73 In terms of additional orders/deliveries/fast procedure, the NRA observed that – in light of the required forecast procedure – there was a need for an additional order procedure; thereby undermining to some extent the purpose of the forecast procedure, see Decision RIO 2000, p. 30, no. 2.3.3. OPTA also recommended that the TO maintain some stock, in particular to satisfy exponentially growing demand for broadband access due to the increase in internet data traffic. OPTA was of the opinion that this recommendation should result in additional contract language for the TO, see Decision RIO 2000, p. 31, no. 2.3.4. But the TO argued that if the OLOs would not be bound by their orders, then they would order more than actually needed. The NRA considered this risk and – in a recommendation that was more beneficial to the TO – recommended that a minimum order level be agreed, see Decision RIO 2000, p. 32, no. 2.3.5.
74 Decision RIO 2000, p. 33, no. 2.3.7
75 The TO cooperated with the NRA in establishing time limits and accepted, to some extent, service credits in case of failure to deliver.
Ad (4) Interoperability requirements

By this, OPTA meant that the RIO needed to contain a test procedure and needed to address the legal consequences for the TO – without specifying what it meant – to enable the parties to test whether services were interoperable. This vague recommendation could potentially have substantial consequences both for the RIO and the contract formation as it would enable OLOs to contractually agree with the TO on divergences from the TOs standard test offer.

Ad (5) Liability issues

OPTA was of the opinion that the TO should not be allowed to contractually limit the amount of its liability or to distinguish between categories of damages. This was due to the fact that the interconnection offer by nature would warrant minimum service levels and sanctions if these levels were not met. According to OPTA, the TO should include the ‘standard form of contractual liability’ and accept liability for consequential damages, albeit that the category could be specified. The NRA felt strongly about imposing contractual penalties on the TO if it would not meet its obligations. It did not address what would be the connection between contractual liability and penalties.

(3) Provision of information

Apparently to ensure adequate transparency, OPTA gave specific orders to the TO to provide information with respect to the RIO. First, the TO would have to warrant the correctness and completeness of all information provided regarding the RIO. OPTA considered Article 15 RIO, a clause on information provision, too general. It considered information provision a

---

76 Decision RIO 2000, p. 33, no. 2.3.8.
77 Decision RIO 2000, p. 34, no. 2.3.10.
78 Apparently, the NRA was of the opinion that the TO was invoking limitations of liability present in the Telecommunications Facilities Act (Wet op de telecommunicatievoorzieningen (Wtv'}). These should not apply to interconnection. But it should be mentioned that these statutory limitations had no meaning whatsoever for interconnection services, so that they would be without merit.
79 The NRA did not mention what a standard form of contractual liability would look like. According to the Explanatory Memorandum to the 1998 Tw, which was written when the Wtv was still in force: “Obviously, and this should be emphasised, the parties are free to contractually limit their liability through an exoneration clause (...).” It was of course customary to limit or even exclude liability for consequential damages, so the TO's offer in this respect was not that unusual.
80 Decision RIO 2000, p. 35, no. 2.4.1.
results obligation. OPTA also wanted the TO to specify what information – such as service levels – would fall under the information provision obligation of Article 15 RIO. OPTA considered the overview of where and how interconnection would be possible, to be unclear.\textsuperscript{81} In particular, OPTA required the TO to inform the OLOs on delimitations/divergences on the interconnection service, arrangements for alternative routing, specification of local, regional and national access areas and contemplated changes or replacements. Hence it required the TO to provide an overview of PoCs.\textsuperscript{82} OPTA considered the provision of information of QoS a reciprocal obligation. But, since the TO was considered to have SMP, OPTA weighed its obligations in respect of the PSTN Terminating Access Service heavier than the OLO’s obligation. According to OPTA, the TO would have to issue reports on a regular basis which would at least contain information on the number of overflows of calls, specifying the number of calls and call minutes per access point; the number of busy hour call attempts; busy hour answered calls; and busy hour unsuccessful call attempts per point of access (‘PoA’) with respect to originating and terminating traffic of the OLO, in order to assess call availability. This information should be provided on a monthly basis. If service levels would not be met, the reports would have to include ‘exception reports’ describing the cause of such failure. OPTA was also concerned about the measurement of call availability. It determined that a numerical overview was insufficient. Rather, OPTA wanted the TO to mention the measurement method employed in detail, including the measurement period and the percentage of call availability. Finally, 6.1 (1) 1998 Tw prescribed that the parties to an access or interconnection agreement would warrant contractually how their customers would be able to communicate with each other. For the TO, this allegedly meant that its Operations and Maintenance Manual would have to contain a results obligation. It also required the TO to mention minimum service levels in the Technical Manual and Parameter Schedule as a results obligation.\textsuperscript{83} Specifically, OPTA required monthly reports regarding the quality of the interconnection point, including availability, error free seconds and severe error seconds. Arguably, the provision of information related to interconnection services prior to entering into an agreement would not fall under the scope of Article 15 RIO (rather, it would be governed by Article 6.7 1998 Tw).

\textsuperscript{81} The Reference Interconnection Offer contained an extensive explanation as to how locations of PoCs should be specified.

\textsuperscript{82} Decision RIO 2000, p. 35, nos. 2.4.2 and 2.4.3.

\textsuperscript{83} Decision RIO 2000, p. 37, no. 2.4.4.
(4) **Contract provisions**

Referring to the minimum terms required by Annex VII to the Interconnection Directive, the NRA addressed another four contractual issues, where it considered that the TO should make modifications to its RIO, which will be discussed briefly: (1) dispute settlement; (2) invoicing and payment; (3) suspension of service; and, (4) termination of the agreement.

**Ad (1) dispute settlement**

Since the 1998 Tw contained no specifics on dispute resolution, OPTA was of the opinion that the dispute resolution needed to relate to at least the services, rates and conditions in the RIO, and needed to contain brief and specific terms. Apparently, OPTA contemplated a process of mediation or internal escalation, which would precede dispute resolution by OPTA. In other words, in spite of its newfound right to intervene in the interconnection agreement, OPTA preferred mediation by and between the parties themselves.

**Ad (2) invoicing and payment**

In this context, OPTA considered that the TO’s requirement of an irrevocable, unconditional, directly claimable bank guarantee for an amount of six months order forecast constituted a barrier to access, although it did not consider the requirement of bank guarantee unfair *per se*. It also ordered the TO to provide for invoicing and payment terms, apparently considering what was available to be unreasonable.

**Ad (3) suspension of service**

Referring to Article 6:262 BW, the NRA took the rather unusual position that the Tw radically affected the statutory provision regarding suspension of contractual obligations. Because of the needed service continuity, OPTA

---

84 Decision RIO 2000, p. 37, no. 2.5.1.
85 Decision RIO 2000, p. 38, no. 2.5.2.
86 Decision RIO 2000, p. 38, no. 2.5.3.
87 Decision RIO 2000, p. 39, no. 2.5.4.
88 In essence, Article 6:262 Dutch Civil Code (*Burgerlijk Wetboek, BW*) provides that a party to an agreement may unilaterally suspend the performance of its obligations, if the other party does not, or partially does not perform its share of the obligations. The law requires there is a direct link between the contractual obligations. Article 17.1 RIO, according to OPTA, did express a close and direct link between the parties’ obligations in respect of access and interconnection — for instance service provision versus payment. —
considered that a right to suspend service provision would have to be excluded contractually, or be allowed in very limited circumstances only. OPTA took into account that the other side could always be stimulated to perform by the imposition of a contractual penalty or a claim for liquidated damages.

Ad (4) termination of the agreement
According to OPTA, termination of the access or interconnection agreement would be allowed only in very limited circumstances. Unilateral termination by the TO in accordance with the normal provisions of Article 6:265 BW would have to excluded, again to warrant continuity of service. OPTA did not prescribe then what would constitute justified grounds for termination by rescission; it merely provided the example of a force majeure event – without considering whether the statutory grounds for force majeure would be relevant in this type of agreement – that continued or could reasonably be expected to continue for more than six months. OPTA gave a theoretical example as to what would constitute a ground for termination for cause and did not adequately consider what would be the ground that would normally be invoked in practice: material or serious default by the other party (in this case the OLO). Dutch law would normally allow for unilateral rescission by the TO fairly quickly, and in the case of access or interconnection, if OPTA were to warrant continuity, and avoid frivolous invoking of termination, it should have ordered the TO in more detail to provide for a possible termination for cause.

Nor did OPTA consider whether termination for convenience (termination whilst observing a reasonable notice period) would be acceptable. It had finished by stating that the TO would not be entitled to full termination of services on a yearly basis.

7.3.5.4 Interim conclusion
The Decision RIO 2000 was fairly detailed but practical where it concerned the services offer required from the TO.

As regards the services considered missing from the RIO the Decision RIO 2000 struck as being somewhat randomly formulated and overtly general. It
was unclear to some extent, on what conditions and circumstances the Decision RIO 2000 had been based. For instance, OPTA did not prescribe a concrete minimum service level for different technologies. This lack of regulatory guidance was particularly felt in the markets for broadband, Internet access and satellite services. Arguably, it would also be unreasonable for each party to demand the same service level; or, *vice versa*, to require each OLO to conform to the same service level. This would ordinarily depend very much on commercial needs. In the Decision RIO 2000 OPTA expected that the TO would include very specific levels for services and quality of interconnection services in its RIO. But, it failed to mention for which services these levels must be included or to mention what the levels should be. OPTA did not amend elements of the RIO, it merely pointed out at a high level what it thought should be modified. It was left to the discretion of the TO to clarify. From the wording of the Decision RIO 2000 and the follow-up letter of 2002, it was unclear whether OPTA even got an insight in the actual levels on offer. In view of the limited effectiveness of OPTA’s review procedure, it seems farfetched that it would prescribe even minimum levels. This matter would better be left to commercial negotiations.

In respect of the exploitation of services, OPTA in – probably too – much detail addressed the scope of exploitation and delivery of services and the manner in which these were on offer from the TO. Take, for example, the issue of transmission capacity. Transmission capacity relates to – simply put – the bit streams that may be carried over a network. This notion is also of importance for the available bandwidth for frequency signals. Now that capacity of, for example, a cable transmission network is limited, transmission capacity may be a scarce service sometimes. Hence, an objective allocation of transmission capacity is in the interest of each OLO. However, no transparent allocation procedure existed. The RIO did not provide how transmission capacity would be divided. Unfortunately, the Decision RIO 2000 did not address the issue either.

---

91 Decision RIO 2000, p. 27, no. 2.3.1.
92 Transmission capacity was not defined in the 1998 Tw. It was mentioned in the context of Article 1.1 sub i 1998 Tw: “to make available to the public transparent transmission capacity between two network connection points of a telecommunications network, without routing functions which end-users can use as part of a leased line as delivered.”
93 It should be mentioned, however, that Parts 1 and 2 of Annex VIII Interconnection Directive did not mention the issue, thus arguably not enabling the NRA to intervene *ex ante*. In this area, the NRA would have to intervene *ex post*, upon complaint of a party who alleged discrimination in the allocation process.
The decision was rather superfluous and – again – appeared to be random in respect of the provision of information required from the TO.\textsuperscript{94} Finally, OPTA's position on contract provision matters struck right at the heart of important legal issues not surrounding the negotiation, but the performance of the interconnection agreement. If the TO would choose to implement the NRA's comments, it would release some rights that would normally be available to it under the law relating to contractual obligations.

With respect to dispute resolution, OPTA did not consider that a clause requesting the \textit{civil courts} to adjudicate might be practical.\textsuperscript{95}

With respect to the position on suspension of obligations, OPTA's assessment of the legal aspects was incorrect. First, by considering that a party could be stimulated to perform by issuing a contractual penalty, OPTA disregarded the intent of such penalty: it is intended usually only as an alternative for damage compensation, since damages may be difficult to assess. It could hardly be intended in the context of an access or interconnection agreement as a stimulus for the TO to provide forecasts or its own minimum service levels. Second, the law does not recognize a penalty as a non-payment remedy. And this would be obviously the main concern for the TO: non-payment or suspension on payment by the OLO. By preventing the TO from invoking its right of suspension, OPTA in practice simply took away a legal and statutory right from the TO. It is doubtful whether the Tw or directives gave the NRA a competence to do this; notwithstanding that OPTA had a valid point that suspension could affect service provision and should preferably be avoided. With respect to contractual termination, OPTA issued a very sweeping order that did not appear to be well considered. First, its consideration on termination for cause appeared to be flawed, referring to an unlikely force majeure event only. Second, it did not motivate whether an OLO would have the right to terminate access or interconnection agreements for convenience, even though Annex VII to the Interconnection Directive listed 'term of the agreements' as one of the aspects that must be agreed on contractually.\textsuperscript{96} In principle, the TO could terminate the interconnection agreement for convenience (if the interconnection agreement was for an indefinite or

\textsuperscript{94} Cf. the points raised in this paragraph, supra, regarding the lack of clearly described service levels in the RO.

\textsuperscript{95} Cf. Chapter 5 paragraph 5.5.3.

\textsuperscript{96} Annex VII Part 2.
The Reference Interconnection Offer

unspecitied term). Moreover, accepting there was a clear imbalance of interests of the parties, it would have been justified for such a termination clause not to be reciprocal; rather, only the OLO should be granted a right to terminate for convenience (albeit that a relatively lengthy notice period would be reasonable).

7.3.5.5 Follow-up to the Decision RIO 2000

Following the Decision RIO 2000 – which was appealed by the TO –, the OPTA held another consultation with market parties, to obtain an insight into their priorities. During the consultation three issues were discussed extensively, notably: (1) the content of the SLA, especially regarding delivery and purchase of interconnect capacity and quality; (2) the system for compensation of interconnect ports; and (3) the offer on local interconnection.

In the meantime, by decision of 6 June 2001, OPTA ordered KPN Telecom to publish a RIO containing a co-location offer, on pain of a penalty of NLG 50,000 per day, with a maximum of NLG 1,250,000. KPN Telecom appealed against this decision and OPTA declared the TO’s appeal without merit on 11 March 2002.

Subsequently, in more than ten sessions, OPTA negotiated the terms of the RIO with the TO. However, on 19 out of the 42 topics, the NRA and TO failed to reach agreement. For example, the NRA and TO did not reach agreement on: what was a complete interconnection offer; the availability of the Network Interconnection Link; the provision of additional services, such as user to user signalling; the issue of connecting several PoCs with

97 Although there would be arguments available that the TO should not terminate for convenience, see Chapter 6 paragraph 6.7.
98 KPN Telecom filed an appeal on 6 September 2000; however, the NRA had considered the appeal to be inadmissible. Note that this appeal and the consecutive court appeal were filed and handled under the 1998 Tw, which still contained the interconnection ‘duty’ and suffered from lack of clarity of the definition of interconnection.
100 Source: Rb. Rotterdam 17 February 2004, 02/0984, LJN AT7604 (KPN Telecom/OPTA), no. 1. See below, for discussion of the court appeal.
101 Order 1 in Decision RIO 2000.
102 Order 4 in Decision RIO 2000.
103 Order 10 Decision RIO 2000.
The 2004 RIO consisted of 25 provisions and 12 annexes, including most notably Service Descriptions, Technical Manual, and Tariffs Schedule. All changes in this version related to the annexes, most notably the Service Descriptions and Operations and Maintenance Manual. The versions reviewed had not yet been amended to the NRF as implemented in the 2004 Tw on 19 May 2004.

7.4.1 Observations on RIO 2004
The following points can be made as regards the RIO 2004 (where applicable, compared with the RIO 2000.1.1 that was the basis for the review procedure and with the RO the TO used at the time of the 1998 liberalization):

(1) The premise of the MIA was full reciprocity between the RIO and the OLO. Article 2 MIA described the services to be provided by each party and referred to the numerous annexes. This approach was not in line with the requirements that applied to a SMP undertaking under the NRF, which dictated asymmetrical obligations. Besides, the OLO might not be in a position to reciprocate the services offered by the TO, and it would be (indirectly) assuming the same obligations as the TO, which would be uncalled for. OPTA had not considered this, although it had considered the clause to be too non-committal. But Article 2.1 MIA read the same in the version of 1998, 2000 and 2004.

(2) Already in the recitals, the TO reserved the possibility to jointly with the OLO modify the terms of the agreement due to regulatory developments. Although this appeared to be sensible, the OLO’s

---

121 The 25 are: definitions, subject of agreement, general provisions, network connection, implementation of services, maintenance and performance of services, operational consultation, prices and tariffs, registration of electronic communications traffic, invoicing and payment, forecasting, calling line identity and privacy, number management and number portability, security/interference prohibition, provision of information, confidentiality, suspension of services, liability, intellectual property rights, term and termination of agreement, modification of agreement, nullity, applicable law, dispute resolution and final provisions. Although a number of areas are not mentioned specifically in the index for instance quality of service and maintenance, these are provided for elsewhere.


123 Article 2.3 MIA, which dealt with unilateral change of scope, was deleted in the 2004 version, but that was without meaning, since a similar clause appeared elsewhere.
position would be weaker, since the TO would still have to agree with a change request from the OLO.\textsuperscript{124}

(3) The definitions were rewritten to take into account OPTA's very detailed comments, but many suggestions were not necessarily followed up.\textsuperscript{125} Several definitions had been added, such as with respect to billing.

(4) Article 3.7 MIA contained a 'non-discrimination' clause. If based on the law or a court decision, the OLO must accept a change made unilaterally by the TO. This clause thus confirmed the TO's point of view that it could not always negotiate differently with OLOs. The clause did not really improve the OLO's position in comparison with the previous versions of 1998 and 2000.

(5) Article 3.8 MIA assumed complete tariff reciprocity (see also under (1) above). This provision obviously ran counter to the law and was not in line with OPTA decisions either. But the clause had been there since 1998.

(6) Article 4.1 MIA, which related to PoCs had not changed in the different versions. The NRA had made the – incorrectly placed – comment that a change procedure was required. The PoCs must conform to the Technical Manual, although the basis seemed to be the European Telecommunications Standardization Institute ('ETSI') standards, so the provision should not cause problems.

(7) There was no anticipated flexibility regarding call technical specifications. They must conform to the Technical Manual, otherwise the TO (who drafted the Technical Manual) was not obliged to terminate such calls, Article 4.5 MIA. This clause had not changed since 1998, notwithstanding OPTA's comments.

(8) There was an automatic acceptance of contract terms applicable to 'Services' that were added to the scope of the service provision. This was an odd clause. The TO added (although apparently not at OPTA's instigation),\textsuperscript{126} that services provided already prior to the parties

\textsuperscript{124} See Recital (4). In the previous versions of 1998 of 2000, the clause was more general and did not imply a duty to re-negotiate; only the recital (4) was present in the previous versions.

\textsuperscript{125} For instance, OPTA prescribed the TO not to use the terminology 'infrastructure', since it had not been defined in the law, which the TO ignored.

\textsuperscript{126} Cf. mark-up of Model Agreement Interconnection Draft 1.0 RIO 2000.1.1 under Article 4.6.
Interconnection Regulation and Contract Law

reaching a definite agreement, would not necessarily be considered as accepted service delivery. This meant that the TO could later refuse to deliver services that were provided during the negotiations phase.\footnote{127}

(9) The parties must still adhere to the Technical Manual and the Operations and Maintenance Manual, Article 5.1 MIA. These were restrictive documents, drafted unilaterally by the TO and changes to the document have proven very difficult to achieve. This was a hidden problem, but it had been present in all versions since 1998. OPTA had not gone into the detail of the Technical Manual and the Operations and Maintenance Manual. It limited itself to the general observation that end-to-end QoS must be warranted.

(10) Number portability was to be agreed separately, Article 13 MIA. In the 1998 version, a standard procedure was referred to, but all involved had found the procedure insufficient. This proved to be an area of contention in 2004, when a number of broadband access providers took action against the TO to achieve Telco to Telco migration and the TO was unwilling to cooperate and refused to sign and execute a Telco to Telco migration standard agreement.\footnote{128} But this would not have been avoided, if the clause had read differently.

(11) The provision on information provision, Article 15 MIA, remained vague and superfluous. The provision did not take into account the notes made by the NRA in its Decision RIO 2000. It had wanted OPTA to undertake a results obligation in terms of information originating from it, but Article 15.1 MIA remained fully reciprocal in the 2004 version.

(12) The confidentiality clause was slightly amended, in that the exception to the obligation was enlarged to disclosures in legal proceedings. This would give the TO a right to disclose confidential business information of the OLO in legal proceedings, which would be undesirable from the OLO’s perspective, although, since it was phrased reciprocally, the OLO could likewise benefit from it.

(13) The provision on suspension, Article 17 MIA, was not amended in any of the three versions, nor in 2004 following the NRA’s instructions and remained very general and in line with the normal arrangement by law.

\footnote{127}{Conversely, the OLO could refuse to take these, but, overall, the clause benefited the TO.}

\footnote{128}{Cf. OPTA decision of May 4, 2004, (bbbNed et al./KPN Telecom) not yet published.}

378
The only change was that provision (17.2 MIA) now referred in general to the ‘statutory interconnection duty’.

(14) The limitation of liability clause, Article 18.1 MIA, had not been rewritten in either version. The clause had always been reciprocal. Exclusion for all kinds of consequential financial damages remains – implicitly – excluded.

(15) Article 18.2 MIA provided that both parties indemnified each other from claims from their end-users. According to some authors, this indicates that claims for damages for failing service provision should be dealt with solely between the OLO and its end-user. Yet this repudiated that the RIO was the opening offer drafted by the TO. Having regard at the technical aspects and the dominant position of the TO, on the contrary it would appear reasonable for the TO not to exclude liability for end-user claims, other than in line with its own normal procedures. But even this would not offer the solution, since most TOs still limit or exclude liability for faulty service provision.

(16) No contractual limitation on the right of the TO to terminate for material cause (through rescission) had been introduced. The right to rescind in case of an attributable default was not excluded, and the parties had the right to rescind by law. This was not unreasonable, and a civil court would anyway in case of contested rescission, determine whether the rescission was justified.

In sum, the different versions of the RIO did not change significantly over time and contained a number of fairly onerous changes that were not removed subsequently. It can be said that OLOs would have to attempt negotiating the interconnection agreement differently; rather than relying on the intervention of the NRA.

7.4.2 Comparison of RIO 2004 with Decision RIO 2000

The following is observed on other terms that were commented on in the NRA's review in its Decision RIO 2000:

(1) According to Article 3.6 MIA, delivery period terms with respect to service provision applied as specified. This seemed to imply at least that the TO accepted that the terms in the Services Schedule were binding. But the clause had been in the previous versions of 1998 and 2000, so nothing had changed, effectively.

(2) Each party must inform the other party immediately of changes to its infrastructure and must take into account the interests of the other party, according to Article 4.4 MIA. This was a practical clause; it had been in the MIA since 1998.

(3) The MIA still distinguished between periodical, user dependent and onetime rates. This used to be contentious, since OLOs complained about the different categories of charges they were confronted with. But the clause had been there since 1998.

(4) The bank guarantee requirement, Article 10.4, was relaxed and brought in conformity with commercial practice: a guarantee was required from the OLO if the TO could reasonably doubt its creditworthiness. This amounted to a significant change in comparison with the prior versions of 1998 and 2000. The 2004 version introduced detailed, but fair, provisions as to how security would have to be provided.

(5) The forecasting procedure, as described very generally in Article 11 MIA, remained in place, but the conditions appeared to have been relaxed. This followed not from the language in the MIA, but from the Operations and Maintenance Manual.

(6) Many procedures and provisions remained reciprocal, for instance regarding calling line identity (CLI) and security. But they did not change significantly since 1998. OPTA had ordered the TO to delete two clauses (12.4 and 12.6, which related to privacy protection), but the suggestion made no sense and was not followed up. In 2004, the TO deleted clauses 12.7 and 12.8, which dealt with exchange of privacy sensitive information, but it seems this deletion was made for practical reasons. OPTA had not ordered it.

(7) The TO was by law required to separate its interconnection wholesale services from other services. In the 2004 version of the MIA, it mentioned this obligation in Article 16.3. But, it required the same in Article 16.3 from the OLO, which was not required and appeared unreasonable in light of the asymmetrical obligations.

(8) The clause on intellectual property rights, Article 19 MIA, which clause appeared to be commercially sound, was also present in the 1998 and the 2000 version. OPTA wanted the TO to delete this clause, although Annex VII to the Interconnection Directive required a clause on intellectual property rights.

(9) The term of the agreement (Article 20 MIA) had changed. The automatic renewal had been replaced by the requirement of
negotiations and this did not follow on OPTA's order. It had wanted the TO not to have the right to terminate on a yearly basis. Instead, the parties were to agree to a contractual duty to negotiate. The OLO could be more or less tied automatically to extension, unless the parties could not agree, in which case there would be partial renewal.

(10) One ground for termination for cause, present in the 1998 version – termination due to a change of law – had been deleted. This deletion did not necessarily appear to benefit the OLO.

(11) Article 21.3 MIA contained a more restrictive modification clause in comparison with the 1998 and the 2000 versions. Modifications could be done if: (a) the law (including decrees and regulations) was amended, as a result of which the terms of the agreement were affected; (b) the technology or operational procedures of either party changed to such an extent that a change was reasonable; or (c) a change of circumstances. The intention was that the parties would negotiate in good faith on the amendment to the Agreement. If no agreement could be reached, they could refer the matter as a conflict to OPTA. There would be no automatic termination. The other clauses were removed.

(12) The NRA also introduced new clauses: (a) The parties, in accordance with the principles of reasonableness and fairness, would in as much as possible amicably resolve any conflict Article 24.1 MIA provided. The new clause of 2004 was a simplification of the 1998 clause. It did not change that much in practice. Both parties still had the right to submit a conflict to OPTA, which was already provided in the 1998 version. Still excluded from the competence of the NRA or the court were conflicts relating to the registration of call traffic. (b) The TO would deposit a copy of the agreement with OPTA, Article 25.2 MIA. Most final provisions of the 1998 and 2000 version had been deleted, but this did not appear to have any significant practical consequences.

130 Previously, there were three additional grounds for a change request: (i) parties agree there is a cause for change – this is nonsense of course –, (ii) the other party terminates at the end of the term – this is illogical –, and (iii) an agreed fixed term for a Service expires – it is logical that the parties will have to agree. So the deletion merely accounted to taking out illogical or superfluous clauses.

131 See, infra, paragraph 7.5.3 on the new clauses in BT's standard interconnection agreement.
Interconnection Regulation and Contract Law

In sum: over time the TO amended only a few topics in the RIO, and some changes were rather onerous on the OLO, whereas others were not very significant.

7.4.3 Comparison with RIO of BT

By 2005, most TOs no longer provided insight into their RIO to anyone. In many jurisdictions, an OLO interested to look at the RIO of TO had to register first.

The development of the UK TO's RIO did not run parallel to the other TO's RIOs. In fact, in 1994, BT already used a standard interconnect agreement ('SIA') with other OLOs. Moreover, BT historically published a short standard agreement with schedules for each different service.

The 1994 SIA consisted of 31 provisions that were very similar to the Dutch TO's MIA and an Appendix, consisting of three annexes: Technical and Operations, Billing and Payments and Schedules incorporated in the Agreement. As could be expected, the specifications were the most extensive and included detailed interface specifications. The Technical and Operations Annex was likewise extensive and included detailed provisions on the location of PoCs, routing principles, traffic forecasting and capacity ordering. It also contained performance standards to be adhered to by the parties and nine appendices, including an appendix with liquidated damages.

The first general point to be made is that the SIA already in 1994 was phrased in a reciprocal manner. Many of the TO's obligations applied likewise to the OLO and this did not seem to be in line with the asymmetrical obligations imposed on BT under the ONP framework.

By 2005, BT's RIO had become more sophisticated, effectively offering unbundled services. For instance, the TO offered separate service levels (including for BT/service operator interconnection). However, it was explicitly stated on the draft agreement that the text would not be binding on the parties.

---

132 The relevant website is www.btinterconnect.com. See for other countries, e.g., Italy, Perrazzelli, Fratini 1999. Since 1997, Telecom Italia had achieved cost reductions and added services. The article discusses briefly some changes as a result of the then changed policy of TI.

133 BT Standard Interconnect Agreement: Main Agreement, BT 94/0430, not published, 32 pages.


135 See draft of 24 October 2003, at www.btwholesale.com/content/binaries/service_and_support/contractual_information/docs/sla_cop/sisla2f.doc.
The Reference Interconnection Offer

The 2004 RIO of BT consisted of, *inter alia*, a main contract, a separate confidentiality agreement, a separate definitions annex, and numerous new annexes, including an annex dealing with planning and operations, and an annex related to artificial inflation of traffic. The Schedules distinguished between joint services, BT services and operator services and contained more than fifty standard documents, including a number of documents that were withdrawn subsequently.

In comparison with the earlier version, the SIA now contained new provisions related to, *inter alia*, QoS provision (Article 5), CLI (Article 11), a clearer delineation between the TO and the OLO services (Articles 12 and 13), artificial traffic inflation (Article 14A), determination (Article 20). The following comments can be made in respect of the 1994 and the 2004 SIA:

1. The definitions, especially in the 2004 SIA were more detailed and better considered than the definitions in the 2000 and 2004 RIO. This facilitated working with the SIA in practice.
2. The 2004 SIA contained fairly practical terms in respect of standardization that were not present in the 2004 RIO.
3. The SIA contained an interesting provision on call conveyance: only those categories that were explicitly agreed — *i.e.*, those technical systems — obliged a party to convey calls.
4. BT only agreed to a reasonable endeavours obligation in respect of QoS; which was a considerable weaker obligation than what the NRA required from KPN Telecom in the Decision RIO 2000.

---

136 See http://www.btwolesale.com/application?origin=siblings.jsp&event=eca.portal.framework. Internal.refresh&pageid=typicalwidelite&nodeId=navigation/node/data/service_and_support/contractual_information/telephony reference_offer/telephony_reference_offer_home. Artificial inflation of traffic concerned a situation where a party had a justified concern that traffic was sent across its network fraudulently to generate termination access payments, without the network or retail customer who generated the traffic having an intention to pay, see Walden, Angel 2005, p. 256.

137 Some of these provisions were already present in prior versions, including provisions on CLI, which was already regulated in Article 7.3 of the 1994 SIA.

138 Cf. Article 3 2004 SIA.

139 Cf. Article 4.2 1994 SIA and 5.2 2004 SIA.

140 See Article 6 2004 SIA.
Interconnection Regulation and Contract Law

(5) Although delivery periods in the SIA did not appear to have binding effect, the context in which they were mentioned, at least appeared to intend them to be more binding on the parties than was the case with the KPN RIO.141

(6) The SIA was more practical than the MIA in that in 1994 the SIA already contained an elaborate clause on system alteration and the introduction of new services by either party to the interconnection agreement.142 Both of which were combined with fairly strong negotiations duties on the TO's side.

(7) The provisions relating to charges were just as hybrid, difficult to construct and interspersed in the SIA, and variances in respect of cost accounting existed.143 But the 2004 SIA also contained practical language for when the UK NRA would order changes to the charges applied by the UK TO.144 The charging method of OLOs was subject to change requests from the TO.145 Although this provision was not necessarily onerous on the OLO, it did effectively require such OLO to renegotiate charges with the TO. Such contractual obligation did not exist for the Dutch OLOs.

(8) The 2004 SIA contained a clause on avoiding artificial inflation of traffic.146 Essentially, it concerned a procedure to deal with fraud.

(9) Contrary to the KPN Telecom RIO, the 1994 and the 2004 SIA did not include a requirement of a bank guarantee.

(10) Interestingly and contrary to the procedure prepared by KPN Telecom between 1998-2004 the traffic forecasts from the OLO were not legally binding; they were designed to meet subsequent capacity order processing.147

141 See, for instance, Article 3.2 1994 SIA, which referred to Interconnection Links and the appropriate Schedule and the reference to Annex C, which contained various specific terms. Many of the Schedules mentioned time periods after which a service would become available.

142 See Article 3.4.1-3.4.2 and 5 1994 SIA; Article 4 and 8 2004 SIA.

143 See Walden, Angel 2005, p. 252ff.

144 See Article 12, in particular 12.3.2ff. 2004 SIA.

145 See Article 13 2004 SIA.

146 See, supra, for a description of artificial inflation of traffic.

147 Cf. Article 6 1994 SIA and Article 8.1 of Annex A.
(11) The clause related to the provision of information originally excluded any warranty that such information was correct; which exclusion was dropped later on.\textsuperscript{148}

(12) BT used different methods in changing the terms of its SIA over time. The TO worked with review notices, for instance, if there were a material change in the law.\textsuperscript{149} A letter from BT to the OLO, setting forth on what issues no agreement had been reached yet, could accompany the SIA. Moreover, parties could add new services to the SIA. By choosing this approach, BT left room to agree on future projects with the other providers. It appears that these methods offered adequate flexibility to the parties, whilst preserving the interests of the OLO.\textsuperscript{150}

(13) Contrary to the MIA, the SIA did contain a possibility for each operator to terminate the agreement, initially upon two years written notice, and later 24 months.\textsuperscript{151} Such provision would probably not stand the critical test applied by the NRA in the Netherlands.

(14) Any suspension or revocation of the OLO’s entitlement to provide telecommunications services also entitled the TO to terminate the agreement, Article 2.2 2004 SIA, but the affected party could still request further negotiations or a legal obligation to enter into an interconnection agreement could trigger new negotiations.\textsuperscript{152}

(15) The 1994 SIA already contained fairly standard language in respect of termination for cause. The clause enabling a party to suspend its performance was more specific than the language in the RIO: suspension would be alright in the event a party would cause a situation, which adversely affected the other party’s system proper working, or which threatened the safety of any person.\textsuperscript{153} But, non-payment following a thirty days’ notice would also enable BT to suspend the service provision. Eventually, if the OLO would not remedy the

\textsuperscript{148} Cf. Article 7 1994 SIA and Article 10.1 2004 SIA.

\textsuperscript{149} See Article 13 1994 SIA and Article 19 2004 SIA. The 2004 SIA contained a dispute settlement mechanism (Article 20, referring to the Director General) in the event the parties could not agree on the review.

\textsuperscript{150} See, e.g., Articles 3.4 and 13 1994 SIA. Especially noteworthy was Article 13.2 1994 SIA, which provided that either party could initiate a review on each second anniversary of the agreement.

\textsuperscript{151} See Article 2.1.4 1994 SIA and Article 2.3 2004 SIA.

\textsuperscript{152} See Articles 2.4 and 2.5 2004 SIA.

\textsuperscript{153} See Article 20.1 1994 SIA.
breach, this would give BT the right to terminate the agreement for cause after six months. This mechanism changed substantially over time, and the 2004 SIA no longer contained the extended six-month remedial period.\(^{155}\)

(16) The liability clause was constructed to oblige both parties to act as with the reasonable care and skill of a competent public telecommunications operator. Neither party was to accept liability for claims of the other party's contracting parties (such as, their customers). And there was a general cap on the contractual liability and — initially — no explicit mention that parties excluded their liability in respect of consequential damages. The 2004 SIA contained standard language on exclusion of liability for consequential damages. The Dutch NRA found such language not acceptable for the Dutch TO.

(17) Absent dispute resolution in accordance with the special clauses, the SIA referred to the exclusive jurisdiction of the English courts. Based on the above comparisons, it is observed that even the 1994 SIA was somewhat less onerous on British OLOs, than the 2000 RIO was on Dutch OLOs. The UK TO had taken a fairly pragmatic approach to its RIO and offered a range of services under more reasonable terms than the Dutch TO. Conversely, the SIA still contained numerous reciprocal clauses that were perhaps somewhat onerous on the OLO.

The 2004 SIA contained practical language on negotiating interconnection agreement, even in the event the OLO's entitlement to operate a network would be withdrawn. Notably, the content of the RIO changed very significantly over time in terms of the services on offer; but not that extensively in respect of the legal terms and conditions.

### 7.4.4 Suggestions for improvement

Having made a number of critical observations, it is also noted that the following provisions in the TO’s RO could be (further) improved.

---

154 See Article 20.1 1994 SIA. This was a clause the Dutch NRA sanctioned in the Decision RIO 2000. But Articles 20.2-20.4 1994 SIA already contained rather reasonable language on behalf of BT.

155 See Article 27 2004 SIA.

156 Cf. Article 16 1994 SIA and Article 23 2004 SIA.

157 See Article 23.4 SIA.

158 Cf. Article 31 1994 SIA and 35.1 2004 SIA.
(1) Article 3.4 MIA, which contained a mutual indemnification against end-user claims could be rewritten to put more of a burden on the TO. OPTA had considered this in its Decision RIO 2000, but had provided an incorrect solution: the TO was to accept liability for all end-user claims and the clause needed to be deleted completely. This would not solve the issue.

(2) Article 20.4 MIA in the 2004 version introduced an interesting principle. If there would be a conflict between the parties as a result of renewal talks (i.e., a conflict on the interconnection charges for the next year, which would presumably not necessarily have been imposed on the TO by OPTA yet), then as long as there would be proceedings ongoing to deal with the conflict, the parties (meaning the OLO) would be bound by the contractually agreed rates. Only once a definite and binding decision would have been delivered, would the TO change the terms of the agreement, albeit retroactively. There was no provision on statutory interest in that case. This new clause was detrimental to the interests of OLOs, and unfair in a situation where the TO can stretch the timing of the proceedings at its will. OLOs would be better served with the opposite provision: in case of conflict against the TO, the TO would implement the change, temporarily, unless and until the opposite would have been decided. But would such a clause be fair and reasonable?

(3) Article 20.5 MIA provided that in case of disagreement on elements, which could not be made undone retroactively, either party could simply provide services at its own discretion. This was a very broad clause that appeared to give the TO too broad discretion and should be deleted.

(4) OPTA had implored many times that the TO introduce a well-considered change provision. All the TO had done in the 2004 version, was to provide very generally, that changes must be agreed upon in writing. This is a very standard clause, and presumably not what OPTA meant. It could not be established with absolute certainty what OPTA did mean.

(5) Interestingly, the TO reserved the right in Article 21.5 MIA to unilaterally amend its service provision terms, if the law changed (to its

159 See Dommering et al. 2003.
advantage). This clause was unreasonable and could create legal uncertainty for the OLO. Besides it was not normal commercial practice.

As was said before, not only had the TO not taken over most suggestions from the NRA, by 2004 it had introduced a few, what seemed to be onerous new conditions, so it would appear that regulatory intervention had not been very effective and sustainable.

### 7.5 Negotiating interconnection and peering agreements

A number of practical lessons can be learned from the RIO.

#### 7.5.1 Negotiating interconnection agreements

Next to considering the regulatory context, the required services, the OLO must be well aware of the limitations posed on it by the prescribed use of a RIO.

As was seen in Chapter 2, the access and interconnection agreement could generally be divided into technical and commercial parts. It will depend on the basic type of access or interconnection sought how the terms will be negotiated. The following headings have been identified to always be present in interconnection agreements, whether in the main body covering the legal terms, or spread across the technical annexes: (1) network configuration; (2) access and PoCs; (3) co-location; (4) proposed interfaces; (5) capacity requirements; (6) (non-binding) traffic forecasts; (7) traffic types; (8) proposed implementation schedule; (9) description of services - joint, both TO and OLO specific services -; (10) service levels (if any); and (11) charges.\(^{160}\)

Following this non-exhaustive list, there are at least six key areas to be considered in respect of interconnection: (1) the interconnection charges to be paid; (2) how to gain access to appropriate facilities reciprocally; (3) equal access for end-users to interconnected networks; (4) flexible provision of services and functionality needed; (5) the timely provision of capacity; (6) the provision of good QoS between the parties, for instance, through the establishment of minimum service levels.\(^{161}\)

---

\(^{160}\) See Kariyawasam 2001, p. 149ff.

Ad (1) Interconnection charges

In Chapter 2, it was discussed that there are various systems to determine interconnection call charges. By 2004, the NRA had opted for a Bottom Up Long Run Incremental Costs (‘BULRIC’) system for fixed terminating access (‘FTA’) charges and wholesale price cap (‘WPC’) for mobile terminating access (‘MTA’). Often, the TO attempted recovering the costs and the overhead from OLOs. This was the main source for discussions, and, ultimately, disputes regarding interconnection charges.

A second potential source for disagreement is whether charges should be fixed or recurring and how to apply them. As an example, where TOs initially charged on a call time and distance basis, this forced OLOs, who wanted to distinguish themselves by using different pricing matrices, to use the same type of charge for retail purposes. A third area of consideration would be the procedure for cost changes. Any change in charges would likely impact the other party’s business directly.

(2) Access to appropriate facilities

Although TOs like to put forward the argument that technical obstacles prevent them from providing access at any given point in their networks, in practice such obstacles hardly exist. The TO should offer access to the OLO at all levels in the network wherever feasible. The choice of the PoCs will affect the business strategy of the OLO. It will for example affect the quality of the calls, cost, redundancy of routing and security. But it also concerns a matter that can be contractually agreed on. By way of example, in the US there has been a judgement against an operator, which for some years had put forward technical objections to providing PoCs at the local exchange level. The court ordered the defendant to provide such access.

Another important issue is interconnection links or co-location sites. The OLO should negotiate access to the premises of the TO to install its equipment.

---

162 Other systems are possible. See also Long 1995, p. 194-196.
163 For instance, by referring to its universal services obligation.
164 See also chapter 3, especially regarding the Open Systems Interconnection (‘OSI’) model. The TO in the Netherlands has argued on several occasions that technical constraints existed, see Chapter 8.
(3) *Equal access for end-users to interconnected networks*

An example is carrier pre-select ('CPS'), a service with which the TO is not very happy to co-operate. For instance, in the mid nineties in England OLO's wanting to have access to BT's network by using a prefix, had to pay access deficit contributions to BT. These requirements were later abolished. But the issue is that for true equal access to exist, the TO and the OLO would have the same amount of digits. The availability of CPS provided a solution for this issue and OLOs should always ask for this service if they consider acting on that basis.

(4) *Flexible provision of services and functionality*

Services flexibility — i.e., the option to change the scope of services offered and received — and the purport of the functionality will be of utmost importance to both parties, but predominantly the OLO. Both must be carefully considered and negotiated by the OLO, although as will be seen in this chapter, the NRA also takes a keen interest in these items. As was seen, there are different methods to agree on the review or implementation of new services, and the SIA probably offers more practical language than the MIA.

(5) *The timely provision of capacity*

Because of competitive concerns, the OLO will reasonably want to have strictly enforceable delivery lead times from the TO. But the other side of this discussion is that the TO may have a justified interest in requiring the OLO to issue forecasts, for instance, on a rolling basis. The legal relevance of providing forecasts should not be underestimated. Dependent upon how these are formulated, the OLO may conform to more or a lesser extent to binding commitments. If the OLO does not meet these commitments, it will incur liability at least for the contractually agreed upon charges with the TO. But any new entrant will face difficulties in establishing a reasonable forecast. It has no experience with the relevant market, and it will be difficult to predict whether a technology — broadband, satellite — will catch on. At least in the UK, the SIA explicitly provides that forecasts are not binding on the OLO and this would be the preferred method.

At any rate, even if forecasts are agreed upon, it is recommendable for the OLO to contractually provide for equal treatment with other OLOs and to include a system for assessment.

167 See Long 1995, p. 198. It is no longer present in BT's RIO.
(6) The provision of good QoS
If the two networks that will be connected apply different technical standards, it is important to make a provision for dealing with system failure, temporary migration of routing, emergencies and service levels in the event of call disruption. But it should be borne in mind that the meeting or failing to meet service levels is important and contentious. From a legal perspective, the parties should consider what remedies are appropriate in the event service levels are not met. There has been a tendency towards greater acceptance by the TO of service level penalties, both in the UK and the Netherlands; albeit that they appear difficult to enforce in practice.

7.5.2 Negotiating peering agreements
These agreements are characterized by probably a comparable position of the parties: negotiations may occur horizontally, between ISPs, but also vertically, between ISPs and Internet Backbone Providers (‘IBPs’), which may be TOs. Hence, in vertical situations there may be inequality of the parties.

If peering agreements are not settlement free and include payment mechanisms, they are bound to become rather complex, probably to some extent comparable to circuit-switched interconnection agreements. In addition to clauses that may be found in both, peering agreements should normally also contain the following provisions: (1) prohibition of transit traffic. This is important, because excessive traffic may lead to network congestion and thus adversely affect QoS; (2) third party routing. This will involve putting restrictions on connectivity to ensure network security; (3) default routes. This will involve an overview of routers listed in the schedule from which traffic will only be accepted. There will normally be provisions setting forth remedies if a party does not keep to the default routes; (4) packet data losses (latency). This may include penalties; (5) restrictions on the monitoring of customer data; (6) acceptable use policies. These will relate to guidelines on the transmission of content, but also include provisions on viruses, logical bombs etc.; (7) limitation of liability for content exchanged over the connected networks; (8) operational issues such as service levels, performance standards, maintenance, network upgrades, which will differ from circuit-switched interconnection agreements.

168 See also Walden, Angel 2005, p. 257ff.
169 Cf. the E-Commerce Directive, Articles 13ff.
170 See for an extensive analysis of such agreements, in particular settlement mechanisms, Kariyawasam 2001, p. 190ff.
Interconnection Regulation and Contract Law

7.6 Interim conclusion

It appears from the analysis that the MIA and the SIA did not change too drastically over the years, in spite of an extensive review procedure, at least in the Netherlands.

OPTA may have given an order or recommendation to amend 42 elements, and have concluded that the TO had agreed and changed around 32, this is not evident from the language in the later MIA, or elsewhere in the 2004 RIO, however. Besides, it also appears that the NRA was unable to successfully counter arguments and defences raised by the TO during the review process that led to and followed the Decision RIO 2000, thus raising the question whether regulatory intervention in the RIO was effective and sustainable.

In the UK, the NRA has been less active in intervening in the SIA since 1998. However, it should be noted that by 1994, the TO's RIO was already available, and although fairly one-sided, it was considerably more transparent, reciprocal and accessible than the 2000 MIA.

This leads to the question as to what extent the NRA should be actively involved in designing the RIO as a tool to negotiate interconnection. Although it certainly appeared from the Decision RIO 2000 that the Dutch NRA had gone into much detail in analysing the RIO, and approached the project with care – also in view of the market consultations it held –, it also appears that the NRA was not capable of fully grasping the contractual issues that the TO and the OLOs faced; that it was not able to offer solutions; and, finally, that it sometimes touched upon the less relevant issues. It is telling that, although the NRA announced in its Annual report for 2003 that it would review the TO's RIO again in 2004, the matter apparently fizzled away, and no mention of such activity was made again in the Annual Report 2004 (issued in May 2005), although perhaps it would focus on the issue again in 2006.  

7.6.1 Intervention in the RIO reconsidered

A number of the issues that OPTA dealt with in its Decision RIO 2000 were not mentioned in Annex VII to the Interconnection Directive. The question is whether OPTA may have interpreted its right to intervene too broadly.

171 The 2004 Annual Report contained no reference to the RIO any longer, see OPTA, 'Visie op de Markt, jaarverslag 2004'. At the time of closing this manuscript, the 2005 Annual Report was not yet available.
Having regard at Article 9 (2) first bullet point Interconnection Directive, the conclusion would be that this was indeed the case. Article 9 (2) Interconnection Directive limited the possibility of intervention to 'the areas mentioned in Annex VII, part 1.' The words: 'for example' or 'amongst others' are missing from this provision, so the list is to be interpreted as being exhaustive. OPTA failed to motivate in the Decision RIO 2000 why it would have the right to interpret this provision more broadly. Moreover, even though it concerned a competence awarded by law, OPTA's motivation to intervene in the RIO was insufficient in that it did not explain why the very broad and sweeping scope of its comments would lead to facilitate interconnection negotiations. It is also difficult to see why a body that is less expert than OLOs should so actively aim at forcing the TO to change its contract terms beforehand.

In sum, in my preliminary view, OPTA did not offer adequate justification for its intervention and OLOs did not visibly profit thereof.

The RIO should be seen as a hybrid document, in that the TO could change the terms from time to time, especially as it learned from market developments.

7.6.2 Practical points for OLOs

In general, it is likely that as the market matured, OLOs were quite capable of negotiating interconnection arrangements themselves, based on what was available in terms of the RO.

Notwithstanding the publication duties of the TO in respect of its RIO, and the fact that interested parties would have access to the RIO as deposited with the NRA, it would nevertheless be difficult for an OLO to engage in cherry picking; that is selecting the most preferable terms from the RIO, when negotiating an interconnection agreement with a TO.\(^\text{172}\) Perhaps as a result of regulatory intervention, the Dutch RIO appeared cast in stone to a considerable extent (and that did not appear to be the same for the BT RO).

Looking at the OLO's perspective, it can be added that the OLO should at least: (1) understand the parameters within which the TO would be inclined to negotiate; (2) consider the organizational structure of the TO;\(^\text{173}\) (3) review

\(^\text{172}\) None of the EU Member States facilitated cherry picking, which, apparently was to some extent allowed by regulators in some countries, such as Argentina.

\(^\text{173}\) For instance, were satellite services available, or should the OLO then contract with another entity?
thoroughly the technical manual and the services offered; (4) consider – if available for inspection – other access or interconnection agreements the TO entered into; (5) engage in benchmark pricing – that is, if there would be options for other operators;\(^\text{174}\) (6) review thoroughly the accounting policies, particularly on cost-allocation\(^\text{175}\); (7) take into account the importance of confidentiality.\(^\text{176}\) In my preliminary view, if an OLO would be at least aware of the intricacies of the negotiations, even if it were the weaker party, it should be able to negotiate well, and active intervention in the contract formation process, through the review of the RIO, would perhaps be less necessary.

### 7.6.3 Final remark

Coming back to the question posed at the start of this Chapter, whether ex \textit{ante} intervention in the RIO is to be preferred over regulated negotiations, my preference is to let the TO and OLOs negotiate and agree on the terms themselves.

One important qualification is made. Although it was not discussed in this Chapter, intervention in case the parties do not agree on pricing is justified, both from a competition law and a regulatory point of view. But, there appears to be less effectiveness in an NRA that deals with technical, practical and legal issues in respect of interconnection beforehand. Not only is it not always clear how this can be justified, the effectiveness and sustainability of such interventions have not been measured, but, appear to be questionable.

\(^{174}\) Consider for instance the TO's charges for leased lines to multinational customers, or prices charged for the provision of resale capacity.


\(^{176}\) See Kariyawasam 2001, p. 146-147 who provides that confidentiality of information in terms of interconnection agreements should cover, ideally: (1) provisions restricting use of end-user information received from other OLOs; (2) information in relation to bad debt of end-users; (3) denial of information if appropriate security procedures have not been put in place; (4) disclosure to employees, directors and advisers; (5) disclosure to shareholders; and (6) privacy and data protection issues.
8. Disputes

8.1 Introduction

The negotiations aimed at interconnection agreements (which often involved technical requirements made by the telecommunications operator ('TO')), the lack of clarity regarding contractual issues, and the performance by the TO of its obligations under the interconnection agreement, led to disputes that could be brought before the national regulatory authority ('NRA'). Although, dependent upon the facts, sometimes they could have been brought before the courts, only very few matters were instated in court. The bulk of the disputes in the Netherlands were fought before the NRA (and, under the old regime, the appeals were handled by the competent court in Rotterdam).¹

This Chapter categorizes the disputes that arose in the Netherlands (to some extent) within the framework of interconnection contract formation and performance, and describes what aspects of the agreement they related to. This approach will enable a conclusion as regards the question whether a duty to negotiate (the primary interconnection rule) — either between the TO and the other licensed operator ('OLO'), or between OLOs — was more controversial than duties imposed on the TO under the significant market power ('SMP') regime (the secondary interconnection rule).²

Beforehand, it appears likely that there must be a relationship between the competencies awarded to the different institutions (the NRA as opposed to the courts) and the number and scope of disputes they have decided on. However, this analysis does not suggest full reliance on either the courts or the NRA in terms of disputes regarding the formation, performance and termination of interconnection agreements.³

8.1.1 Quantitative overview of disputes before the Dutch NRA

There is no overview of matters related to access and interconnection that were initially brought before the courts (as opposed to the NRA). However,

¹ After implementation of the new regulatory framework ('NRF'), appeal could be instated before one instance only: the Appellate Board for Business ('College van Beroep voor het Bedrijfsleven, 'CBB').
² For an explanation of these rules, see Chapter 2 paragraph 2.5.
³ Although this is not the order used by the institutions, for consistency the headings in this Chapter combine formation, performance and termination with the principles applied in regulation, such as non-discrimination and transparency.
less than 10 decisions were found of access and interconnection disputes that were dealt with in court proceedings. These will be discussed in this Chapter as well. Conversely, numerous conflicts were fought before the NRA. A 2003 report, commissioned by the NRA, discussed six years of administration and case law in the Dutch telecommunications market. The report investigated both the amount and the content of decisions taken by the Rotterdam court and the Appellate Board for Business (College van Beroep voor het Bedrijfsleven, 'CBB'), until the enactment of the 2004 Telecommunications Act (Telecommunicatiewet, 'Tw') both were competent to decide on telecommunications disputes in appeal and most decisions were on cases initiated under the 1998 Tw.

Until 1 August 2003 – the date the IViR research was closed – 166 administrative decisions were taken. The IViR conducted further research in respect of enforcement through the NRA in 2004. Within the same year, another 278 decisions were taken. By 31 December 2004, the NRA had taken another 339 decisions.

Many appellate decisions related to formal considerations (often in respect of competence). A lot of these were materially related to issues of frequency allocation and rights of way, while some to obligations of OLOs under the 1998 and the 2004 Tw, such as in respect of number portability.

---

4 The main decision is HR 31 May 2002, C00/332HR LJN AE3437 (Saarneal/Telfort). It will be discussed, infra, paragraph 8.2.2.4.

5 See Dommering et al. 2003. The report focuses on the decisions taken in appeal by the Rb. Rotterdam and the CBB. The 2003 Instituut voor Informatierecht ('IViR') report concluded to state that the national regulatory authority ('NRA') had given little consideration to enforce its administrative decisions, i.e., by imposing civil law like remedies, such as penalties for non-compliance with an NRA order, or damages. The Report considered that a stronger enforcement - using the tools allocated by law - would be necessary. Cf. for Germany, Andenas, Zleptnig 2004, p. 132. See also Stegh 2002, p. 13ff.


7 Onafhankelijke Post- en Telecommunicatie Autoriteit ('OPTA'), Annual report 2004, p. 81. See also Ottow et al. 2004. According to the Annual Report these included notes of objection (135), appeals (126), provisional measures (11) and decisions on fines (6).

8 The NRA counted some decisions to consist of different matters, thereby somewhat artificially increasing the total number of disputes.

9 For a general description, see Dommering et al. 2003 p. 57ff., p. 101-110.

10 See, for example, the decision CBB 11 November 2005, AWB 0/425, LJN AU6002 (Nexema/Broadcast NewCo Two). These topics – including disputes relating to rights of way - will not be discussed.
The disputes fell into different categories. According to the Annual Report, the NRA wanted to concentrate on ‘fundamental contentious issues’. Below an overview is provided of the relevant decisions taken by the NRA up to 2004.

Figure 8.1 Interconnection disputes 2004

<table>
<thead>
<tr>
<th>Area</th>
<th>Submitted/Decided</th>
</tr>
</thead>
<tbody>
<tr>
<td>Special access</td>
<td>5/8</td>
</tr>
<tr>
<td>Interconnection</td>
<td>5/9</td>
</tr>
<tr>
<td>Tolerating rights of way</td>
<td>4/3</td>
</tr>
<tr>
<td>Site sharing</td>
<td>1/1</td>
</tr>
<tr>
<td>Cable access</td>
<td>1/5</td>
</tr>
</tbody>
</table>

In comparison with the preceding year the following can be seen:

Figure 8.2 Interconnection disputes 2003

<table>
<thead>
<tr>
<th>Area</th>
<th>Submitted/Decided</th>
</tr>
</thead>
<tbody>
<tr>
<td>Special access</td>
<td>20/20</td>
</tr>
<tr>
<td>Interconnection</td>
<td>6/16</td>
</tr>
<tr>
<td>Tolerating rights of way</td>
<td>3/3</td>
</tr>
<tr>
<td>Site sharing</td>
<td>1/0</td>
</tr>
<tr>
<td>Cable access</td>
<td>1/0</td>
</tr>
</tbody>
</table>

### 8.1.2 Scope of work

In this Chapter, a fairly high-level summary of disputes relating to interconnection and special access agreements and requests is presented...

---

11 Cf. OPTA, Annual report 2003 (OPTA, Visie op de markt en jaarverslag 2003) www.opta.nl, p. 24. Initially, the emphasis was on interoperability. Following the CBB decision of 24 November, 2004, LJN: AR6450, AIBB 04/651 (Yarosa/T-Mobiel) the NRA withdrew its Guidelines on interoperability and these were no longer mentioned as such in the 2004 Annual Report.

12 OPTA, Annual Report 2004, p. 81. This overview includes number of disputes settled that were submitted for dispute resolution prior to 2004.

13 OPTA, Annual report 2003, p. 101. Overview includes number of disputes settled that were submitted for dispute resolution prior to 2003.
Interconnection Regulation and Contract Law

It also focuses on the content of the disputes that arose regarding access and interconnection under the 1998 and the 2004 Tw. It is observed that it is not the intention to provide a full overview of the scope of disputes brought before the NRA, since the emphasis in this book lies on the contract law aspects. Although it was acknowledged in Chapter 2 that economic aspects are guiding the ex post consideration of access and interconnection, an extensive economic analysis of case law also falls outside the scope of this book. Disputes with respect to cost orientation and price control, the core of the decisions taken by the NRA, will be discussed marginally.

In the following, the disputes that were reviewed have been grouped according to the open network provision (‘ONP’) and the new regulatory framework (‘NRF’) principles and obligations that were discussed in Chapters 3 and 4. The description has been grouped to follow the order of problems with definitions, contentious issues relating to the formation and negotiation phases and contentious issues relating to the performance phase. No cases related to the termination of the interconnection agreement were identified. Finally, paragraph 8.3 contains an interim conclusion.

8.2 Selected disputes on access and interconnection in the Netherlands 1997-2005

The 2003 IViR report found that proceedings based on the 1998 Tw were lengthy and tedious. The total run time for proceedings initiated with the NRA and decided on in appeal by the court averaged up to 970 days.

8.2.1 Definition of interconnection, special access and third party interest

As discussed in Chapter 4, the 1998 Tw contained no definition of interconnection and this caused contention between market parties as it was not always clear to the TO whether a request to obtain access related to interconnection or not.

---

14 As is the case throughout the book, disputes related to access in general, for instance rights of way, or in respect of registration or universal service requirements will not be discussed.

15 Cf. Chapter 5, which concerned more with the formal delineation of the powers of the NRA in deciding in interconnection conflicts.

16 Cf. Dommerin et al. 2003, p. 22, 31. In most cases, the parties did not object to extensions. It is possible to obtain a decision from the court ordering the NRA to take a decision, see, e.g., Court (Rechtbank, ‘Rb.’) Rotterdam, 5 June 2003, not published (Tele2 Nederland/OPT-A).

17 See Chapter 4 paragraph 4.2.1.
8.2.1.1 Interconnection

Under the 1998 Tw, more than once the TO argued an access request did not fall under the legal definition of interconnection. Consequently, it would not fall under the competence of the NRA to intervene.

In one case, the TO argued that the NRA was not competent to issue requirements as regards spill-over functionality, since these did not fall under the notion of interconnection. This matter was submitted to the court. The court applied the broad notion of interconnection. In its analysis of the definition, the court included the notion of end-to-end connectivity, to be warranted by the provision of spill-over facilities and it ordered the TO to provide the functionality. It did not consider whether the restrictions in fact made the interconnection an empty shell.

In the Orange/KPN Mobile decision, Orange had requested the NRA to establish reciprocal interconnection. KPN Mobile already provided terminating access services to Orange, but was not willing to enter into originating access arrangements, as it preferred a transit arrangement. This is one of the cases where the TO prevailed. The NRA had exempted it from entering into direct interconnection agreements and stood by its policy decision. The NRA upheld its decision in the appeal.

In a complaint filed against an order to offer a RIO including collocation services, the TO unsuccessfully argued that collocation services did not fall under the interconnection obligations and should be fully reciprocal anyway. In the prior Cistron/KPN decision, the NRA had decided that the

---

18 See Rb. Rotterdam 31 January 2003 (note A.T. Ottow), Mediaforum 2003/4, p. 139 (KPN Telecom/OPT-A) in which Energis joined. The court provided: "By considering that KPN, in principle, must make an offer for comparable spill over functionality (or a comparable functionality) as the functionality it had available over the NAPs, in order that Energis would be able – after migration from the NAPs to the RAPs – to offer the same quality of service as before and, if the functionality offered by KPN does not form part of the existing services package of KPN, to determine that KPN must describe the service, including the conditions under which this service will be offered, the defendant [the NRA] went beyond the boundaries of Article 6.3 (1) in conjunction with Article 6.3 (2) [1998] Tw, because interconnection as such, was already warranted under the above restrictions."

19 It would be interesting to see whether the court would have reached the same conclusion regarding the NRA's competence in the Teleco-Telco migration decision, OPTA 4 May 2004 OPTA/IBT/2004/200995 (Tiscali, Versatel, bbNed./KPN Telecom); discussed in paragraph 8.2.2.G.


Interconnection Regulation and Contract Law

duty to provide interconnection was to be considered independently from a request for collocation. Such request had to conform to the same basic requirements applying for other access or interconnection requests.22

**Direct and indirect interconnection**

A mobile OLO had an interconnection agreement with the mobile TO, but its traffic was handled by the fixed infrastructure TO (a form of transit interconnection that was discussed in Chapter 2). The OLO wanted to enter into a revised agreement with the mobile TO. When summoned in legal proceedings, the mobile TO argued successfully that it was not subject to the interconnection duty of Article 6.1 1998 Tw, since the transit of communications originating from the mobile OLO were handled in practice by an affiliate of the mobile TO, namely the fixed infrastructure TO (KPN Telecom, at the time appointed to have SMP).21 In other words: the mobile OLO's claim was inadmissible as it had sued the wrong party. This decision was not very welcome to mobile OLOs and thus demonstrates the importance for any party wishing to take legal action in terms of interconnection to carefully determine which party is the actual provider of the service.

However, subsequently, the narrow interpretation of indirect interconnection was overruled effectively in a decision of 25 August 2005, regarding a conflict on delayed reciprocity as regards mobile termination rates ('MTA'). The court looked at the definition of interconnection in the Interconnection Directive, in particular the mention of 'the physical and logical connection of telecommunications networks'.24 Hence, the court -

---


my view correctly – recalled the above prior decision of the same court, stating that in the event of transit interconnection over the TO’s fixed infrastructure, there still was a situation of interconnection within the meaning of the Tw.  

8.2.1.2 Special access
Under the 1998 Tw, there existed considerable uncertainty as to what constituted special access. In a number of disputes, the NRA first had to determine whether the request from the OLO qualified as a request for special access or not.

In the EnerTel/KPN dispute, the NRA stipulated that unbundled access to (parts of) the TO’s network, or any other significant market power (‘SMP’) undertaking, was considered a type of special access under Article 6.9 1998 Tw.  

The reasoning behind the notion of special access was to realize workable competition.

In the Yarosa/OPTA dispute, it concerned what Yarosa labelled an original form of special access. It will not be possible to verify what service Yarosa offered, since it successfully prevented the NRA from publishing its decision with an appeal to the Onafhankelijke Post- en Telecommunicatie Autoriteit (‘OPTA’) Procedural Guidelines.

The XOIP/KPN Telecom decision concerned a request for access to parts of the TO’s fixed infrastructure to provide a unified messaging service. XOIP also requested the NRA to order the TO to provide information on the service provision. The NRA decided that XOIP’s request was inadmissible, in so far as Article 6.3 (2) 1998 Tw was concerned. But it did order the TO to provide technical information to the OLO within two weeks after its decision and set a term for the TO, one week after the OLO expressed its will, to start negotiations.

('Interconnection Directive'). See also Chapters 2 paragraph 2.3, 3 paragraph 3.4.2 and 4 paragraph 4.2.2.

26 See 17 December 1997, OPTA/MI/97/1158 (EnerTel/PTT Telecom); OPTA, provisional decision, 22 February 2000, OPTA/IBT/2000/200361 (Cistron/KPN Telecom).
27 See President (‘Pres.) Rb. Rotterdam, 12 February 2003 (note A.W. Hins), Mediaforum 2003/5, p. 175 (Yarosa/OPTA).
Interconnection Regulation and Contract Law

Another example is the VersaTel/KPN Telecom dispute, where the NRA acted against a refusal of the TO to make available to VersaTel an operator controlled model for carrier pre-selection (‘CPS’). This dispute resulted in the NRA setting guidelines for an operator controlled notification model for CPS.

In the Tiscali/KPN Telecom dispute, the NRA, and subsequently, the court and the CBB, addressed the provision of bit-stream access by the TO. The NRA considered bit-stream access a form of special access as stipulated in Article 6.9 1998 Tw. Again, the court of appeals struck down the decision for lack of NRA competence to decide on the issue.

As will be seen below, the qualification as a special access report was relevant not only to determine the scope of intervention, but also to determine whether the request was reasonable. If it was not a reasonable request then the TO did not have to render the service.

In a later decision, the NRA held that in case of insufficient capacity, the TO would still be under an obligation to provide for additional points of connection (‘PoCs’) not to impede a reasonable distribution and the use of available PoCs.

Following the European Community (‘EC’) Regulation on unbundled access (Unbundled Access Regulation), the NRA developed a more elaborate

---


31 CBB 16 April 2004, AWB 03/1363 and 03/1401, LJN AO8356 (Tiscali/KPN Telecom); Pres. Rb. Rotterdam, 17 July 2003, VTELEC 03/1400-HRK (KPN Telecom/OPT-A); with Tiscali as interested third party. May 2004, reported in OPTA Connecties June 2004, no. 3.

32 Cf. Chapter 4 paragraph 4.3.2.

33 Cf. Article 3 (2) Council Regulation 2887/2000/EC of 18 December 2000 regarding the unbundled access to the local loop, [2000] OJ EC L 336/4 (‘Unbundled Access Regulation’). It stipulated that such a request could be rejected on the basis of objective criteria, which relate to the technical feasibility and the need to maintain the integrity of the network.

402
Disputes

definition of what constituted reasonable access, although it really expanded to some extent on the case law it developed by as well.\textsuperscript{34} The NRA held that necessity and potential disruption of competition would have to be jointly considered, in determining whether the request was reasonable.\textsuperscript{35}

In the Tele2/KPN Telecom decision, the TO attempted to argue that a CPS request initiated under the 1998 Tw, had turned into an access request under the 2004 Tw.\textsuperscript{36}

\textbf{8.2.1.3 Interested third party}

It is noteworthy that in one of the earlier disputes on interconnection rates, the President of the court decided that another OLO, who in principle would be faced with the consequences of the decision on the rates between the TO and Telfort, was not an interested third party based on the Act on Administrative law (\textit{Algemene wet bestuursrecht}, 'Awb'), because its interest would not be directly affected by such decision.\textsuperscript{37}

In later decisions, one OLO again tried to secure its interest to be heard in decisions taken by the NRA as regards the TO in different matters; but often to no avail.\textsuperscript{38}

The issue of being an interested third party would be treated very differently under civil law.\textsuperscript{39} It was not discussed in this book.

\textsuperscript{34} Consideration (7) of the Unbundled Access Regulation stipulated that a reasonable request for unbundled access implied: (1) that access was necessary for the requesting party to provide services, and (2) that competition would be impeded, restricted and distorted, if the TO were to refuse the request.

\textsuperscript{35} In other words, the TO had to match the other licensed operator's ('OLO's') request; not \textit{vice versa}. The NRA also considered that business and economic risks advanced by the TO, were not a sound legal ground to refuse a request as being unreasonable. See, OPTA 12 November 2001, OPTA/IBT/2001/202834 (\textit{BabylXL}/KPN).

\textsuperscript{36} See, \textit{infra}, paragraph 8.2.2.3; CBB 21 December 2005, AWB 05/91 and 05/581, LJN AU8622 (KPN Telecom/Tele2).

\textsuperscript{37} See Pres. Rb. Rotterdam, 18 February 1998 (note P. Burger), \textit{Computerrecht} 1998/2. p. 89 (\textit{Versatel Telecom}/OPTA). In a decision on the determination of special access flat rate Internet access call origination ('FRIACO') and metered Internet access call origination ('MIACO') rates, the court took a formal decision again, when it refused to recognize Level 3 as an interested third party in proceedings between the TO and MCI Worldcom: "It is difficult to conceive that a third party should participate in a dispute that in the end is aimed at fixing a contractual relationship between two parties." Rb. Rotterdam 16 February 2001, (note R. Chavannes), \textit{Mediaforum} 2001/4. p. 134, (KPN Telecom/OPTA).

\textsuperscript{38} See, \textit{e.g.}, Rb. Rotterdam 7 January 2002, LJN 7867 (\textit{Versatel}/OPTA) and CBB 19 November 2003, AWB 03/622, LJN AO1107 (\textit{Versatel et al.}/OPTA).

\textsuperscript{39} It was not discussed in this book, as the principle is very different and it would be difficult to envisage an OLO intervening in civil law proceedings.
8.2.2 Duty to negotiate interconnection

For the purposes of this thesis, the most relevant type of intervention would be where the NRA would order the TO to conduct or complete interconnection negotiations with an OLO under the primary interconnection rule. There is not that much case law that dealt with this issue. The matter was merely mentioned by the court (in a dispute originating under the 1998 Tw), which concerned a situation where the NRA had granted an exemption from the duty to negotiate. The court held that the exemption - which exemption had been granted in light of the fact that the parties had agreed to a form of indirect interconnection (transit interconnection), thus using the TO’s infrastructure to achieve the end-to-end connection -, entailed that they were no longer under a duty to negotiate direct interconnection. And it went on to consider that, now that under the indirect interconnection arrangement, the parties had not reached an agreement on the applicable rates, the NRA was competent under Article 6.3 Tw to resolve the dispute.

Interestingly, the duty to negotiate between OLOs proved to be more contentious.

8.2.2.1 Duty of interoperability

In probably the most controversial case, T-Mobile/Yarosa, the scope of the negotiations obligation in light of the Explanatory Memorandum to the 2004 Tw was extensively investigated, when an OLO wanted to offer short message services (SMS) to T-Mobile subscribers not over T-Mobile’s mobile telecommunications network, but through a by-pass over the TO’s network. T-Mobile was not willing to enter into an agreement with Yarosa, predominantly because it considered Yarosa’s request a special access request, akin to a carrier pre-select request and was not willing to provide the services as requested. Yarosa then filed a complaint with the NRA. The issue at stake was whether Yarosa’s request to gain access to the network of T-Mobile’s subscribers was aimed at establishing end-to-end connectivity

---


42 Although T-Mobile stated that it would be willing to enter into an access agreement against what it considered to be normal commercial terms, see 3.2 of the CBB decision.
under Article 6.1 (1) 2004 Tw. If that were the case, then T-Mobile would be under a duty to enter into negotiations with Yarosa; which it had refused. T-Mobile's most far-reaching argument against the obligation to negotiate was that the Dutch government had incorrectly implemented Articles 4 and 5 of the Access Directive. According to it, the scope of the said provisions did not extend to ECS providers in the broad sense and the NRA was not competent to hear Yarosa's complaint. The NRA opined that Yarosa's request fell under the scope of Article 6.1 (1) 2004 Tw and ordered T-Mobile to conduct negotiations with Yarosa, thereby basing itself on the aforementioned part of the Explanatory Memorandum. The fact that the Explanatory Memorandum considered that also services offered with the help of an ECN or ECS fell under the scope was considered important; this included the hand-over of SMS traffic coming from Yarosa's SMS switch. Thus, in the NRA's view, ECS providers had a right and were under a duty to enter into negotiations. The NRA then considered, whether the parties had sufficiently negotiated, and concluded this was not the case. It ordered the parties to negotiate with each other in accordance with the time frame it had set. In the appeal, T-Mobile argued, inter alia, that neither party had requested from the NRA to establish the conditions for interconnection, hence the NRA was not in a position to set these. Yarosa was unhappy with the outcome too, and argued that the NRA should have gone further and should have instructed T-Mobile merely to bring about end-to-end connections in respect of the SMS service. According to the NRA, interoperability of services (the heading of the new chapter 6 2004 Tw) implied that end-users were entitled to choose whatever end-to-end services they needed from other providers and this resulted in a duty to negotiate.

---

43 See Annex for the full text of Article 6.1 (1) 2004 Telecommunications Act (Telecommunicatiewet, "Tw").
44 See also Chapter 3 paragraph 3.4.3.
45 See also the Of tel Guidelines for the interconnection of public electronic communications networks, 23 May 2003, p. 3ff. where it sets out the test for the public electronic communications network and not service: (1) is an electronic communications network provided? And (2) Is it provided wholly or mainly for the purpose of making electronic communications services available to members of the public?
46 See Explanatory Memorandum no. 28 851, no. 3, p. 102.
47 The NRA also considered the comparison made with special access to be of no relevance under the 2004 Tw, Decision paragraph 3.4. See also, supra, paragraph 8.2.2.1. And it considered it was not – yet – under an obligation to conduct the consultation procedure, see Chapter 5 paragraph 5.2.3.2, where it merely had ordered the parties to negotiate further.
The CBB overturned the NRA's decision. In its decision of November 24, 2004, the Board considered the NRA's motivation in first instance flawed, notably running counter to both the EC's and the Dutch legislator's policy intentions in respect of the primary duty to negotiate. It referred to an observation made by the Minister in the Explanatory Memorandum, according to which a provider could only invoke interoperability where it concerned improving its own end-users' connectivity. According to the CBB, Yarosa's request concerned T-Mobile's end-users. The CBB attached great importance to the fact that the service anticipated by Yarosa was not destined to improve the accessibility for Yarosa's end-users. Rather, it concerned an added value service. The CBB then interpreted the negotiation duty as embedded in Article 4 Access Directive. According to the CBB, the wording of Article 4(1) clearly stipulated that the duty to negotiate involved interconnection agreements. This meant then that electronic communications service providers could not infer a right to negotiate interconnection agreements under the 2004 TW. Consequently, Yarosa could not invoke a right to negotiate interconnection with T-Mobile. And the result of this was, according to the CBB, that the NRA could not set the rules for interconnection, without such agreement.

8.2.2.2 Urgent interest
In general, the NRA kept considerable discretion in deciding whether an OLO had an urgent interest or not. Under the 1998 TW, where the TO and the OLO did not reach an agreement, the NRA treated a complaint by the OLO as a request under Article 6.3 (1) 1998 TW (notably, the secondary interconnection rule). In one instance, the NRA held that the OLO had an urgent interest in obtaining access, thus justifying a provisional decision in line with the Awb. The reasoning provided by the NRA was that the OLO could miss turnover if it would fall behind other OLOs, which had already entered into an access agreement.

48 See also Chapter 5, in particular paragraph 5.4.4.
49 The CBB also considered that, vice versa, Yarosa's customers were able to reach communicate with T-Mobile customers, see paragraph 4.1.3 of the CBB Decision.
50 The CBB cited the phrase: '(when requested by) undertakings so authorised' of Article 4 (1) Access Directive and concluded that this referred to public electronic communications network providers (and not public electronic communications service providers).
51 See Decision paragraph 4.2.3.
8.2.2.3 Reasonability of access request
The 1998 Tw provided that special access requests needed to be reasonable for the TO to consider them. The law stipulated that the TO was to inform the requesting party whether the special access request was accepted and against what delivery date, within two weeks after lodgement of the request. The notion of what constituted a reasonable request for access was heavily contested by the TO at numerous occasions.

If the TO would be of the opinion that the OLO's request was not a reasonable one, it could deny the request giving the grounds thereof.53 Similarly, if the request for special access was reasonable, the TO, as an SMP undertaking, would be obliged to make an offer.54 It was then considered that the TO would act unreasonably, in principle, if it were to refuse to issue an offer, if it was clear that the request was reasonable. Another condition that the NRA formulated to consider reasonability of the request was that it needed to be sufficiently specific, in particular with regard to the desired form of access and location. In the abovementioned decision, the NRA decided that in case of insufficient specification, the OLO would still be offered the opportunity to justify its request in a more detailed manner. However, this did not always mean that the OLO would get special access eventually.

This decision is interesting, and is in line with the principle of contract law that an offer must be sufficiently specific.55 There is nothing against granting the other side an opportunity to rephrase its offer or request, if the offeree considers it a non-binding offer anyway.56

In the aforementioned Cistron/KPN matter the NRA also decided that the TO, or any other SMP undertaking, could not simply refuse the delivery of

---

55 See Chapter 6, in particular paragraph 6.5.2.1.
56 The NRA also decided that a request could be rephrased even if it went against what had been agreed to be the boundaries in the Forum Interconnection Special Access (FIST) consultation procedure. This was a consultative forum for market parties in the Netherlands with respect to interconnection. Finally, the NRA held that the fact that a party could take a lead in the market due to a first mover advantage would not offer a valid reason for rejection either.
a location, based solely on the fact that the OLO did not yet begin service provision at another location.57

In a dispute initiated by Tele2, the NRA decided that Tele2’s request to obtain CPS from the TO for non-geographical numbers was not unreasonable.58 KPN Telecom appealed the decision before the CBB, but was unsuccessful.59 Although the initial request to establish the terms for CPS dated from the time of the 1998 Tw, the TO invoked numerous provisions under the 2004 Tw, arguing part of the OLO’s request was a new request under the new law, but this line of argument failed as well.

In a carrier-select request by another OLO (Infotel), the NRA had refused to set the terms for such special access, basing its refusal on denying that technical arguments employed by the OLO were correct. In line with the ONP framework, the court considered that a special request may be thought to be unreasonable only, in the event there exist viable technical and economic alternatives and when the request is not reasonable in light of the available means (of the TO).60 The court confirmed that the OLO did not need the requested facility to provide its service. An appeal based on non-discrimination failed as well.61

8.2.2.4 Obligation to offer capacity
In the Devricon/KPN Telecom dispute, the NRA decided in the end that the TO was not ordered to provide access to Devricon; nor did it have to offer collocation services for the telephone exchange of Devricon at the TO’s exchange, because the TO adequately demonstrated that there were enough alternatives available for the activities of Devricon.62 In the end, it was decided that access was not a necessity for Devricon. The NRA considered the request unreasonable, due to insufficient specification. However, in spite of this decision, the NRA still required the TO to further examine Devricon’s request for potential reasonableness.

59 CBB 21 December 2005, AWB 05/91 and 05/581, LfN AU8622 (KPN Telecom/Tele2).
61 Rb. Rotterdam 28 December 2004, LfN AT0370 (Infotel/OPTA). In the end, the court did quash OPTA’s decision, but on a minor issue of definition and it let the legal consequences in tact.
By way of comparison, mention is made of a host of decisions by the German NRA (Regulierungsbehörde für Telekommunikation und Post, ‘RegTP’) on the failure of the German TO, Deutsche Telekom AG (‘DTAG’) to deliver carrier leased lines within a reasonable term. The German NRA took more than four months even to decide to initiate action against DTAG. Three months later, the NRA issued a judgement ordering DTAG to deliver leased lines within a fixed period. DTAG then filed to obtain an injunction to suspend the NRA’s decision and prevailed.63

In the Scaramea/Telfort case, a string of judgements that are illustrative of how a (civil) court might decide on interconnection disputes between OLOs (the primary interconnection duty), the exploitation of a virtual internet service provider (‘ISP’) was at stake. The plaintiff was not a ‘generic’ OLO: it concerned an affiliate of an insurance company interested to obtain business on the Internet. It had entered into a letter of intent (‘LOI’) on the provision of interconnection capacity by Telfort (later BT Ignite), at the time one of two fixed infrastructure providers in the Netherlands next to the TO. As part of the LOI, Scaramea had ordered 5,000 ports from Telfort (which Telfort then subcontracted to the TO) for an amount of NLG 5.4 million.64

Interestingly, the bottleneck or scarcity occurred at the TO’s level, who bluntly refused to deliver the requested capacity to the Telfort, which in turn was unable to perform towards the ISP (Scaramea). Telfort issued numerous proposals to Scaramea to ‘accommodate’ its needs and even offered compensation due to a delay in the launch of Scaramea’s portal. Simultaneously, Scaramea entered into an agreement with the TO, to obtain at least part of its required ports capacity directly from the TO. In summary proceedings, Scaramea claimed that Telfort should make available 5,000 ports and relates services; in addition, it wanted Telfort to implement the ports that Scaramea had obtained from the TO. Scaramea also claimed a penalty of NLG 5 million for every day that Telfort would not comply with the order. The president in first instance awarded the first claim (making available of the ports), based purely on a contract law based analysis of the matter. She found a clear contractual commitment from Telfort (in the LOI, and was unwilling to find a force majeure event), holding Telfort liable for attributable default and issued a hefty penalty as requested with a maximum

64 This was not a peering type of arrangement. Note that the letter of intent contained a significant kick-back provision, see the description of the facts in HR 31 May 2002, C00/332HR L/N AE3437 (Scaramea/Telfort), no. 1.10.
of NLG 50 million (approx. € 23 million).\textsuperscript{65} The presiding judge also seems to have tended towards accepting a results obligation on Telfort's behalf, even though Telfort's terms and conditions and the letter of intent specifically mentioned that it concerned an efforts obligation (and, in the given circumstances, as Scaramea was aware that Telfort also depended on the TO, it would be difficult for Telfort to warrant a result).\textsuperscript{66} The court of appeals ("Hof") Amsterdam confirmed the decision in first instance, although it limited the order to make 5,000 ports available to 1,656 (based on technical arguments made by Telfort).\textsuperscript{67} Telfort then referred the matter to the Supreme Court (the decision will be discussed below). It is noteworthy that - next to claiming hefty penalties - Scaramea in the meantime instated proceedings on the merits of the case, in which it claimed an amount of NLG 228,570,122 (over € 100 million) in damages (to be augmented with the legal interest). The damages allegedly consisted of cost incurred in vain, loss of income and loss of profits. Invigorated by its victory in the summary proceedings, Scaramea based its damages' claim on three defaults.\textsuperscript{68} The court confirmed the president's provisional judgement that Telfort had attributably defaulted under its obligations under the LOI, but it referred the matter to further consideration by the damages court, which had not published a judgement yet by the end of 2005.\textsuperscript{69} In its decision of 31 May 2002, the Supreme Court partially quashed the decision of the Hof Amsterdam, which probably was rather fortunate for Telfort.\textsuperscript{70} Put simply: in the opinion of the Supreme Court, the Hof Amsterdam should have annulled the decision of the President of the Rb. Amsterdam in first instance. Since the appellate court had limited the number of ports from 5,000 to 1,656 (and thus apparently had a legal basis to take a decision

\textsuperscript{65} Cf. Chapter 6 paragraph 6.6.3. In her decision, the fact that Scaramea was able to obtain 1,500 ports from the TO played a role.

\textsuperscript{66} Pres. Rb. Amsterdam 22 October 1999, 99/2593VB LJN AA1033 (Scaramea/Telfort). See letter of intent, Article 4.4. Note that the parties also went to court in a conflict on Scaramea's enforcement of the judgement in summary proceedings (Telfort had instated summary proceedings to obtain an order to stop Scaramea enforcing the judgement) and the enforcement was subsequently suspended until a final judgement will be rendered in the proceedings on the merit of the case.

\textsuperscript{67} Court of Appeals ("Hof") Amsterdam 28 September 2000 (Scaramea/Telfort), not published.

\textsuperscript{68} For the decision on the merits of the case, see Rb. Amsterdam 15 May 2002, H 00.1066, LJN AE3458 (Scaramea/Telfort), no. 2.2ff.

\textsuperscript{69} According to information from counsel, the matter was still pending in December 2005.

\textsuperscript{70} HR 31 May 2002, C00/332HR LJN AE3437 (Scaramea/Telfort).
instead of the president in first instance) it should have ordered the matter back for renewed consideration on the number of ports. The Supreme Court referred the matter back for a new decision.  

These decisions demonstrate at least that an interconnection dispute relating to performance of the agreement can just as easily be brought before the civil courts; the main difference still being that these are not bound by terms on the timing of their decision making. In this matter, the NRA would not have been competent to decide, since the conflict did not fall under either the primary or the secondary interconnection rule.

In an unrelated matter in civil proceedings, BT Ignite (i.e. Telfort) in summary proceedings claimed an outstanding amount of €20,030,944.95 from the TO for fixed terminating access (FTA) services provided by BT Ignite to the TO in the period July 1999-August 2000. Unfortunately, the President denied the claim, as he felt this matter better be left to the court deciding on the merits of the case. The matter was then left for tariff regulation by OPTA, and thus forms a good illustration that the courts do not consider themselves competent as regards tariff regulation.

Finally, mention is made of a dispute instated by KPN Telecom, where it requested special access to UPC’s network to offer a package of digital radio and television programmes. Probably, this was the first case where the TO tried to obtain access to a network of another operator. The basis for the dispute was not Article 6 of the 2004 Tw, but rather Article 8.7 sub o. 2004 Tw, which gave the NRA the right to intervene when a party wanted to obtain access to a broadcaster’s network. The NRA considered that the TO was unable to demonstrate an urgent interest in obtaining access. The NRA also found no final dispute, thus considering itself incompetent to hear the claim.

---

71 The new appellate decision was not yet issued. It is mentioned that: (1) Scaramea later merged with another ISP; and (2) KPN Telecom acquired Telfort’s mobile business in 2005.
72 Probably, for Scaramea, the decision may have come too late.
74 Not surprisingly, the court referred to the Energis matter, to be discussed, infra, and provided it was up to the NRA to set the FTA tariffs between BT Ignite and KPN Telecom, see Rb. Rotterdam 23 May 2002, 161233/Ha ZA 01-2032 (BT Ignite/KPN Telecom). See also Ottow 2002 p. 316ff.
8.2.2.5 Setting timelines
In one of the first decisions on an interconnection dispute of 1997, the NRA looked at setting timelines for the completion of negotiations. It held that the TO was obliged to supply interconnection at the local access level in principle within three months of a 'reasonable' request. This period concerned both local access and special access. The three months were set to give the TO time to realize the provisions. If access could not be supplied in a timely fashion, interconnection must be supplied at a higher level in the TO’s infrastructure. To this, the TO argued that it could not provide access at the requested level. The NRA then determined that the tariffs applying for access (at the higher level) had to be on par with the tariffs the TO charged at a lower level in the network. Besides, it ordered the TO to motivate why interconnection could not take place based on the requested level.

In later decisions, the NRA consistently applied three-month windows for the provision of access. It did provide then, however, the possibility to obtain extension from the three-month period, if the request for an extension was sufficiently supported. Compare these decisions with the decision in the Scaramia/Telfort case, where the president of the Amsterdam court gave Telfort a term of eight days only after the serving of the judgement to comply only (although the order was suspended after further proceedings by Telfort).

8.2.3 Performance
8.2.3.1 Intervention in contract terms and enforcement
In a civil court, the clearest example of an OLO (or rather an ISP) effectively obtaining remedies from a non-performing OLO was discussed in paragraph 8.2.2.4 already. In this paragraph, a number of other issues regarding performance that were referred to the NRA will be discussed briefly.

By 2004, several OLOs were using the TO’s communications lines to offer broadband access through DSL connections. An issue arose in respect of

---

76 OPTA 17 December 1997, OPTA/MI/97/1158 (EnerTel/PTT Telecom).
77 Cf. Chapter 2 paragraph 2.2.
the timing of migration of end-users from the TO to other OLOs offering broadband. Due to unnecessary contract and technical requirements imposed by the TO, end-users were deprived of a DSL connection for weeks. Thus, a number of OLOs had negotiated a migration agreement with the TO, to ensure a smooth transition. The terms of the agreement had been fully agreed between the parties and all (except the TO) signed it. The TO subsequently persisted in its refusal to execute the agreement and instead, introduced new demands. Although this refusal of the TO to sign an agreement which terms had been fully negotiated would very likely amount to bad faith behaviour under contract law, the OLOs filed a complaint with the NRA based on Article 6.3 (1) and 6.9 1998 Tw, asking the NRA to set the terms for the TO's cooperation.

The NRA took a different approach than the courts would have had. Its starting point (which, in my view was incorrect from a contract law perspective) was that the parties had not reached an agreement.

The TO raised its usual objections, stating that: (1) there was no dispute and the NRA was not competent to resolve the dispute, (2) there was no statutory duty for the TO to comply with the migration request as it did not fall under an interconnection or special access duty, (3) the migration request would interfere with agreements the TO had entered into with its end-users, (4) the NRA was not competent to require cost oriented rates in this instance, and (5) the request was not reasonable.

The NRA rejected these objections and applying the principles of transparency, fairness and non-discrimination, set the terms of migration, mostly in accordance with the terms that had already been agreed and laid

---

82 Re the notion of good faith under contract law: see Chapter 6.
83 OPTA 4 May 2004, OPTA/IBT/2004/201556 (Tiscali, Versatel, bbNed/KPN), p. 2 and 6, considering that the parties did not achieve a negotiations result.
84 The TO unsuccessfully argued this on an analogy with decisions taken by the NRA based on policy guidelines with respect to number portability. The courts had struck down decisions and enforcement measures by the NRA forcing the TO and other OLOs to arrange for smooth number portability, in spite of there being a civil law agreement between the TO/OLO and its end-users, for instance setting a fixed initial term for the agreement. The court then decided based on a complaint by the TO, in this exceptional case joined by two OLOs that the NRA had no competence under Article 4.10 1998 Tw to intervene and to set aside contract terms between the TO/OLO and their end-users, see Pres. Rb. Rotterdam, 18 December 2003, Mediaforum 2004/4, p. 137 (KPN Mobile/OPTA), and against the enforcement decision, Pres. Rb. Rotterdam, 24 March 2004, 04/493 VTELEC and 04/94 VTELEC.
down previously between the OLOs and the TO. The NRA later published a decision approving the charges in respect of migration.\(^{85}\)

8.2.3.2 No requirement of a written contract
In a decision following a complaint against the TO to refuse implementing an operator controlled model for CPS, the NRA decided that the TO's requirement that OLOs first enter into a written agreement with their end-users to prevent slamming, was unreasonable under Article 6.9 1998 Tw.\(^{86}\) Only in case of consistent abuse, would such requirement be acceptable.\(^{87}\) This decision did not deal with the question whether OLOs were required to enter into a written agreement with the TO at the wholesale level for CPS.

8.2.3.3 Intervention prior to completion of market analysis
In this matter, Wanadoo invoked the new Article 6b. 3 2004 Tw.\(^{88}\) It wanted the NRA to refrain from holding a consultation and proceed immediately in taking measures against a KPN Telecom affiliate that offered ADSL metered access.\(^{89}\)

The NRA denied Wanadoo's claims, based on the fact that it was still in the process of conducting a market analysis and only in exceptional circumstances could it intervene. The NRA found no such circumstances. However, in the appeal, the CBB overruled the NRA and ordered that the NRA had to take measures as requested by Wanadoo in first instance within four weeks after its decision.\(^{90}\) On 25 May 2005 (published 13 July 2005) OPTA confirmed its decision considering there were no special circumstances requiring a speedier decision.\(^{91}\) It is rather difficult how a court would have handled this matter (had it been competent). Probably, applying the Awb a court would have reached the same result.


\(^{86}\) See OPTA 28 October 2004, OPTA/IBT/2004/202142 (Versatel et al./KPN Telecom); appeal against the decision of OPTA, 20 February 2004, OPTA/IBT/2004/200690.

\(^{87}\) See also the OPTA 28 November 2003, Guidelines on dispute resolution special access and slamming (Richtsnoeren beoordeling geschillen bijzondere toegang en slamming), OPTA/EGM/2003/204579.


\(^{89}\) See Chapter 5 paragraph 5.2.3.2 on the consultation procedures.

\(^{90}\) See CBB 27 April 2005, AWB 05/1991 and 192, IJN AT6100 (Wanadoo/KPN Telecom). The CBB did not go as far as to impose a provisional measure.

\(^{91}\) The NRAs market analyses merit a separate, extensive treatment and are not subject of this book.
8.2.4 Tariff regulation

As can be expected, most disputes on interconnection related to the aspects of the tariffs charged by one of the parties, often (but not always) the SMP undertaking. On several occasions the NRA dealt with this issue and often fixed these tariffs ex post. Some notable decisions are briefly discussed herein, as their inclusion in this book is simply motivated for reasons of completeness. The discussion is restricted to disputes regarding interconnection between the TO and the OLO's; whilst decisions regarding cable access television ('CATV') networks are not discussed.92

8.2.4.1 Obligations regarding unbundling

The SMP undertaking on the relevant market must provide unbundled tariffs. The issue of unbundling was considered in various disputes brought before OPTA. The following is a selection.

In the Esprit IMS et al./KPN Telecom decision, the NRA argued that this would enable the OLO to make reasoned decisions about investments on the basis thereof.93 Although the NRA's reasoning was in line with the legal framework, the decision was far-reaching, since it involved the local exchange.

It is noteworthy that with respect to the obligation to offer unbundled tariffs, reasonability played a role. For example, the NRA decided that information about tariffs did not have to be supplied, in case it was technically impossible to provide interconnection to (parts of) the network.

Contention on cost-orientation and unbundling really took off once the NRA ordered the TO to apply rates that were lower than those that the NRA had previously determined in its final decision on interconnection rates, dated July 1, 1998.94 Following this decision, the NRA decided several

---

92 Although the NRA also actively intervened in the setting of rates applicable to access to cable networks (broadband services), see, e.g., OPTA 16 March 2001, OPTA/IBT/200/200517 (Ipsilon/ Casema), and OPTA, 31 July 2000, OPTA/IBT/2000/202198; OPTA/IBT/2002/200696 (Canal+/UPC). See on the FTA rates for broadcasting disputes CBB 16 June 2005, AWB 04/754, LJD AT7786 (KPN Telecom/OPTA). See also Van Eijk 1998.

93 See OPTA, 28 April 1999, OPTA/1/99/2351 (Esprit IMS et al./KPN Telecom).

94 Ibid. In this decision, the NRA effectively confirmed it wanted the TO to apply the Embedded Direct Cost ('EDC') model for interconnection cost accounting. Specifically, the TO was to: (1) charge a return on assets charge of 11.6%, (2) determine the cost price per minute of its wholesale billing system for a five-year period on a yearly basis, beginning - retroactively - in 1997, the date of liberalization of the Dutch (Continued)
times in disputes or acted at its own initiative, to set interconnection rates and modify prior decisions. 95

In the UPC/KPN Telecom dispute, the NRA introduced a notion of the evidently recognisable separate network (evident kenbaar afzonderlijk netwerk, ‘ERSN’) to determine whether the TO’s requirement of charging transit rates in addition to terminating rates to certain networks was justified. 96

In a further decision, MCI prevailed against the TO, when it successfully argued that the TO was not entitled by law to charge transit rates in addition to charges for the termination of internet telephony, for which the TO used transit networks. 97 Only if, technically, the ERSN qualified as independent from the TO’s network, would the additional transit rates have been legal. The matter was confirmed in the appeal before the CBB. 98

See Chapter 2 for the Consultation Documents relevant to these decisions. And see, e.g.: (1) OPTA, 1 July 1998, OPTA/M/98/1537, Decision regarding the Embedded Direct Costs model of KPN (EDC-I decision); (2) OPTA, 1 June 1999, OPTA/IBT/99/5955, Decision to modify the decision of July 1, 1998 regarding the Embedded Direct Costs model of KPN and the tariffs for interconnection and special access services based thereon; (3) OPTA/IBT/99/8000, Determination of the provisional rates for interconnection or special access services to be charged by KPN Telecom B.V. for the period of July 1, 1999 until July 1, 2000 (Decision EDC-IIA); (4) OPTA, 16 December 1999, OPTA/IBT/99/8393, Decision regarding the interconnection and special access rates to be charged by KPN Telecom B.V. for the period July 1, 1998 until July 1, 1999 (Decision EDC-IIB); (5) OPTA, 4 December 2000, OPTA/IBT/2000/202891, Decision regarding the interconnection and special access tariffs to be charged by KPN Telecom B.V. during the transitional period from July 1, 2000 until July 1, 2001, and regarding the period July 1, 1999 until July 1, 2000 for those services as the definite tariffs; (6) OPTA, 26 April 2002, OPTA/EGM-IBT/2002/201084, Memorandum of findings, integral tariff regulation for end-user and interconnection services; (7) OPTA, 30 June 2004, OPTA/IBT/2004/202290, Decision regarding the interconnection and special access rates to be charged by KPN Telecom B.V. for the period September 1, 2003 until September 1, 2004 (interconnection rates) and for the period July 1, 2003 until July 1, 2004 (special access), an extensive decision containing numerous annexes; (8) OPTA, 29 June 2004, OPTA/EGM/2004/202394, Decision regarding price cap on leased lines and telephony; (9) OPTA, 2 August 2004, OPTA/IBT/2004/202721, Decision regarding approval collocation charges according to EDC VII method.

98 See CBB 11 May 2005, Alw'B 04/707, LJN AT6099 (KPN Telecom/MCI).
Disputes

8.2.4.2 Obligations regarding cost-orientation

The TO consistently and vigorously opposed the content of and the formalities surrounding cost orientation guidelines, both before the NRA and the courts.

An important issue of contention between the TO and OLOs was the causality between the tariffs charged by the TO and the precise cost that applied to create interconnect conditions that an OLO requested. New entrants had in their turn regularly opposed interconnection rates charged by the TO. It came as no surprise that their main argument was that the TO’s rates were not cost oriented. Simply requiring a party with SMP to apply cost oriented rates did not, prima facie, appear to help in providing the market parties legal certainty.

The policies of the NRA appeared to have undesired side effects. Whereas on the one hand, interconnection rates were not completely left to negotiations between the parties, but were subjected to regulatory intervention, on the other hand that intervention was of such general nature, that all parties involved were at a loss as to establish what the meaning of the principle of cost orientation translates to in practice.

As regards cost considering technological aspects of infrastructure in connection with the economic aspects, the NRA often considered costs per technology. This was a logical approach, but controversial in the eyes of the TO, since the TO was forced to amend lucrative cost charging models for service where it had a dominant position. An example in the later 1990s was the market for Internet access: the metering out of Internet call traffic and the flat-rate Internet access tariff applied for the TO’s own end-users and the kickback granted to providers.99 In the MCI Worldcom/KPN Telecom dispute, the NRA decided that the TO had to make an offer to the OLO within two weeks after the decision for time independent Internet access based on the Metered Internet Access Call Originating (‘MIACO’) model. Moreover, the TO was ordered to make an offer within the same term for a service based on the Flat Rate Internet Access Call Originating (‘FRIACO’) model.100

99 See on the first topic the OPTA Consultation Document, 12 November 1999 (06760 service). The NRA wanted tariffs to be differentiated.

Interconnection Regulation and Contract Law

In another decision, the NRA approved the FTA rates charged by MCI to KPN Telecom.\footnote{See OPTA 15 November 2004, OPTA/JUZ/2004/202387 (MCI Worldcom/KPN Telecom). For the initial complaint, see OPTA 12 May 2004, OPTA/IBT/2004/201554 (MCI Worldcom/KPN Telecom). See also Rb. Rotterdam, 23 December 2004, LJN AS1892, and CBB 8 March 2005, AWB 05/89, LJN AT0965 (EnerTel et al./KPN Telecom).}

A problem arising in respect of applying cost orientation that adversely affected the TO was that the 1998 Tw did not offer the NRA an opportunity to distinguish between those OLOs that did and those that did not investigate in their own network infrastructure. Hence, it was largely dependent upon the cost model that was eventually chosen whether the NRA could take this circumstance into account. The long run incremental cost ('LRIC') and bottom up long run incremental cost ('BU-LRIC') systems appeared to provide an adequate basis for the taking into account of the circumstance that an SMP undertaking would be reasonably entitled to earn back part of the investment cost and divide these in a cost-based manner among the OLOs.

Other decisions included decisions on the cost-orientation of the TO’s interconnecting leased lines\footnote{See OPTA, 29 December 2003, OPTA/IBT/2003/204911 (OPTA/KPN Telecom); OPTA, 26 February 2004, OPTA/IBT/2004/200355 (BT/KPN Telecom); OPTA, 26 July 2004, OPTA/IBT/2004/201873 (BT/KPN Telecom).} and fixed terminating access charges.\footnote{See OPTA, 12 May 2004, OPTA/IBT/2004/201553 (BT/KPN Telecom); OPTA, 29 July 2004, OPTA/IBT/2004/202361 (KPN Telecom/Caima), where the dispute was started by the TO; and OPTA, 2 November 2004, OPTA/IBT/2004/203636 (KPN Telecom/Versatel). The TO started proceedings on the same issue against UPC and Priority Telecom. The TO failed to obtain an enforcement action against UPC for its allegedly overcharging in respect of fixed termination access rates, See OPTA 24 December 2004, OPTA/IBT/2004/203913 (KPN Telecom/UPC).The reasoning was that the TO had already passed on the higher charges -subsequently lowered – to its end-users anyway.} The Court The Hague was adjudicated in a dispute over the provision of free broadband services by the TO and a number of ISPs.\footnote{See Hof The Hague 11 March 2004, 03/1605, LJN AO5399 (nl.tree/KPN Telecom et al.).} The proceedings on the cost-orientation of cable provider UPC were highly contentious and culminated in an interim appellate decision on the confidentiality of business information submitted by the parties in December 2005.\footnote{See CBB 22 December 2005, AWB 05/83, 05/85, 05/86 and 05/88, LJN AU8623 (OPTA et al./UPC).}
The NRA also enforced the cost-orientation of interconnection rates by imposing fines on the TO at several occasions.\textsuperscript{106}

\subsection*{8.2.4.3 Fixed and mobile terminating access rates}

The amount of mobile terminating access ('MTA') rates had been a very contentious issue in the Netherlands.\textsuperscript{107}

In 2001, the NRA provisionally established the MTA rates for Telfort/O2 at the request of KPN Mobile.\textsuperscript{108} In light of the obscurity regarding the nature of their interconnection, the NRA had ordered the parties to issue an exemption request from the interconnection obligation. In the first final decision in the O2 dispute, the NRA fixed the MTA rates between the TO and O2.\textsuperscript{109} O2 and KPN Mobile had entered into an interconnection business relationship, but, communications traffic originating at O2 was handled effectively by the fixed infrastructure TO, KPN Telecom, with which O2 had executed an interconnection agreement in 1998.\textsuperscript{110} Until mid-2000, the TO and O2 charged reciprocal interconnection rates. However, in June 2000, the TO lowered its rates significantly and cancelled this decrease again in October 2000. O2 had done the same. The TO objected to the decrease in tariffs.

The NRA had motivated its competence to determine MTA rates as stipulated in Article 6.3 1998 Tw, in particular: (1) its right to consider an interconnection agreement based on an administrative notion of reasonableness. Even though the plaintiff, strictly speaking, had no direct interconnection agreement with KPN Mobile, the defendant, -- since the communications traffic was terminated by KPN Telecom --, the NRA found an implicit agreement. But the court struck down this motivation; and (2) Article 6.3 (1) 1998 Tw, but the TO had asked for a release of its direct

\textsuperscript{106} See, e.g., OPTA/IBT/2003/204860 (\textit{OPTA/KPN Telecom}) where the NRA imposed a rather high administrative fine on the TO (€ 2,000,000,- per month with a maximum of €12,000,000,00) when the NRA found that the TO's charges were not in synch with the latest NRA decision on cost-oriented interconnection rates. The TO unsuccessfully attempted to suspend this administrative fine by obtaining a decision in summary proceedings, see Pres. Rb. Rotterdam 29 January 2004, 03/3646 VTELEC, LJN AO2740 (\textit{KPN Telecom/OPTA}).

\textsuperscript{107} The NRA issued almost 50 provisional, modified and final decisions in connected cases in 2001-2002.

\textsuperscript{108} See OPTA 18 December 2001, (no reference) (\textit{KPN Mobile/Telfort}).

\textsuperscript{109} OPTA 10 April 2002, OPTA/IBT/G.16.01/2002/200691 (\textit{KPN Mobile/Telfort}).

\textsuperscript{110} See also, \textit{supra}, paragraph 8.2.1.1.
Interconnection Regulation and Contract Law

interconnection duty, and pending a decision on that request, the court found that the NRA was not competent to decide on MTA rates.\textsuperscript{111}

The decision by the NRA was later suspended by the court, as the court was uncertain whether the power to impose cost orientation extended to what was considered an indirect interconnection agreement.\textsuperscript{112}

By 2002, the NRA had issued numerous further decisions on MTA. First, it decided partly in favour of the objections raised by the parties.\textsuperscript{113} It modified the MTA rates applied by O2, including the term for implementation of the modification. O2 objected to this decision and also asked the president of the Rb. Rotterdam to suspend the NRA decision. Subsequently, in a number of decisions in September and October 2002, the NRA – at the request of the market parties – fixed the rates for MTA that were to apply among (1) mobile operators and the TO, (2) mobile operators,\textsuperscript{114} and (3) mobile operators and fixed communications network providers MCI Worldcom and Versatel.\textsuperscript{115} The NRA based itself predominantly on policy rules it had issued

\textsuperscript{111} See the Annex for the full text of Article 6.3 1998 Tw.


\textsuperscript{115} As regards MCI Worldcom and other decisions all issued 23 September and dated 2 October 2002: OPTA/IBT/2002/202829 (MCI Worldcom/KPN Mobile),
Disputes

with respect to MTA.116

In brief, the NRA had set a general maximum threshold for interconnection rates, based on a differentiation between the position of existing mobile operators and relative newcomers, motivated by a market analysis, the need to act against cross-subsidisation and the enhancement of durable competition.

The NRA issued a number of amended decisions on 17 October 2002 in respect of Tele2 as it had not included traffic originating on the fixed infrastructure.117

On 21 November 2002, the NRA issued modifications in respect of Dutchtone and Vodafone.118

However, the President of the Rb. Rotterdam suspended all of the NRA’s decisions again in his judgement of 29 November 2002.119 Once more, the issue at stake was the competence of the NRA under Articles 6.1 and 6.3 1998 Tw. Basically, the point was that under the 1998 Tw, the NRA did not have the power to test the reasonability of interconnection rates for non-SMP undertakings ex officio.120 This would first require a complaint from a market party. Although the court found no problem with the NRA issuing


In this decision, OPTA based itself on Amended policy rules (Aanpassing van de beleidsregels inzake de regulering van mobiele terminatie tarieven, OPTA, 22 July 2002, OPTA/IBT/2002/201827.


This did not change under the 2004 Tw.
policy guidelines, the powers of the NRA to decide were restrictively
delineated by law, or as set forth in the parliamentary history. The court did
not read the competence pretended by the NRA in Articles 6.1 or 6.3 1998
Tw and considered that this was left to the parties’ agreement. The court also
ignored the NRA’s argument (based on parliamentary history) that,
presumably, the interconnection rates were set at such a high level, that an
interconnection agreement had not been effectively agreed upon. The
court considered the agreements between the providers, which had been
performed for a relatively long period without complaint, so it did not agree
with the NRA’s argument. Only in case of specific circumstances could the
NRA argue this, according to the court, but, the NRA had not argued that
such existed.

Finally, the court decided in the various objections raised by O2 against the
NRA decision of 9 April 2002 and subsequent decisions. According to the
court, the NRA decision was founded on Article 6.3 (1) 1998 Tw and not,
as argued, Article 6.3 (2) 1998 Tw. The court found that there was no
interconnection agreement between O2 and KPN Mobile. Consequently,
Article 6.3 (2) 1998 Tw did not apply. The way the parties conducted their
retail relationship did not constitute interconnection. Thus, it found that the
NRA was not competent to fix the MTA tariffs at the request of the TO.
Under the NRF the NRA’s competency was enhanced and specified under
the respective markets.

One conclusion that could be made was that the court used a fairly artificial
construction, clearly intended to first and foremost prevent the mobile TO
from getting a price control decision in its favour. However, it is true that the
legal basis for the NRA to decide on price control for OLOs without SMP
was not present in the 1998 Tw, and that was effectively what the mobile TO
had attempted to establish.

121 According to annotator A.T. Ottow; this restrictive interpretation was in contravention
of earlier decisions taken by the same judge in respect of site sharing. President Rh.
Rotterdam, September 13, 2000 TELEC 99/2715-RIP and TELEC 99/2781-RIP
(KPN Mobile/OPTA and Dutchtone); see note, Mediaforum 2002/2, p. 108.

paragraph (Dutchtone et al./OPTA), See also, supra, on the O2/KPN Mobile dispute
regarding direct interconnection.

123 See, Rh. Rotterdam, 25 April 2003 (note A.T. Ottow), Mediaforum 2003/9, p. 309,
Computerrecht 2003/4, p. 253, note R. van den Hoven van Genderen (O2/KPN Mobile
and OPTA).
The matter reappeared high on the NRA's regulatory agenda in 2005, when the NRA published a further consultation document, which included a draft decision on MTA containing the market analysis under the 2004 Tw and the definite market analysis decisions of 14 November 2005 later appeared on OPTA's website and was subject to many appeals at the time of closing this book.  

8.2.4.4 Local exchange

In the EnerTel/KPN Telecom dispute that related mostly to the local exchange, the NRA also addressed the tariffs charged by the TO. It decided that the definitive rates charged by the TO for special access, including the rates for access to the local exchanges, were to be submitted to OPTA as part of the new EDC model for a decision on their feasibility. The NRA requested the TO to restrict its FTA charges to a maximum, as specified in the decision.

8.2.5 Other issues raised by the ONP framework and the NRF

There were numerous cases that involved issues of transparency, non-discrimination etc. A few notable cases are summarized in the sub-paragraph.

8.2.5.1 Obligations regarding non-discrimination

The non-discrimination obligation was often invoked by plaintiffs and referred to by the NRA and the courts. The non-discrimination obligations were applied when the TO at the time the telecommunications market was broken up effectively, allegedly suffered from structural capacity problems in its fixed telephony network to provide timely and adequate interconnection to all parties requesting this. The NRA decided in a number of conflicts that the TO had to allocate the available capacity using the principles of objectivity, transparency and non-discrimination. This meant that the TO charged

---

124 OPTA Consultation Document, 17 March 2005, Draft decision, the market for terminating access on different networks (De markt voor mobiele gespreksafgifte op afzonderlijke netwerken – ontwerpbesluit), see for the definitive decisions www.opta.nl.

125 The NRA considered it would at any rate consider the TO's charges unreasonable if: (1) these would charge full gateway cost – instead of on a one time basis –, (2) average rate per minute would be more than 2,1 cent, (3) the replacement cost for the exchanges or for the installation of special switches would be charged completely to the party requesting access. See OPTA 17 December 1997 (note P. Burger), Stert. 1998, 13, p. 14, Computerrecht 1998/2, p. 80, OPTA 15 July 1998 (note P. Burger), Stert. 1998, 153, p. 4, Computerrecht 1998/5 (EnerTel/KPN Telecom).

126 As amended by the NRA.
The court added that what the NRA did have to restrict was its decision on the conflict submitted to it. It also contemplated that the rule of reasonableness and fairness applied likewise to the adjudication by the NRA.\(^{138}\) The court then concluded that the NRA had correctly decided previously that the TO had to include a 'guardian-orphan' construction in its RIO to enable a spill over for end-users of Energis in peak time.\(^{139}\)

Interestingly, the court also had an opinion on the competences of the NRA under Article 6.7 1998 Tw. It held that a notification of the TO to include a certain interconnect service in its RIO did not qualify as an administrative decision under Article 1.3 Awb. Hence, an objection against such notification should not be admissible in the first place. The way to bypass this formality would be for the NRA to first start enforcement proceedings against the TO.

Finally, the on-going *Pretium/KPN Telecom* dispute related to alleged slamming practices pursuant to a CPS agreement.\(^{140}\)

### 8.2.6 Germany and England

Both in Germany and England, there have been a good deal of conflicts especially regarding the position of SMP undertakings and some regarding the position of the TO as regards interconnection (both as regards the secondary interconnection rule).\(^{141}\)

The overview of cases tried appears to show for England that more cases stayed with the NRA than in the Netherlands, *i.e.*, less matters were appealed (although there is no conclusive evidence for this position).

The length of the appeal proceedings in Germany – which resulted on rules relating to confidentiality - were being considered problematic.\(^{142}\)

---

138 No decisions were published where the TO or the OLO had terminated an access or interconnection agreement, and this led to a dispute regarding the termination, the circumstances surrounding termination etc. Hence, it is not possible to comment on the NRA's role in this respect.

139 *Cf.* for the original decision, OPTA, 12 July 1999, www.opta.nl; and OPTA/JUZ/2000/202339 for the objection procedure (*Energis/KPN*).


141 There is little literature on this. See for England, *e.g.*, Lloyd, Mellor 2003 and for Germany, Gramlich 2002 and 2004.

142 See Andenas, Zleptnig 2004, p. 76.
In any event, the centre of gravity of intervention appears to have been on tariff regulation.\textsuperscript{143}

8.3 Interim conclusion

In the period 1997-2005, the NRA used its authority mandated by law predominantly to re-establish interconnection rates under an existing agreement between the TO and an OLO.\textsuperscript{144} In few circumstances, the NRA interfered in and re-established other contractual provisions, such as the requirement of a bank guarantee, conflicts regarding forecasts, service level and liability issues. It is not clear whether OPTA's reserve is due to either a lack of complaints by the market parties, OPTA's interpretation of its authority under the law, or OPTA's relative lack of knowledge of the technical aspects of interconnection agreements.

The 2003 IViR report noted that in decisions taken by the court Rotterdam – even though it was specifically competent to hear telecommunications disputes – fundamental problems, such as MTA rates, Internet, cable access, were not really considered.

The court took a very formalistic position with respect to the competences awarded to it under the 1998 Tw. This is unlikely to change further to the 2004 Tw.

Many of the NRA's decisions were subject to appeal; under the 1998 Tw, first before the Rb. Rotterdam and then before the CBB; under the 2004 Tw, before the CBB only. On several very important matters of principle, the CBB overturned decisions taken by the NRA.

The primary interconnection duty was subject to one decision between OLOs.\textsuperscript{145} Civil courts were adjudicated by an ISP when the OLO could not meet its contractually agreed delivery obligations.\textsuperscript{146}


\textsuperscript{144} The following issues have proven to be contentious, in order of frequency: (1) cost orientation, for instance, in respect of mobile terminating access, FRIACO and MIACO, interconnecting leased lines, fixed termination rates etc. These disputes were brought before the NRA after the parties had entered into an access or interconnection agreement; (2) special access, in particular the question whether a request for access was deemed reasonable, and/or whether it was sufficiently specific.


\textsuperscript{146} See, supra, paragraph 8.2.2.4 and first decision, Pres. Rb. Amsterdam 22 October 1999, 99/2593VB LJN AA1033 (Scaramea/Telef).
8.3.1 Interconnection and special access

Various disputes arose in respect of the definition of interconnection; or matters that involved the question whether there was direct or indirect interconnection. In both cases, a possible cause for the contention was due to the fact that the notion was not clearly regulated in the 1998 Tw, and perhaps incorrectly implemented in respect of the duty to conduct commercial negotiations in the 2004 Tw.147

The notion of special access developed as the NRA dealt with different disputes. Initially, the NRA considered that a request for special access was reasonable if: (1) access was necessary for the OLO to compete on the telecommunication market and (2) there was sufficient capacity for access.148 Further to the first condition, in case reasonable alternatives were available to the OLO, or in case the OLO could demonstrably use its own infrastructure to warrant interoperability of services to its end-users, the TO would be entitled to deny access.

8.3.2 Tariff regulation

As could be expected, the setting of tariffs after the parties had entered into an agreement, proved to be very contentious. Not only did the NRA intervene on several occasions, it should also be borne in mind that the TO appealed many times against the NRA's decisions.

8.3.3 Non-contentious issues

The following issues have proven not to be contentious, or at least there exist no published cases in this respect: (1) deposit and review of the access and interconnection agreement; (2) fixing the timeline for the completion of interconnection contract negotiations; (3) setting the terms of the interconnection agreement; (4) transparency: appeal against NRA decision with respect to the RIO; (5) accounting separation and (6) non-performance of the agreement.

It is interesting to see then, that those issues that have been regulated heavily in respect of the contract side of interconnection disputes did not often result in litigation. It might be argued that the regulation works as an

147 See also Chapter 4.
149 The TO could deny the special access request in the event of scarcity of resources.
effective deterrent against distorting behaviour of the TO. Or, and this is more what I am inclined to believe, one might argue that the parties to these agreements, the TO and the OLO were very well able to reach an agreement eventually without outside help.

The NRA did not consider the notion of good faith in respect of formation, negotiation or performance of access and interconnection agreements as such.

8.3.4 Final remark

It is evident that there have been many disputes regarding interconnection, especially tariffs and refusal to deal (i.e. under the secondary interconnection rule). It is also evident that there were not that many circumstances, where the duty to conduct commercial negotiations was sought to be enforced against a TO, although the few disputes that were brought before the NRA dealt with important issues. Finally, alternative dispute resolution (‘ADR’) as regards interconnection disputes has not taken off yet.\(^{150}\)

Looking at the scope of the obligations considered it appears fair to assume that civil courts could have considered many, if not most of these issues just as well.

\(^{150}\) Cf. Holznagel, Schulz 2003 on ADR in telecommunications disputes, but not between operators
III Conclusion and recommendations
9. Final remarks

9.1 Introduction

Has the European Community's (EC's) regulatory intervention in the formation and performance of interconnection agreements contributed to the promotion of interoperability of electronic communications networks ("ECNs")?2

This analysis was made in hindsight. Since 2002, the electronic communications markets have transformed further, competition has increased, the regulation of interconnection moved towards local loop unbundling regulation and considering new technologies such as voice over the Internet protocol ("VoIP"). The current state of the markets is not exclusively the consequence of the harmonization of the regulatory framework. Shifting business and technological demands play an equally important role in the further shaping of markets.

Thus, given the status quo, it is relatively easy to criticize the policy choices made by the EC regulator as regards the regulation of interconnection agreements in light of the desired interoperability of ECNs, as well as the consecutive decisions taken by the national regulatory authority ("NRA"), in terms of regulation and dispute resolution based on the national implementation of these measures.

The new regulatory framework ("NRF") was construed in a manner to be more technologically neutral and the emphasis shifted from attempting to break down the dominant position of the telecommunications operator ("TO") to controlling retail pricing and wholesale charges. The regulation of service provision to some extent aimed at establishing interoperability.3

---

1 On the meaning of the notion interoperability, see also Chapter 1 paragraph 1.1, and on the European Community (EC) context: Chapter 3 paragraph 3.4.1. The promotion of interoperability was a clear and unequivocal policy objective of the EC regulator.

2 See the Tenth Report on the Implementation of the Telecommunications Regulatory Package COM (2004) 759 final, p. 2ff.: “Competition is intensifying in most markets, bringing increased benefits in terms of price, quality and innovative services to consumers.”

On the market situation in the various Member States, see www.euractiv.com.

3 See the analysis of the technological and cost accounting aspects described in Chapter 2.
The socio-technological aspects of ECNs – infrastructure and technology (market position, consumers, innovation) – remained important factors of consideration for further regulation of the telecommunications markets.  

Although competition, access to infrastructure and innovation appeared to continue their gradual increase, policy and institutions kept intervening where this was considered necessary due to remaining market imperfections. By 2005-2006, the EC had not established that the competition rules of the EC Treaty, rather than sector-specific initiatives, could be fully applied to the electronic communications sector.  

In this context, it will be seen whether freely negotiated interconnection agreements are to be preferred over (strongly or lightly) regulated interconnection agreements. A distinction will be made between TO-OLO and OLO-OLO agreements. Lessons learned, especially from the enforcement (or not) of the primary duty to negotiate in the past, may thus lead to a reconsideration of the principle and the manner in which it is enforced as regards access and interconnection agreements.

9.2 The normative framework – synthesis

With respect to the justification of the main issue five questions were explored: (1) did the regulator's intervention in contracts' formation and performance between undertakings focus on warranting competition? (2) 

---

4 See, e.g., Communication from the Commission, The results of the public consultation on the 1999 Communications Review and Orientations for the new Regulatory Framework (provisional text), COM (2000) 239 final ('Communications Review') paragraph 2.3: 'There was also agreement among most commentators that the pre-definition of markets for interconnection was unlikely to be durable in the long term and therefore that more specific market definition was necessary (e.g. originating traffic, transit traffic, and terminating traffic).'

5 See Figure 1.1 in Chapter 1. See also the description of the new regulatory framework ('NRF') in Chapter 3.

6 See Chapter 3 paragraph 3.3.1.

7 Cf. Franken 2000/1 p. 148 who refers to various learned authors to posit that it does not lead to anything to state that freedom of contract is the main principle and everything that goes against it is an exception. Cf. Houben 2005, p. 327, who posits the same (referring to older literature). See also Nieuwenhuis 1999 p. 24-25: in his view the legal principle (i.e. freedom of contract) marks the starting point. As discussed in Chapter 1, paragraph 1.3.1 the principle is qualified by the notion of inequality of parties, see also Hartlief 1999/2, p. 2; Hondius 1999, p. 387, which inequality was also perceived as regards the telecommunications operator ('TO') and the other licensed operators ('OLOs'); Tijttes 1997 p. 378ff. argued that consumer protection rules should not apply to companies one-on-one.
Was the regulation of the parties’ obligations in respect of interconnection supported by clearly formulated and unequivocal regulatory aims? (3) Did market intervention conform to principles of adequate regulation, such as, in the field of interconnection, effectiveness and sustainability? (4) Could contract law itself prove to be an adequate means of bringing about interconnection? (5) Were there sufficient remedies available under contract law to the weaker party?²⁸

(1) Did the regulator’s intervention in contracts’ formation and performance between undertakings focus on warranting competition?

In principle, the answer is positive, as the focus of regulation definitely was on promoting competition, in addition to other regulatory objectives (see under (2)).

The primary interconnection rule

The question that was not addressed thoroughly at the time of the open network provision (‘ONP’) network or at the time of the NRF was whether and to what extent telecommunications regulatory objectives justified setting aside to considerable extent the freedom of contract, especially where it concerned dealings between undertakings that did not have SMP (in this book called ‘OLO’s), however ‘light’ the regulation under the primary interconnection rule appeared to be. Initially, the EC regulator put the emphasis on ex ante regulation of the market, which was combined with active intervention in interconnection contract formation no matter what parties. Although the EC’s stated preference was for the International Telecommunications Union’s (‘ITU’s’) first negotiations model (free negotiations), the EC felt market forces were not allowing for its application yet,⁹ not by 1998 at the time of the ONP framework and not by 2002 at the time of the NRF. Thus it applied a model of commercial negotiations that were made subject to a regulated framework (the third model) for all concerned. Clearly, the market parties had a voice in this, and it appears that perhaps the TOs with SMP may have had the dominant say as regards the application of the primary interconnection rule to all parties rather than just the TO.¹⁰ The regulated commercial negotiations model therefore

---

²⁸ These questions centre on important normative issues that must be weighed objectively, see Chapter 1 paragraph 1.4.1.

⁹ See for a description of the negotiations models: Chapter 3 paragraph 3.2.2.1.

¹⁰ See the Communications Review paragraph 2.3 in which it was stated: “There was a broad consensus that primary interconnectivity rules of the current regulatory framework remained valid in the new framework and thus that the obligation and right of all parties to negotiate interconnection, as well as regulatory powers of dispute resolution should be maintained.”
remained symmetrical: both the TO and OLO had to negotiate an interconnection agreement upon request of the other party and hence the right/obligation applied mutatis mutandis between OLOs.\textsuperscript{11}

The detailed duties in respect of contract formation proved to be a rather unusual tool to establish and enhance competition in the telecommunications markets and the scope of the duty to negotiate interconnection was not altogether clear.\textsuperscript{12} National law, for instance the 2004 Dutch Telecommunications Act (Telecommunicatiewet, 'Tw'), aimed at broadening the scope of the duty to negotiate to service provision, due to an incorrect interpretation of the NRF, in particular Articles 4 and 5 Access Directive.\textsuperscript{13} This impacted the position the NRA took on the formation and negotiation of interconnection agreements under national law between OLOs.\textsuperscript{14}

The secondary interconnection rule

The ONP principles were used also to formulate the secondary interconnection contractual duties of the SMP undertaking.\textsuperscript{15} This approach had the characteristics of a set negotiations regime, with \textit{ex ante} and \textit{ex post} intervention. The formulation of the transparency obligation illustrated one of the problems with the regulation of access and interconnection: transparency was formulated as a leading principle, but, the NRA received hardly any guidance as to how to apply and impose this principle in interconnection situations and discussions arose nationally regarding the NRA's competences.\textsuperscript{16}

\textsuperscript{11} See, extensively, Chapter 3 paragraph 3.4.12 and paragraph 3.4.2.2. See also Chapter 6, paragraph 6.3 on good faith negotiations and contract law.

\textsuperscript{12} \textit{Cf.} Communications Review paragraph 2.3 as regards the duty of the TO with SMP to negotiate access: "There was also much criticism of the proposal to impose an obligation to negotiate access on SMP operators. New entrants argued in favour of maintaining an obligation to provide access, and considered an obligation to negotiate would not be taken seriously by operators with SMP, and therefore be ineffective. Others - including cable operators - argued that the prospect of regulatory intervention where negotiations broke down meant that an obligation to negotiate access would in practice have the same effect as an obligation to provide access, since service providers would not negotiate seriously, but wait for the regulator to impose a price."

\textsuperscript{13} See Chapter 4 paragraph 4.4.3.

\textsuperscript{14} See Chapter 5 paragraph 5.4.1 and Chapter 8, in particular paragraph 8.2.2.1.

\textsuperscript{15} See Chapter 3, paragraph 3.3.2.1.

\textsuperscript{16} The relevant clause provided that the NRA could require operators to publish specified information, regarding accounting, technical specifications, network characteristics, terms and conditions for supply and use and prices, without specifics. \textit{Cf.} Chapter 7.
The Commission had difficulties in balancing the interests of the stakeholders and was faced with criticism from TO’s who had SMP as regards the (continued) imposition of asymmetrical obligations under the NRI.\footnote{See Communications Review: “Opinions were divided on the extent to which asymmetric obligations in respect of interconnection remained necessary. Some incumbents argued that the incentives to interconnect were the same for all market players, and therefore equivalent obligations should apply to all. New entrants and regulatory authorities disagreed, arguing that the incentives, especially in call termination, remained fundamentally different because of the ubiquity of the incumbent’s network.”}

As regards the secondary interconnection rule, the emphasis on regulation of contracts did not shift significantly (with a few exceptions, one for the purpose of this research being a shift of intervention in the RIO). However, the requirement of market analysis added a pre-qualification test for NRAs and the Commission to determine whether intervention in such markets (including in the contracts between the market parties) could be justified, and, thus, shifted the timing of possible intervention.

The purpose in line with the regulatory objectives remained to provide the market parties and the NRA guidelines for numerous access and interconnection issues perceived to threaten the (further) opening of markets, whilst taking into account the administrative law principles enshrined in Community law.

**Contract law aspects**

The regulation of interconnection did not take into account the civil law aspects of interconnection agreements. Rather, the approach was based on a mix of general competition law and sector-specific regulation. In this book, a discussion was offered on the contractual side of access and interconnection agreements.

**Other regulated markets**

By way of comparison, in the utility sectors, different systems for negotiating access were used and promoted.\footnote{Cf. Chapter 3 paragraph 3.5.} Having looked briefly at other regulated markets, it can be concluded that the regulation of telecommunications interconnection agreements has been rather sophisticated, likely due to the very different market composition. Interconnection regulation impacted heavily on the freedom to contract at the wholesale level.
(2) Was the regulation of the parties' obligations in respect of interconnection supported by clearly formulated and unequivocal regulatory aims?
The answer is: to some extent. The regulatory aims were made clear from the outset. For the NRI, these included: the promotion of an open and competitive European market (discussed above), for the benefit consumers and the consolidation of the internal market in an environment of increasing convergence. The regulation based thereon had to conform with four principles, notably simplification and consolidation of the ONP framework, neutrality with respect to technology, enhancement of sector-specific rules and strengthening of the supervisory powers of the Commission (I will focus on the first two hereinafter as the last do not necessarily conflict with contract law). Regulation would become lighter. But, where the regulator put more emphasis on the technology progress and the consumer protection rationale, in fact it kept concentrating on the anti-monopoly rationale.

Legislative history and simplification and consolidation
It was observed that the objectives must be clear from the legislative history and must not be open for different interpretations. In the legislative history of the Interconnection and the Access Directives, neither a reference to the freedom of contract principle under civil and common law, nor a mention of the desirability to look at this principle in light of telecommunications regulation was found. The Commission thus took for granted that freedom of contract may be set aside, even between OLOs at the wholesale level.

Besides, there was a marked lack of clarity as regards the scope of the meaning of ‘access’, ‘interconnection’ and ‘interoperability’, which in the
Netherlands raised issues as regards the applicable statutory rights and obligations of the stakeholders. In the course of this research it was not possible to identify an unequivocal discussion explaining the objective of imposing a duty to negotiate on professional parties and whether this duty would amount effectively to a duty to contract, or a 'lighter' duty.

Nor was a satisfactory analysis provided by the regulator on the desired intervention in the reference interconnection offer ('RIO') by the NRA. It was not defended in detail, why such far-reaching measures were needed, nor was it investigated what the positive results of such action would be.

In terms of the status of interconnection agreements and especially the negotiations leading to such agreements, the Interconnection and the Access Directives were, at best, ambiguous, in terms of choosing what would be the most appropriate model for regulation. The Interconnection Directive had presented an unprecedented possibility of third party intervention in the process of contract negotiations. In the EC's view, the inequality of the parties justified both forms of *ex ante* and *ex post* intervention. In the recitals to the Access Directive, the EC stated to be resigned to freely negotiated interconnection agreements. It is unclear what the Commission meant where it contemplated that there should be no restrictions that would prevent companies from negotiating interconnection agreements, since, presumably, under the prior regime, no such restrictions could exist by law. The recital also stated that negotiations must be performed in good faith. But, it was nowhere made clear what this meant. When the Commission referred to good faith negotiations, it did not become clear whether it envisaged contractual good faith, or whether it tried to introduce a public law good faith notion emanating from EC regulatory principles that, in fact, set aside the contractual good faith notion.

From this perspective, the strong interest in interconnection contract formation was not clearly formulated or unequivocal. Arguably, the Commission implied the intent of a limited harmonization of contract law principles in the context of the formation and performance of interconnection agreements as part of the objective of the opening up of the telecommunications markets, without having regard for similarities and differences at the national level.

---

24 Cf. Chapter 3 paragraph 3.4.2 and Chapter 4 paragraph 4.2.
25 See Chapter 3 paragraph 3.4.2.2.
26 See, for the discussion of the good faith principle, Chapter 6 paragraph 6.3.
Technology neutrality

The NRF enhanced technological neutrality by increasing the scope of the definitions and – to some extent – expanding on new convergence and new technologies. It made no difference if enabling technologies or new technologies were at stake. It could be inferred from the approach of delineating a number of markets, that regulation to some extent remained technologically dependent, since it would depend on the market definition and market analysis whether specific obligations for SMP undertakings would be applicable.\(^27\)

Besides, it would be difficult to take into account future developments, so that the technological aspects relevant to the actual access or interconnection agreements could be left to the parties’ discretion as much as possible.

(3) Did market intervention conform to principles of adequate regulation, such as, in the field of interconnection, effectiveness and sustainability? The answer is: not entirely. Where it concerns the secondary interconnection rules, the SMP regime is much broader in scope than the topic addressed in this book, so care is needed when answering the question.

The EC regulator introduced a number of specific measures in terms of interconnection contract formation and intervention in the case of SMP providers that were without precedent, and from a contract law perspective, the EC did not consider whether the stakeholders would have alternatives under contract law to achieve interconnection – which perhaps was not illogical, since the economic analysis led to the identification of possible network externalities.

However, as regards the primary interconnection rule, it would have made sense for the EC to reconsider it very carefully at the time of the Communications Review (and perhaps it should reconsider it when it reviews the NRF).

Nor did the EC investigate whether divergences in the laws of the Member States (especially administrative law) could lead to varying – possibly unwelcome – results in NRAs establishing the rules and conditions for access and interconnection in different countries, rather than leaving such matters to the courts. The EC regulator and the European Regulators Group (‘ERG’) did not qualify or consider the legal relevance of the RIO in much detail either.

\(^27\) See for the market analysis Chapter 5 paragraph 5.3.
The NRA was given far-reaching competences in the field of facilitating the formation of interconnection agreements, both in terms of setting timelines for the process to be completed and even the possibility of fixing the contract terms, but there were no reports identified on the effectiveness of the NRA in this respect.28

As regards sustainability, the contention is that it is not in anyone’s interest if the EC regulator comes with a fresh overhaul of regulation every few years, unless this leads to true simplification. Less than five year lapsed between the ONP framework and the NRF. The Commission considered a review of the NRF for 2006, which is less than four years after the NRF.29 Is the market helped with more regulation, even if this is designed to lessen regulation and simplify the regulatory framework? My subjective preliminary answer is negative, since this will lead to renewed uncertainty with the market players.

As regards the adequacy of the EC regulation and the subsequent implementation in the Netherlands’ law, in particular its effectiveness and sustainability, the contention was that effectiveness could be measured by, for instance, continuously monitoring the market structure, the position of the stakeholders and the emergence of viable services and sustainability, for instance, by looking at how often regulation is modified, or withdrawn.30

It could not be established in case law that the TO was inclined to enter into interconnection agreements with OLOS sooner when confronted with the threat of litigation as a result of the duty to negotiate; there is no large body of case law on interconnection contract formation disputes between OLOS; nor did the regulatory intervention in the RIO appear to have been very successful.31 As time progressed, disputes often related to pricing and sometimes to scarcity, so the emphasis of regulatory intervention clearly lied in enforcing the secondary interconnection rules.32 Admittedly, this may either show that regulation was very effective (i.e. opening up of the market occurred and few disputes were escalated), or it may show that the regulator relied more than it should have on self-regulation by the parties to negotiate...

28 The justification for this was discussed in Chapters 3 and 4.

29 At the time of writing the status of the presumed NRF review was not known. See for a brief discussion of the Commission’s supervision of the implementation of the NRF, e.g., Chapter 4 paragraph 4.1.

30 One of the starting points for the NRF was simplification of the regulatory framework, see Chapter 3 paragraph 3.3.3.2.

31 See Chapter 7, in particular paragraphs 7.3 and 7.5.1.

32 Cf. the overview of disputes in Chapter 8.

441
Interconnection Regulation and Contract Law

a commercial agreement. In my view, there is no conclusive evidence for either position.

Question marks can be placed with the sustainability of the actions of the NRA as regards access and interconnection issues – at least in the Netherlands. The position is that the NRA's rights in regulating SMP undertakings were broad and impacted the position taken on both the process of contract formation and the terms used. These competencies of an administrative body to intervene in private contracts were not complemented by competencies in respect of the contractual law aspects of interconnection agreements. Moreover, the NRA was not able to address the civil law consequences of non-performance by the TO, first, because it considered itself an administrative body so, unlike the civil courts, it was not equipped to hear matters based on principles of contract law; and second, because the ONP Framework nor the NRF afforded it any competencies in the field. In some cases it attempted to intervene by defining a non-performance issue as the absence of an agreement. This provided the OLO with an ineffective weapon to claim performance: it could address both the NRA and the civil courts, yet risk that its claim be held (partly) inadmissible.

The application of principles of administrative law has proven cumbersome in solving access and interconnection disputes between undertakings.

It cannot be said either that at the national level, the regulator was pushing away from a commercial negotiations model subject to a regulatory framework to a fuller commercial negotiations model, with less NRA intervention. NRA intervention, both ex ante and ex post, remained the norm. In that way, a reasonable efforts obligation to negotiate an interconnection agreement could (still) be turned into an obligation that resembled a results obligation, to effectively bring about interconnection, even between OLOs.

As regards the primary interconnection rule, the analysis of case law has not shown a significant body of disputes were the NRA set the terms for interconnection between the parties, failure agreement between them - not even if one of the parties was the TO. The primary interconnection rule appears to have been less contentious than the secondary rules.

33 Cf. Chapter 4 paragraph 4.4.3 and Chapter 8 paragraph 8.2.2.1.
34 Cf. the Seventh Report, p. 15: "(...) and new entrants in the market request increased pro-activity and ex ante action by regulators (...)." But the Commission is not referring here necessarily to contract formation.
If the purpose of requiring the TO to publish the RIO was warranting non-discrimination and facilitating the negotiations process, this research expressed doubts whether these goals could be achieved by *ex ante* regulatory intervention. The analysis of the process and the result of the RIO review in the Netherlands, leads to the rather critical conclusion that the NRA has not been very successful in making the terms of the RIO more transparent, facilitating swift contract formation and ensuring non-discrimination.

It must be added that this book has concentrated much less on access regulation and the regulation of (special) access arrangements under the secondary interconnection rules. It is clear that the NRF imposed heavier and more detailed obligations on the SMP undertaking as regards the provision of access to third parties than under the primary interconnection rule.

(4) Could contract law itself prove to be an adequate means of bringing about interconnection?
The answer is: to a large extent, yes. Contract law - minor exceptions left aside – provides an adequate and sufficient framework for these types of contracts. Seen from a contract law perspective, their negotiation, formation, performance and termination is not that atypical, where it concerns OLOs.

What makes the regulated process of interconnection contract formation different from other forms of regulated duty to contract is that undertakings not only were put under a duty to negotiate (the primary rule), but were put on leash, where it concerned both regulatory the imposition of NRA remedies in the absence of a commercial agreement being reached between them and intervention in the RIO (the secondary rule).

The primary interconnection rule
Under the primary interconnection rule, it is difficult to sustain that an administrative body should be actively involved in their negotiation or

35 *Cf.* Communications Review paragraph 2.3: "As with the access discussion, there was disagreement over the criteria for applying cost-orientation and non-discrimination obligations to operators with market power. Regulators and new entrants generally argued in favour of retaining an obligation to provide interconnection at cost-oriented prices for all SMP operators. Incumbents and other larger operators supported the proposal to impose such obligation only on operators who were dominant on the relevant market."

36 *Cf.* Chapter 7, in particular paragraph 7.3.

37 See Chapter 6.
dispute resolution in respect of performance and termination when it concerns two OLOs, since by and large each will have an economic interest to conclude an agreement. Moreover, where it concerns negotiations with the TO under the primary interconnection rule, if the objective is to emphasize commercial negotiations in that possibly asymmetrical situation, then regulatory restraint and reliance on the courts to apply the principle is still justified.

As regards negotiation, it must be considered whether principles such as good faith can help the OLO in entering into an agreement with the TO. The findings on the application of the contract law principles to interconnection agreements where rather positive.\(^{38}\)

Conflicts in the pre-contractual phase also could well be left to resolution by the courts, although the emphasis would have to be on an order to continue negotiating rather than the award of financial damages due to the TO’s failure to negotiate in good faith, or breaking off the negotiations in good faith.

Even though the foregoing could be different in the event the telecommunications regulatory framework would not incorporate a duty to negotiate in good faith (either in the TO-OLO or the OLO-OLO situation), the NRA would then face exactly the same problem: it would lack a competence to intervene.

The regulatory framework contained no clear rules for NRAs how to determine contractual performance, and their competences in the field were not clearly delineated from the existing competences of the civil courts.\(^{39}\) It was likely that courts (and this is probably true for all EU Member States) would be better equipped than NRAs to deal with issues of contractual non-performance, except for disputes regarding tariffs with SMP undertakings, which should remain with competition agencies or NRAs as their competence and expertise in that area was clear (even though their decisions have been contested).

Thus, with respect to conflicts regarding the performance of the agreement – with the exception of cost orientation and pricing issues – again there may be no good reasons why NRA intervention should be preferred over adjudication to the courts.\(^{40}\)

\(^{38}\) See Chapter 6, in particular paragraph 6.7.

\(^{39}\) This was discussed in Chapter 5.

\(^{40}\) See Chapter 5 paragraph 5.5.
Electronic communications regulation does not provide for the consideration by NRAs of post-contractual interconnection issues - such as damage claims. This then is left to the courts. Since there is not one forum for the settlement of access or interconnection contract issues, this could create unwarranted differences in the application of contract law.

The secondary interconnection rule
Only where specific anti-competitive behaviour is identified – under the secondary interconnection rules – could *ex ante* or *ex post* intervention in contracts be justified; albeit that this could also be court enforced. Besides, it should be borne in mind that unwillingness to provide a facility is not always necessarily evidence of abuse of a dominant position. It was briefly discussed whether general competition law would in that case provide a means to obtain interconnection, and thus achieve interoperability, but no conclusive answer was given. This topic is subject to further investigation and consideration in legal literature.41

When it involves professional undertakings contract law does not generally provide for the mandatory publication of general terms and conditions, such as a RIO, or for intervention in offers or standard terms beforehand.42

Certain contract law principles such as reasonableness and invalidation of unfair contract terms help to promote competition between TOs and OLOs, although expectations should not be too high, since the OLO is not a consumer within the meaning of consumer law and is not necessarily the ‘weaker’ party.43

In sum, the interpretation and application of contract law principles would better be left to the courts, unless it would be established that NRAs would obtain competency in this respect (which this book does not defend; nor alternative dispute resolution). No indication was found that courts would not apply certain EC regulatory principles – such as transparency or non-discrimination – in the judging of interconnection, or would apply them differently than an NRA would. Courts have proven to be able to apply, develop and interpret statutory obligations and principles, and solutions to timing may just as well be incorporated in the law, for instance through the creation of special chambers or the application of summary proceedings. Conversely, thought must then be given to civil courts applying administrative law principles.

---

41 See e.g., Larouche 2004.  
42 See Chapter 6 paragraph 6.5.1.  
43 Cf. Tijttes 1997, p. 387. See also below under (5).
(5) Were there sufficient remedies available under contract law to the weaker party?

The answer is to a large extent: yes. It must be considered first, what the meaning is of ‘weaker party’. It is a different notion from the meaning attached to parties, for instance, under consumer law. ‘Weaker party’ is understood to be an ECN operator or ECS provider who is confronted with unreasonable demands or offers by the other party in an access or interconnection agreement or negotiation (often the SMP undertaking).

It is evident that there have been many disputes regarding interconnection, especially tariffs and refusal to deal. It is also evident that there were not that many circumstances, where the obligation to conduct commercial negotiations was sought to be enforced against a TO.

The primary interconnection rule

Even though the EC regulator, who looked at these contracts from different angles, perceived that there was an inequality of the parties – caused for instance by network externalities, scarcity of resources or market behaviour, it is still difficult to sustain that this should lead to a situation whereby a third party, the NRA, should intervene actively in the contract formation process, instead of civil courts. Given the statutory duty for TOs to negotiate with a public OLO seeking access, and the same duty applying to OLOs, courts could just as well play an active role in the pre-contractual phase. It is likely that courts would consider the position of the TO towards an OLO differently from the position of the OLO towards another OLO. Contract law does take into account issues, such as the relative position of the parties, the scope of their anticipated performance and whether or not they would be under a (statutory) obligation to offer or perform.

The ONP framework and the NRF left some room for interpretation as regards how an OLO could effectively enforce an order from the NRA on interconnection contract formation. Sometimes, this led to lack of clarity as to what institution was competent to decide on a contract formation or performance claim.

It appeared that – in light of existing telecommunication regulation – the courts have been reluctant to intervene in the interpretation of

---

44 See on inequality of the parties, Chapter 1; on intervention by the NRA in the contract formation, Chapters 3 and 4; on intervention by the NRA in the RIO, see Chapter 7.

45 Cf. Chapter 6 paragraph 6.3.6.

46 See, e.g., Chapter 5 paragraph 5.5.3 and Chapter 6 paragraph 6.6.3.2.
interconnection contractual obligations, rather leaving these issues to the NRA. But as was discussed previously, the NRA was not always considered competent in deciding thereon. And there appeared to be no coordination between the two institutions. This effectively created a gap in dispute resolution, where there existed overlap in other areas. It would be helpful if the NRA were to publish guidelines how it would see the delineation of its competence in comparison with the civil courts.

Sufficient means that an OLO not only would have recourse to civil courts, but would also be in a position to enforce a judgment against the TO or another OLO. This should not be problematic under contract law as regards negotiation, performance and termination, as was established in Chapter 6.

The secondary interconnection rule
Where it concerns pricing issues or intervention in the RIO, it is more difficult to envisage what remedies would be available to OLOs against an SMP undertaking before the courts. They could certainly claim performance or damages, but courts would be extremely hesitant to set the terms of the contract in this case in place of the offer made by the TO. Besides, unlike NRAs, courts have no competence to intervene at their own initiative. A very close cooperation with competition authorities would be required, but it does appear to make more sense to leave these issues exclusively to consideration by the competition authority (or the NRA).

9.3 Specific observations on the main question
One of the main research objectives was to establish whether both from the regulator and the market’s perspective, the time has come to determine again whether freely negotiated access and interconnection is to be preferred over regulated agreements, especially in light of the primary interconnection rule.

Besides, it must be remembered that there have been complaints that: "(...) civil procedure is inefficient and only very partially fulfils what is expected of it. There is a striking unanimity about its deficiencies: proceedings take too long, lawyers cost too much, the scarce resources available are wrongly distributed, the procedural law is too formalistic so that even specialists make mistakes unnecessarily often, and the legislation is geared too much to the most complicated cases, while an estimated three quarters of these are relatively simple as regards procedural law." Asser et al. 2003, p. 330. See Chapter 5 paragraph 5.5.3.1.

See Chapter 1 paragraph 1.4.2.
Both under the old ONP and the NRF regime, the law regulated the primary interconnection rule in significant detail. Besides, there was substantial discretion in intervening *ex ante* and *ex post* under secondary interconnection rules: there remained heavy reliance on the publication of RIOs and the NRA intervened actively in terms of tariffs. Provided the NRA adhered to the principles formulated at the EC level, it was free to change the scope and provisions of the interconnection agreement between the TO and the OLO, if a dispute was brought before it (and to some extent: at its own initiative).

It is not argued that as competition increases, regulatory intervention should necessarily decrease, although a critical introspection by the NRA remains important in this respect.\(^\text{50}\)

It is not contested that sector-specific regulation to warrant competition remains of importance, that it serves various purposes, including the promotion of supplier access, customer access and transactional access, especially where it concerns new services, market analysis and predatory pricing issues.\(^\text{51}\)

However, at the wholesale level there is no immediate need for a statutory duty to negotiate at all levels, especially where to OLOs are involved - including where it concerns access obligations.\(^\text{52}\) Thus, a preference for *ex post* intervention in the formation and performance of interconnection agreements was expressed, for reasons set forth in this Chapter.\(^\text{53}\) In my view, the time has come to accept that there needs to be less reliance on *ex ante* regulation of the contract formation process and thus that freely negotiated access and interconnection agreements, including for VoIP, are preferred.

It is acceptable that heavier duties to negotiate would apply for SMP undertakings.\(^\text{54}\) The duty to negotiate may continue to be an incentive on the

---

\(^{50}\) Cf. OFCOM's approach who is dedicated to prevent frivolous and unnecessary intervention. See Dick 2005, p. 78.

\(^{51}\) See Chapter 3 paragraph 3.1 second last sentence.

\(^{52}\) Cf. Chapter 3 paragraph 3.4.2.4 on the additional obligations for significant market power ('SMP') operators.

\(^{53}\) Cf. The Ninth Report on the Implementation of the Telecommunications Regulatory Package, COM (2002) 695 final: "The general trend is towards less detailed ex ante regulation, for operators without market dominance, and more ex post checks." It is not certain that leading authors on EC law will fully agree with this position. For interesting positions on *ex ante* and *ex post* intervention (although not restricted to interconnection agreements): see, e.g., Larouche 2004, Nihoul, Rodford 2004. *Ex post* intervention and sector-specific regulation are not mutually exclusive: see Larouche 2002, p. 131ff.

\(^{54}\) See Chapter 5 paragraph 5.3.
TO to conduct and conclude the commercial negotiations, and if preserved, it may be added in the law that such negotiations must be conducted in good faith and in a serious manner. Establishing the burden of evidence as regards the reasons for breaking off the negotiations, would enhance the effective enforcement of remedies against a party walking away from the negotiations. Perhaps introducing penalties on SMP undertakings as a stick to conclude such agreement could increase the effectiveness of the duty, although utmost care must be exerted in considering whether and if so, what, penalties could be justified (and if the duty should be maintained at all). Even if there were no duty to negotiate in the law, hence if freedom of contract became again the norm as regards access and interconnection, it is not that evident that this would always lead to a refusal to deal from the TO. The gap in inequality between TOs and OLOs may be closing.

There is much to be said for considering the economic aspects of access and interconnection and the effects they might have on the commercial viability of the contract; less so on the contract formation process. Doubtlessly, technological developments and considerations have an immediate impact on the formation, negotiation and performance of interconnection agreements. In that respect, they are no different from other ICT agreements that are not regulated, however. But, it should be noted that NRAs and the Commission appear to take more of an economic view on these types of contracts (whilst including their understanding of the technological aspects). I found it hard to apply technological considerations surrounding access and interconnection to the contracts, not only because of the inherent complexity and lack of clarity on standards, but also because technological development is constant (and probably, desirable). It is therefore difficult to distil conclusions regarding how the law should develop from technological progress in the electronic communications markets. This research attempted to identify a number of issues that must be taken into account, but did not ‘marry’ technological with contract law principles.\(^5\) Rather, the underlying thought was that the law should not hamper technological progress.

9.4 Recommendations

9.4.1 The role of the NRA

In addition to obliging Member States to have NRAs coordinate their efforts with the competition agencies, it would have been sensible if the NRF would

---

\(^5\) It has been stated in Chapter 2 that these aspects are very important.
have urged Member States to have NRAs also coordinate their decision making with civil courts and alternative dispute resolution bodies. Moreover, a more concerted coordination not only of policy objectives, but regulatory forbearance in the application of principles of dispute resolution, would be welcome.\textsuperscript{56} This could lead to a less prominent role for NRAs in interconnection contract formation and performance (with the possible exception of price control; unless that would also be left more to the competition agencies). Tariff regulation does not require regulated interconnection negotiations. Parties could well stay free in negotiating access, whilst simultaneously being subject to tariff regulation.\textsuperscript{57} All issues in respect of price control and price (but not service) discrimination should better be left to the NRA, who is better equipped to deal with this. In other words, the NRA should act more as a competition authority and less as a court.

9.4.2 The role of the Courts
Disputes relating to tariffs left aside, in my view civil courts should be able to deal with all matters surrounding access and interconnection, such as in respect of contract formation and negotiation, non-performance by one of the parties and termination. Courts should be helped, for instance by NRA guidelines on dispute resolution on the applicable rules or if they would establish a cooperation protocol with the NRA.\textsuperscript{58} Courts should also be required to decide within fixed terms and special decision making chambers could be established.

9.4.3 The RIO
If the active role of the NRA in respect of determining the terms of the RIO is maintained this should become more effective and improvements are possible. Or as the 2004 Tw states, if the NRA is to ‘give the company instructions with respect to the changes to be made’, then the NRA should be much better instructed in applying the ONP and NRF principles of non-discrimination, transparency, cost orientation and accounting separation pragmatically into a contractual relationship. It will not suffice to merely require from the NRA that these principles should be mentioned or taken into account in the review of the RIO.

\textsuperscript{56} Cf. Stern 2004.

\textsuperscript{57} See also Houben 2005, p. 18 on the enforcement of tariffs in civil law.

\textsuperscript{58} See also Vranken 1999, p. 86 who contends that courts should be directed more closely.
Moreover, if the right to intervene in the RIO were to be preserved, the NRA should do well in considering how the ONP principles interrelate with principles of contract law, such as that agreements must be performed in good faith.

Finally, it would be practical for NRA's to consider – taking into account the fact that it concerns agreements between two undertakings, even if there is a perceived inequality – important legal notions, such as performance, liability, warranties etc. from a contract law and not only a regulatory perspective.

9.4.4 Closing remark
Physical interoperability has increased and this is one of the main successes of the EC regulatory framework.59

There can be more hesitation as regards the question whether this success is also due to the intervention in the freedom of contract. Perhaps the time has come to balance that interest in further regulation, to prevent unnecessary regulatory intervention where the solution of disputes might well be left to commercial settlement by the parties as much as possible.

59 Cf., e.g., Lloyd, Mellor 2003, p. 124: "In many respects the attainment of interoperability can be seen as one of the success stories of the liberalized European telecommunications industry. With no apparent exceptions, every subscriber to a public communications network can connect to any other subscriber. Any problems and disputes tend to relate to questions of price rather than availability."
Bibliography

Adams, Browword 1995

Aghion, Bolton 1987

Akyürek-Kievits 1998

Allen 1991

Andenas, Zleptnig 2004

Arowolo 2005

Arnbak 1990

Arnbak, Mulder 2000

Arnbak 2004

Armstrong 1998

Armstrong 2002

Asser Hartkamp 4-I 1996
Interconnection Regulation and Contract Law

Asser Hartkamp 4-II 1997

Asser Hartkamp 4-II 2001

Asser et al. 2003

Atkinson, Barknekov 2000

Azcueneaga 1990

Bach, Sallet 2005

Bailey 1995

Baldwin, Cave 1999

Barendrecht, Van den Akker 1999

Bavasso 2003

Bavasso 2004

Baur, Henk-Merten 2003
Beale et al. 2002

Beatson, Friedman (eds.) 1995

Beese, Müller 2001

Bekkers, Smits 1999

Bekkers 2001

Berger 1999

Bergkamp 2003

Besen, Farrell 1994

Besen, Milgrom, Mitchell, Srinagesh 2001

Bishop, Walker 2002

Blouin 2000

Bock, Völcker 1998

Bohlin, Levin 1998

Bonell 1994
Interconnection Regulation and Contract Law

Borba LefÈvre, Doeleman 2005

Bouwman et al. 2004

Brandenburger, Janssens 2004

Brands, Leo 1999

Bratby, Strivens 1998

Braun, Capito 2002

Bright 1999

Brisby 2005

Brody, Polster 1998

Brody 2001

Bronckers, Larouche 1997

Busch et al. 2002

Cable & Wireless College 2000

Cameron 2002
Carter, Wright 1999

Cartwright 1991

Cave, Crowther 1996

Cave, Mason 2001

Cave 2004/1

Cave 2004/2

Cave 2004/3

Cawley 2004

Chen-Wishart 2005

Cherry 1998

Clarkson, Smits 1999

Clarkson, Smits 2003

Clements 1998
Interconnection Regulation and Contract Law

Correa 2001

Coudert 1995

Cuijpers 2004

Czarnota, Hart 1991

Damen *et al.* 2003

De Bijl *et al.* 2004

De Brauw 2001

De Kluiver 1992

De Rijke 2004

De Ru, Peters 2000

De Stree12003

De Stree12004

De Stree12005

De Vlaam, De Bruijn, Ten Heuvelhof 1997
Interconnection Regulation and Contract Law

De Vlaam, Maitland 2002

De Vries 1991

De Vries 2000

Dewan, Freimer, Gundepuli 2000

Dick 2005

Dodd 2002

Doherty 2001

Doing 1998

Dommering 1993

Dommering 1998

Dommering 1999

Dommering et al. 1999
Interconnection Regulation and Contract Law

Dommering et al. 2001

Dommering 2001/1

Dommering 2001/2
E.J. Dommering, “De Nieuwe Brusselse Telecommunicatie-richtlijnen”, *Computerrecht* 2001/1, p. 4-10.

Dommering et al. 2001/3

Dommering 2003

Donner et al. 1998

Dries, Gijrath, Knol 2003/1

Dries, Gijrath, Knol 2003/2

Drion 2005

Duvernoy, Desmedt 2005

Eccles 2002
Edens 2005

Esty, Geradin 2001

Eijlander 2005

Farr, Oakley 2002

Farrell, Saloner 1987

Faulhaber 2002

Fawcett 1984

Fleury, Smals 1997

Franssé 1997

Fredebeul-Krein, Freytag 1999

Freund, Ruhle 2002

Frieden 1996

Galbi 1998
Interconnection Regulation and Contract Law

Gandal 2002

Garzaniti, Liberatore 2004

Geppert, Ruhle 2004

Geradin, Kerf 2003

Geradin 2004

Geus, Hocepied 1997

Geus, Phoelich 2006

Gilbertson 2001

Giovannetti 2002

Gijrath 2001

Gijrath 1997

Gijrath, Tempelman 1997

Gijrath, Tempelman 1998
Gijrath, Huisjes 2001

Gijrath 2006

Goes, Koster 2004

Goldberg 2004

Goodman 2001

Gramlich 2002

Gramlich 2004

Grosheide 1996

Grosheide 2001/1

Grosheide 2001/2

Hammerstein, Vranken 2003

Hancher, Bartman 1998

Hancher, Lugard 1999
Hancher, Lavrijsen 2000

Hancher 2001

Hancher, Larouche, Lavrijsen 2003

Hartlief, Stolker 1999

Hartlief 1999

Hesselink 1998

Hesselink 1999

Hesselink 2004

Heun 2004

Hocspied 2002

Holmes, Kempton, McGowan 1996

Holznagel, Schulz 2003

Hondius 1991
Interconnection Regulation and Contract Law

Hondius 1999

Hondius 2001

Houben 1999

Houben 2005

Hovens 2005

Huisjes 1998

Huisjes 2002

Hummel 2000

ITU 2000

Jans et al. 2002

Janssen, Hancher, Roggenkamp 2000

Janssen, Mendys 2004

Janssen, Van Rossum 2004

Jew, Reede, Nicholls 1999
Interconnection Regulation and Contract Law

Jones, Carlin 2005

Kariyawasam 2001

Kaye 1990

Katz, Shapiro 1994

Kleinlein, Binder 2001

Knight, Bailey 1995

Koenig, Loetz 2002

Koenig, Bartosch, Braun 2002

Krans 2004

Lando, Beale 2000

Larouche 1998

Larouche 2000

Larouche 2002
Larouche 2004

Liebowitz, Margolis 1994

Lipsky, Sidak 1999

Lloyd, Mellor 2003

Long 1995

Long 2006

Loos 1996
M.B.M. Loos, Dienstverlening: de overeenkomst van opdracht, Consumentenrecht, serie Recht en Praktijk, Deventer: Kluwer 1996

Lorenz, Lübbig, Russell 2005

Madden, Savage 1998

Martinez Lange, Brokelmann 1998

Mason 2000

Mayen 2005

Mellewigt, Thiessen 1998
Interconnection Regulation and Contract Law

Michie 1998

Møllgaard, Kastberg Nielsen 2004

Muyser 2004

Naftel, Spiwak 2000

Neitzel, Müller 2004

NERA 2002

Nieuwenhuis 1979

Nieuwenhuis 1999

Nieszkens-Ipsording 1991

Nihoul 1999

Nihoul, Rodford 2004

Nikolinakos 1999

Nikolinakos 2001
Interconnection Regulation and Contract Law

Noam 2001

Noll 1999

O’Connor 1990

Ottow 1997

Ottow, Eeken 2001

Ottow 2002

Ottow et al. 2004

Ottow 2005/1

Ottow 2005/2

Oxera 2003

Perrazzelli, Fratini 1999

Petri, Göckel 2002

Piepenbrock, Müller 2000

469
Piepenbrock, Schuster 2002

Pijetlovic 2004

Pijnacker Hordijk 2005
W. Pijnacker Hordijk, “Providers staan interconnectie in de weg”, Automatiseringgids # 5, 4 February 2005.

Pijnacker Hordijk, Van der Bend, Van Nouhuys 2004

Pitt 1999

Polak 2000

Polak 2003

Prechal 1996

Prins 1995

Prins, Gijrath 2000

Quarantini 2005

Rädler, Elspaß 2004
Interconnection Regulation and Contract Law

Rapp 1999

Rathenau 1995

Reurich 2005

Riehmer 1998

Rijken 1994

Robinson 2004

Ryan 2003

Scanlan 1996

Scherer, Ellinghaus 1998

Scherer et al. 1998

Scherer 2000

Scherer 2004

Scherer et al. 2005

Schillemans 2003
Interconnection Regulation and Contract Law

Schillemans 2005

Schmitz-Morkramer 1999

Schuster 2005

Sidak 2004

Sitompoe1 1999
N. Sitompoe1, “Carrier Pre-selectie”, Computerrecht 1999/6, p. 270.

Sitompoe1 2000

Slot, Wissink 1999

Smits 1991

Smits 1992

Smits 1999

Smits, Stijns 2000

Smits 2001

Smits 2003

Smits 2004
Interconnection Regulation and Contract Law

Snell, Andenas 2003

Spoerr 2000

Stallings 1991

Stegh 2002

Steinwärder 2005

Stern 2004

Stiglitz 2000

Streefkerk 2004

Strivens 2003

Stroink 2002

Stuurman 1995

Sutherland 2001/1

Sutherland 2001/2
Tarrant 2000

Taylor 2001

Taylor 2005

Tempelman 2001

Ten Berge 1997

Thal 1988

Thuswaldaner 2000

Tjittes 1994

Tjittes 1997

Tjittes 2005

Treitel 2003

Tuthill 1997

Valcke, Stevens, Dumortier 1999
Van Beelen, Rolland 2003

Van Bijnen 2004

Van Bijnen 2005

Van Breugel, Daalder 1999

Van Cuijlenberg, Verhoest 1998

Van den Beukel 1999

Van Dam 1994

Van Dam, Wessel 1994

Van Damme, Hancher 2000

Van de Meent 1997

Van den Hoven van Genderen 2003

Van der Klis 1997

Van Dunne 1991

Van Eijk 1998
N.A.N.M. van Eijk, “ONP voor de kabel”, Mediaforum 1998/9, 244.

Van Geffen 2005
S.M. van Geffen, “De omvang van het algemene recht op onderhandeling onder
Interconnection Regulation and Contract Law

art. 6.1 Tw", Computerrecht 2005/6, p.305-312.

Van Klink, Prins 2002

Van Marissing 1995

Van Marissing 2004

Van Stralen, de Roover 1995

Vercoulen 1999

Vranken 1988

Vranken 1999

Vranken 2000/1

Vranken et al. 2000

Vranken et al. 2002
Vranken 2004/1

Vranken 2004/2

Walden 2001
Walden, Angel 2001

Walden, Angel 2005

Waters, Watts 1997

Weisshaar, Koenig 1998

Wessels, Van Wechem 2003

Whitfield 2005

Wielisch 2004

Wissink 2001

Wissman 2003
Interconnection Regulation and Contract Law

**Wit 2004**

**Wrona 2005**

**Xavier 1998**

**Yarbrough 2001**
Overview of cases

European Court of Justice (‘ECJ’)
ECJ 25 November 2004, Case C-109/03, Mediaforum 2005/3, March 2005, p. 113 (KPN Telecom/Denda Multimedia);
ECJ 22 May 2003, Case C-462/99 (Connect Austria/Telekom-Control Kommission and Mobilkom Austria);
ECJ 26 November 1998, Case C-7/97, Jnr. 1998, ECR I-7791 (Bronner);
ECJ 13 November 1990, C-106/89, Jnr. 1990, p. I-4135, NJ 1993, 163 (Markeasing);
ECJ 10 April 1984, Case C-14/83, [1984] ECR 1891 (Von Colson and Kamann/Land Nordrhein-Westfalen);

Court of First Instance (‘CFI’)
CFI 17 September 2002, C 334/00 (Tacchoni SpA/HWS GmbH);
CFI 25 March 1999, Case T-102/96, [1999] ECR-II 753, 815ff. (Genor v Commission);

Commission
Commission Decision 10 July 2002, Case Comp/M.2803 (Telia/Sonera);

Supreme Court (Hoge Raad, ‘HR’)
HR 12 August 2005, C04/163 (CBB/IPO);
HR 20 February 2004, RvdW 2004/34, (DSM/Fox);
HR 4 October 2002, NJ 2003, 257 (Schwarz/Gnatovic);
HR 31 May 2002, C00/332HR LJN AE3437 (Saramea/Telfort);
HR 11 January 2002, NJ 2003, 255 (Fraanje/Göttä);
HR 30 November 2001, JOL 2001, 710;
HR 30 November 2001, JOL 2001, 709;
HR 16 May 1997, NJ 2000, 1 (with note Brunner) (Consumentenbond/EnergieNed);

479
Interconnection Regulation and Contract Law

HR 4 October 1996, NJ 1997, 65;
HR 14 June 1996, NJ 1997, 481 (De Ruiterij/MBO);
HR 26 April 1996, NJ 1996/728 (Gemeente Rijssen/Universal Star Productions; Rasti Rostelli);
HR 22 December 1995, NJ 1996, 300 (ABP et al./FGH et al.);
HR 15 December 1995, NJ 1996, 509 (Pampers/Huggies);
HR 21 April 1995, NJ 1996/462 (Boehninger/Kirin Amgen);
HR 24 September 1994, NJ 1994, 174;
HR 24 May 1994, NJ 1994, 574 (Nederlandse Gasunie/Gemeente Anloo);
HR 17 September 1993, NJ 1994, 173;
HR 31 May 1991, NJ 1991, 647 (Vogelaar/Ski);
HR 23 October 1987, NJ 1988 1017 (C.J.H.B.) (VSH/Shell);
HR 18 June 1982, NJ 1983, 723 (Plas/Vaiburg);
HR 13 March 1981, NJ 1981, 635 (Ermes/Havilte);
HR 16 December 1977, NJ 1978, 156 (with note ARB);
HR 17 December 1976, NJ 1977, 241 (Bunde/Erickens);
HR 19 May 1967, NJ 1967, 261, (Saladin/HBU);
HR 15 November 1957, NJ 1958, 67 (Baris/Riezenkamp).

Court of Appeal (Gerechtsbof, 'Hof')
Hof The Hague 11 March 2004, 03/1605, LJN AO5399 (nl.tree/KPN Telecom et al.);
Hof Amsterdam 22 November 2001 court docket no. 441/94 (Liebeswerk Kirche/CAP Gemini);
Hof Amsterdam 28 September 2000 (Scaramea/Telfort), not published;

Appellate Board for Businesses (College van Beroep voor het Bedrijfsleven, 'CBB')
CBB 22 December 2005, AWB 05/83, 05/85. 05/86 and 05/88, LJN AU8623 (OPTA et al./UPC);
CBB 21 December 2005, AWB 05/91 and 05/581, LJN AU8622 (KPN Telecom/Tel2);
CBB 11 November 2005, AWB 0/425, LJN AU6002 (Nozema/Broadcast NeuCo Two);
CBB 16 June 2005, LJN AT7789 (KPN Telecom/ Versatel);
CBB 16 June 2005, AWB 04/754, LJN AT7786 (KPN Telecom/OPTA);
CBB 11 May 2005, LJN AT6099 (KPN Telecom/MCI);
CBB 27 April 2005, LJN AT6100 (Wanadoo/KPN Telecom);
CBB 8 March 2005, LJN AT0965 (EnerTel et al./KPN Telecom);
CBB 24 November 2004, Mediaforum 2005/3, no. 12 (Yarosa/T-Mobile);
CBB 16 April 2004, AWB 03/1363 and 03/1401, LJN AO8356 (Tiscali/KPN Telecom);
CBB 3 December 2003, TJ 201 (UPC/OPTA);
CBB 19 November 2003, AWB 03/622, LJN AO1107 (Versatel et al./OPTA);
CBB 25 April 2001, Mediaforum 2001-6 nr. 28 (KPN/OPTA and Dutchtone).
Interconnection Regulation and Contract Law

Court (Rechtbank, ‘Rb.’)

Rb. Rotterdam 25 August 2005, case no. 04/3391, Ljn AU2878 (Versatel/OPTA);
Rb. Rotterdam 25 August 2005, case no. 04/3387, Ljn AU2876 (KPN/OPTA);
Rb. Rotterdam 8 July 2005, 04/1691, Ljn AU9579 (KPN Telecom/OPTA);
Rb. Rotterdam 23 June 2005 LJN 9578 (KPN Telecom/OPTA);
Rb. Rotterdam 28 December 2004, Ljn AT0370 (Infotel/OPTA);
Rb. Rotterdam 23 December 2004, Ljn AT0606 (Tele2 et al./OPTA);
Rb. Rotterdam 23 December 2004, Ljn AS1892 (EDC/BULRIC);
Pres. Rb. The Hague 1 June 2004, Mediaforum 2004/9, no. 31 (Pretium/KPN);
Rb. Rotterdam 20 April 2004, Ljn AO8431 (Versatel/OPTA);
Rb. Rotterdam 17 February 2004, 02/0984, Ljn AT7604 (KPN Telecom/OPTA);
Pres. Rb. Rotterdam 29 January 2004 03/3646 VTELEC, Ljn AO2740 (KPN Telecom/OPTA);
Rb. Rotterdam 26 January 2004, Ljn AO 3321 (Tele2/OPTA);
Pres. Rb. Rotterdam 18 December 2003, Mediaforum 2004/4, p. 137 (KPN Mobile/OPTA);
Rb. Rotterdam 9 October 2003, Ljn AL8228 (KPN Telecom/OPTA);
Pres. Rb. Rotterdam 17 July 2003, 03/1400-HRK, Ljn AI0514 (KPN Telecom/OPTA);
Rb. Rotterdam 5 June 2003 not published (Tele2 Nederland/OPTA);
Rb. Rotterdam 25 April 2003, Mediaforum 2003/9, Computerrecht 2003/4 (O2/KPN Mobile and OPTA);
Pres. Rb. Rotterdam 12 February 2003 Mediaforum 2003/5 (Yarosa/OPTA);
Rb. Rotterdam 31 January 2003 Mediaforum 2003-4 (KPN/OPTA);
Pres. Rb. Rotterdam 29 November 2002, Mediaforum 2003/2 and Computerrecht 2003/2 (Dutchstone et al./OPTA);
Rb. Haarlem 8 August 2002, 85015/KG ZA 02-400, Ljn AE6332 (Pretium Telecom/KPN Telecom);
Rb. Rotterdam 23 May 2002, 161233/HA ZA 01-2032 (BT Ignite/KPN Telecom);
Rb. Amsterdam 15 May 2002, H 00.1066, Ljn AE3458 (Scaramea/Telfort);
Pres. Rb. Rotterdam 14 May 2002, 173281/KG ZA 02-284 (Energis/KPN Telecom);
Pres. Rb. Rotterdam 1 May 2002, VTELEC 02/900 RIP, Ljn AE2382 (Telfort Mobiel/KPN Mobiel);
Pres. Rb. The Hague 18 March 2002, KG 02/248, Ljn AI1311 (BT Ignite/KPN Telecom);
Pres. Rb. Rotterdam 19 February 2002, VTELEC 02/327-SIMO (KPN Telecom/OPTA);
Rb. Rotterdam 7 January 2002, Ljn 7867 (Versatel/OPTA);
Rb. Rotterdam 29 November 2001, 156783/HA ZA 01-1308 (CLEC Netherlands, BabyXL Broadband DSL/KPN Telecom);
Rb. The Hague 11 July 2001, Computerrecht 2001/5, p. 268 (Wolffsbergen/Exact);
Rb. Rotterdam 16 February 2001, Ljn AB0027 (KPN Telecom/OPTA);
Interconnection Regulation and Contract Law

Rb. Rotterdam 31 January 2001, LJN AB0447 (KPN Telecom/OPTA);
Rb. Rotterdam 21 December 2000, 138043/HA Z.A 00-1088 (Energis/KPN Telecom);
Pres. Rb. Rotterdam 13 September 2000, Mediaforum 2002/2, p. 108 (KPN Mobile/OPTA and Dutenbone);
Pres. Rb. Rotterdam 24 December 1999, Mediaforum 2000/1, p. 67 (Libertel/OPTA);
Pres. Rb. Amsterdam 22 October 1999, 99/2593VB LJN AA1033 (Scaramone/Telfort);
Pres. Rb.Rotterdam 25 February 1999, Computerrecht 1999/2, (EnerTel/OPTA);

Onafhankelijke Post- en Telecommunicatie Autoriteit ('OPTA')

OPTA 31 January 2005, OPTA/IBT/2005/200046 (Wanadoo/KPN Telecom);
OPTA 30 December 2004, OPTA/IBT/2004/204506 (KPN Telecom/UPC);
OPTA 29 December 2004, OPTA/IBT/2003/204911 (OPTA/KPN Telecom);
OPTA 24 December 2004, OPTA/IBT/2004/203913 (KPN Telecom/UPC);
OPTA 23 December 2004, OPTA/IBT/2004/204501;
OPTA 23 December 2004, OPTA/IBT/2004/IBT/203801 (Tele2/KPN Telecom);
OPTA 30 November 2004, OPTA/JUZ/2004/202635, Mediaforum 2005/3 (Yarosa/KPN Mobilé);
OPTA 15 November 2004, OPTA/JUZ/2004/202387 (MCi Worldcom/KPN Telecom);
OPTA 2 November 2004, OPTA/IBT/2004/203636 (KPN Telecom/Versatel);
OPTA 28 October 2004, OPTA/JUZ/2004/202142 (Versatel et al./KPN Telecom);
OPTA 29 July 2004, OPTA/IBT/2004/202361 (KPN Telecom/Casemá);
OPTA 28 July 2004, OPTA/IBT/2004/202496 (BT/KPN Telecom);
OPTA 26 July 2004, OPTA/IBT/2004/201873 (BT/KPN Telecom);
OPTA 20 July 2004, OPTA/IBT/2004/202117 (Yarosa/T-Mobilé);
OPTA 16 July 2004, OPTA/IBT/2004/201605 (MCi/KPN Telecom);
OPTA 30 June 2004, OPTA/IBT/2004/202290 (Tele2);
OPTA 24 May 2004, OPTA/IBT/2004/200995 (Tiscali, Versatel, bbNed/KPN);
OPTA 12 May 2004, OPTA/IBT/2004/201554 (MCi Worldcom/KPN Telecom);
OPTA 12 May 2004 OPTA/JUZ/2004/201332 (Orange/KPN Telecom);
OPTA 12 May 2004, OPTA/IBT/2004/201553 (BT/KPN Telecom);
OPTA 26 April 2004, OPTA/IBT/2004/201323 (Yarosa/KPN Mobilé);
OPTA 26 February 2004, OPTA/IBT/2004/200355 (BT/KPN Telecom);
OPTA 20 February 2004, OPTA/IBT/2004/200690 (KPN Telecom/Versatel et al.);
OPTA 19 December 2003, OPTA/IBT/2003/204263 (Orange/KPN Mobilé);
OPTA, 19 December 2003, OPTA/IBT/2003/204596 (KPN Telecom/ Versatel et al.);
OPTA 28 November 2003, OPTA/EGM/2003/204579 (KPN Telecom/Versatel et al.);
OPTA 5 June 2003 (MCi Worldcom);
OPTA 29 May 2003, OPTA/IBT/2003/201727 (Tiscali/KPN Telecom);
OPTA 7 April 2003, OPTA/IBT/2003/201398 (Versatel);
Interconnection Regulation and Contract Law

OPTA 12 December 2002, OPTA/IBT/2002/204232 (UPC/KPN Telecom);
OPTA 21 November 2002, OPTA/IBT/2002/203197 (Vodafone/Tele2);
OPTA 21 November 2002, OPTA/IBT/2002/203289 (Dutchtone/Tele2);
OPTA 21 November 2002, OPTA/IBT/2002/203311 (Dutchtone/O2);
OPTA 21 November 2002, OPTA/IBT/2002/203312 (Dutchtone/Ben);
OPTA 21 November 2002, OPTA/IBT/2002/203342 (Dutchtone/KPN Mobile);
OPTA 17 October 2002, OPTA/IBT/2002/203111 (Tele2/Ben);
OPTA 17 October 2002, OPTA/IBT/2002/203117 (Tele2/Dutchtone);
OPTA 17 October 2002, OPTA/IBT/2002/203120 (Tele2/O2);
OPTA 17 October 2002, OPTA/IBT/2002/203123 (Tele2/KPN Mobile);
OPTA 17 October 2002, OPTA/IBT/2002/203124 (Tele2/Vodafone);
OPTA 2 October 2002, OPTA/IBT/2002/202829 (MCI Worldcom/KPN Mobile);
OPTA 2 October 2002, OPTA/IBT/2002/202837 (MCI Worldcom/Ben);
OPTA 2 October 2002, OPTA/IBT/2002/202838 (MCI Worldcom/O2);
OPTA 2 October 2002, OPTA/IBT/2002/202896 (MCI Worldcom/Vodafone);
OPTA 2 October 2002, OPTA/IBT/2002/202897 (MCI Worldcom/Dutchtone);
OPTA 2 October 2002, OPTA/IBT/2002/202898 (MCI Worldcom/Tele2);
OPTA 2 October 2002, OPTA/IBT/2002/202899 (VersaTel/Tele2);
OPTA 2 October 2002, OPTA/IBT/2002/202900 (VersaTel/Dutchtone);
OPTA 2 October 2002, OPTA/IBT/2002/202901 (VersaTel/Vodafone);
OPTA 2 October 2002, OPTA/IBT/2002/202902 (VersaTel/Ben);
OPTA 2 October 2002, OPTA/IBT/2002/202903 (VersaTel/KPN Mobile);
OPTA 2 October 2002, OPTA/IBT/2002/202904 (VersaTel/O2);
OPTA 19 September 2002, OPTA/IBT/2002/202207 (KPN Mobile/Vodafone);
OPTA 19 September 2002, OPTA/IBT/2002/202302 (KPN Mobile/Ben);
OPTA 19 September 2002, OPTA/IBT/2002/202467 (KPN Mobile/Tele2);
OPTA 19 September 2002, OPTA/IBT/2002/202576 (KPN Telecom/Tele2);
OPTA 19 September 2002, OPTA/IBT/2002/202591 (Ben/Vodafone);
OPTA 19 September 2002, OPTA/IBT/2002/202608 (KPN Telecom/Vodafone);
OPTA 19 September 2002, OPTA/IBT/2002/202611 (O2/Vodafone);
OPTA 19 September 2002, OPTA/IBT/2002/202634 (KPN Telecom/O2);
OPTA 19 September 2002, OPTA/IBT/2002/202635 (O2/Ben);
OPTA 19 September 2002, OPTA/IBT/2002/202636 (Tele2/Vodafone);
OPTA 19 September 2002, OPTA/IBT/2002/202637 (KPN Telecom/Ben);
OPTA 19 September 2002, OPTA/IBT/2002/202640 (Vodafone/KPN Mobile);
OPTA 19 September 2002, OPTA/IBT/2002/202642 (Ben/O2);
OPTA 19 September 2002, OPTA/IBT/2002/202643 (Vodafone/Ben);
OPTA 19 September 2002, OPTA/IBT/2002/202645 (Ben/KPN Mobile);
OPTA 19 September 2002, OPTA/IBT/2002/202646 (Tele2/Ben);
OPTA 19 September 2002, OPTA/IBT/2002/202647 (O2/Tele2);
OPTA 19 September 2002, OPTA/IBT/2002/202649 (Tele2/KPN Mobile);
OPTA 19 September 2002, OPTA/IBT/2002/202654 (O2/KPN Mobile);
OPTA 19 September 2002, OPTA/IBT/2002/202664 (Ben/Dutchtone);
OPTA 19 September 2002, OPTA/IBT/2002/202665 (O2/Dutchtone);
OPTA 19 September 2002, OPTA/IBT/2002/202662 (KPN Mobile/Dutchtone);
OPTA 19 September 2002, OPTA/IBT/2002/202666 (Tele2/Dutchtone);
OPTA 19 September 2002, OPTA/IBT/2002/202667 (KPN Telecom/Dutchtone);
OPTA 14 May 2002, OPTA/IBT/2002/200617 (BabyXL/KPN);
OPTA 10 April 2002, OPTA/IBT/G.16.01/2002/200691 (KPN Mobile/Telfort);
OPTA 21 March 2002, OPTA/IBT/2002/200696 (Canal+/UPC);
OPTA 15 February 2002 (Mail Merge Nederland/TPG);
OPTA 11 February 2002, OPTA/JZ/2002/2200392, appellate decision (BabyXL/KPN);
OPTA 17 January 2002, OPTA/IBT/2001/203789 (Infotel/KPN);
OPTA 18 December 2001 (KPN Mobile vs. Telfort Mobile);
OPTA 12 November 2001, OPTA/IBT/2001/202834 (BabyXL/KPN);
OPTA 15 October 2001, OPTA/IBT/2001/203129 (Energis/KPN);
OPTA 15 October 2001, OPTA/IBT/2001/203095 (Inovara/KPN);
OPTA 20 August 2001 (BabyXL/KPN);
OPTA 29 June 2001, OPTA/G.10.01/2001/201633 (XOIP/KPN Telecom en KPN Mobile);
OPTA 16 March 2001, OPTA/IBT/200/200517 ([Jmond/Casema);
OPTA 16 March 2001, OPTA/IBT/2001/200411 (Versapoint/KPN);
OPTA 21 November 2000 (Worldcom/KPN) (FRLACO);
OPTA 17 November 2000 (MCM/Castel);
OPTA 13 November 2000 (Eager Telecom/KPN);
OPTA 9 November 2000 (Libertel);
OPTA 3 November 2000, OPTA/IBT/2000/202749 (Worldcom/KPN) (MIACO);
OPTA 3 November 2000, OPTA/IBT/2000/202922 (Eager Telecom/KPN);
OPTA 30 October 2000, OPTA/IBT/2000/202797 (Cistron/KPN);
OPTA 19 October 2000, OPTA/IBT/2000/202565 (Versatel/KPN);
OPTA 31 July 2000, OPTA/IBT/2000/202198 (Canal+/UPC);
OPTA 22 June 2000, OPTA/IBT/2000/201780 (Versatel/KPN);
OPTA 25 May 2000, OPTA/IBT/2000/201454 (MCI Worldcom/KPN Telecom);
OPTA 22 February 2000, OPTA/IBT/2000/200361 (Cistron/KPN Telecom);
OPTA, 16 December 1999, OPTA/IBT/99/8393 (EDC-IIB);
OPTA 22 September 1999, OPTA/IBT/99/7686, Computerrecht 1999/6 (KPN/EnerTel);
OPTA 28 July 1999, OPTA/IBT/99/6646 (Devircon International/PTT Telecom);
OPTA 12 July 1999, Computerrecht 1999/6 (EnerTel/KPN III);
OPTA 1 June 1999, OPTA/IBT/99/5955 (EDC It);
OPTA 28 April 1999, OPTA/1/99/2351 (Esprit IMS et al./KPN Telecom);
Interconnection Regulation and Contract Law

OPTA 7 April 1999, OPTA/IBT/2003/201398 (Versatel/KPN Telecom);
OPTA 9 March 1999, Computerrecht 1999/6 (Versatel/KPN);
OPTA 15 July 1998 (EnerTel/KPN II);
OPTA 12 July 1999, Computerrecht 1999 (EnerTel/KPN Telecom);
OPTA 1 July 1998, OPTA/MI/98/1537 (EDC-I);
OPTA 3 April 1998, Computerrecht 1998/4 (Telfort/KPN II);
OPTA 17 December 1997, OPTA/MI/97/1158, Computerrecht 1998/5 (EnerTel/PTT Telekom).

Minister of Economic Affairs

Minister of Transport and Waterworks

Stichting Geschillenoplossing Automatisering, 12 June 1997, Computerrecht 2001/6, p. 315 (Breikant).

Supreme Court (Bundesgerichtshof, ‘BGH’)
BGH 25 June 1980, BGHZ 77.301;
BGH 19 October 1960, LM BGB § 276 (Fa) no. 11; NJW 61.169;
BGH 19 March 1957, BGHZ 24.39 (Gold Coast Cocoa);

Lower courts - Germany
OG Münster 3 February 2003, 13 B 2130/02.
OG Münster 18 February 2002, 13 B 2175/02.
OLG Düsseldorf 19 December 2001 - U (Kart) 48/01; CR 6/2002, p. 426ff.;

Court of Appeal - England
Court of Appeal [1979] 1 W.L.R 294 (Gibson/Manchester CC);
Court Of Appeal [1971] 2 All ER 183 (Bigg/Boyd-Gibbins Ltd.);
Court of Appeal [1954] 1 QB 247 (Houghton/Trafalgar Insurance Co. Ltd.).

House of Lords and courts - England
[2004] EWHC 1502 (Frans Maas UK/Samsung Electronics UK);
[2002] EWC A Civ 355 (London & Regional Investments Ltd./TBI plc Belfast International Airport Ltd.);
[1997] CA 8 (British Sugar/NEI Power Projects);
[1996] 4 All ER, 481 (ICL/St. Albans);
Interconnection Regulation and Contract Law

[1995] 70 P. & R. 469, p. 475 (Little/Courage);
[1992] 2 AC 128 (Walford v. Miles);
[1981] AC 1050 (Raineri/Mikes);
[1971] 3 All ER 237 (Prenn/Simmonds).

Other
Overview of Relevant EU and National Regulation

Regulations
- Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1/1;

Directives
- Council Directive 91/263 of 29 April 1991 on the approximation of the laws of the Member States concerning telecommunications equipment, including the mutual recognition of their conformity, [1991] OJ L 128/1 which was later consolidated and overhauled by further Directives, such as Directive 98/13 on telecommunications equipment and satellite earth station equipment, including the mutual recognition of their conformity, [1998] OJ L 74/1 ("Terminal Equipment Directive II");

489
Interconnection Regulation and Contract Law


Recommendations
- Recommendation C (2000) 1059 on Unbundled Access to the Local Loop and the Regulation of the European Parliament and the Commission on unbundled access to the local loop;
- Recommendation 92/382 of 5 June 1992 on the harmonised provision of a minimum set of packet-switched data services (PSDS) in accordance with open network provision (ONP) principles, OJ L 200/1;
- Recommendation 86/589 of 22 December 1986 on the coordinated introduction of an Integrated Services Digital Network (ISDN), [1986] OJ L 382/36, which was followed by a Resolution of 18 July 1989, OJ C 158/1 and a further
Recommended 92/383 of 5 June 1992 on the provision of harmonised integrated services digital network (ISDN) access arrangements and a minimum set of ISDN offerings in accordance with open network provision (ONP) principles, [1992] OJ L 200/10;

Decisions (see also cases, below)
- Commission Decision 17 May 2005, C (2005) 1442 final (Withdrawal of notified draft measures, Case DE/2005/0144: Call termination on individual public telephone networks provided at a fixed location);
- Council Decision (97/838/EC) of 28 November 1997 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the results of the WTO negotiations on basic telecommunications services, [1997] OJ L 347/45 (the Fourth Protocol).

Communications and Green Papers
- Commission Communication, The treatment of Voice over Internet Protocol (VOIP) under the EU regulatory framework: an information and consultation document, 14 June 2004;
Interconnection Regulation and Contract Law

- Green Paper on alternative dispute resolution in civil and commercial law, COM (2002) 196 final, 19 April 2002;
- Commission Communication, Seventh Report on the implementation of the telecommunications Regulatory Package, Brussels COM (2001) 706 final;
- Communication from the Commission, The results of the public consultation on the 1999 Communications Review and Orientations for the new Regulatory Framework (provisional text), COM (2000) 239 final (‘Communications Review’);
- Communication on the results of the Public Consultation on the Green Paper on the Convergence of the Telecommunications, Media and Information Technology Sectors, COM (99) 108, 10 March 1999;
- Green Paper on radio spectrum policy in the context of European Community policies such as telecommunications, broadcasting, transport, and R&D, COM (1998) 596 final;
- Green Paper on the Convergence of the Telecommunications, Media and Information Technology Sectors, and the Implications for Regulation, COM (97) 623 final, 3 December 1997;
- Commission Communication on the consultation and on the review of the situation in the telecommunications sector, COM (93) 159 final, 28 April 1993;
- Commission Communication, 1992 Review of the situation in the telecommunications services sector, EC (92) 1048, 21 October 1992;

Resolutions
Interconnection Regulation and Contract Law

- Council Resolution of 18 September 1995 on the implementation of the future regulatory framework for telecommunications, [1995] OJ C 258/1;
- Resolution of 26 May 1989 to bring into line the private law of the Member States, [1989] OJ C 158;

Notifications
- Commission Notification regarding the determination in light of competition law of both telecommunications and cable networks, [1998] OJ C 71/04;
- Notification of the application of competition rules to agreements regarding access in the telecommunications sector, OJ 1998 C 265/02.

Guidelines/other
- Commission Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services, [2002] OJ C 165/6, 11 July 2002 ('Commission guidelines on market analysis');
- Determination of organisations with significant market power (SMP) for implementation of the ONP directives (1 March 1999);
- European Telecommunications Platform (ETP), Inventory of Dispute Resolution Mechanisms: What are the choices for the telecommunications sector? Document ETP (98) 107;
- Commission Notice of 11 January 1992, case IV/33.361, OJ C 7/3 (Infonet);

Press Releases
- Press release IP/05/167, 11 February 2005;
- Commission Press Release IP/05/430, 14 April 2005;
Interconnection Regulation and Contract Law

- Commission Press Release IP/02/483 of 27 March 2002 (involving KPN Telecom);

Onafhankelijke Post- en Telecommunicatie Autoriteit (‘OPTA’) documents and decisions (other than dispute resolution)
- OPTA 13 July 2005, Sert. 2005, 133;
- OPTA 21 March 2005, Procedural rules regarding dispute resolution and enforcement (Procedureregeling geschillen en handhaving OPTA);
- OPTA, 17 March 2005 Draft decision, the market for call termination on different mobile networks (Ontwerpbesluit, de markt voor gespreksafgifte op afzonderlijke mobiele netwerken);
- OPTA 30 November 2004, OPTA/JUZ/2004/204117 Policy rules regarding fine allocation as regards the imposition of fines as a result of Article 11.4 Tw (Beliesregels boete toepassing met betrekking tot het opleggen van boetes ingevolge Artikel 11.4 van de Telecommunicatiewet);
- OPTA 1 October 2004, OPTA/IBT/2004/201834, Consultation Document Interoperability, (Consultatiedocument interoperabiliteit);
- OPTA 13 September 2004, OPTA/EGM/2004/203434, concerning the revised schedule for the OPTA Market Analyses (Gewijzigde planning markt analyses);
- OPTA, Sert. 2004, 234 Policy on fines (OPTA Boetebeleidregels);
- OPTA 2 August 2004, OPTA/IBT/2004/202721, Notification re the tariffs applying for KPN’s co-location services as of 1 July 2004 (Mededeling inzake de voor KPN’s co-locatie te gelden tarieven per 1 juli 2004);
- OPTA 29 June 2004, OPTA/EGM/2004/202394 Approval of special connections (Goedkeuringsbesluit bijzondere aansluitingen);
- OPTA 24 June 2004, Cooperation Protocol between OPTA and Nma (Samenwerkingsprotocol OPTA/NMa);
- OPTA, Annual report 2004 (OPTA, Visie op de markt en jaarverslag 2004);
- OPTA, Annual report 2003 (OPTA, Visie op de markt en jaarverslag 2003);
- OPTA 19 November 2003, OPTA/IBT/2003/203596, Provisional decision re interconnection (Voorlopigoordeelinterconnectie);
- OPTA 17 June 2003, OPTA/IBT/2003/202084 Enforcement decision against reference offer KPN Telecom (Handhavingsbesluit tegen referentieaanbod KPN Telecom);
- OPTA, 24 April 2003, OPTA/IBT/2003/201415 Policy intention re a reasonable local interconnection offer (Beleidsvoornemen inzake een redelijk aanbod voor lokale interconnectie);
Interconnection Regulation and Contract Law

- OPTA 11 March 2003, OPTA/IBT/2003/201837 Decision to impose a penalty on KPN Telecom for breach of the non-discrimination principle reference offer ULL (Besluit opleggen boete KPN Telecom wegens overtreden non-discriminatiebeginsel referentieaanbod ULL);
- OPTA, 13 January 2003, Consultation Document on the reasonableness of the fixed termination rates (Consultatiedocument de redelijkheid van vaste terminating tarieven);
- OPTA 17 December 2002, OPTA/IBT/2002/202957 Consultation Document regarding the provisional view on the provision of security (Consultatie voorlopige zienswijze inzake zekerheidsstellingen);
- OPTA, 11 December 2002, OPTA/IBT/2002/202979, Consultation Document on the long-term system for tariff regulation of interconnection and special access services offered by KPN and a new model for tariff regulation of interconnection leased lines offered by KPN (Consultatiedocument inzake het meerjarsysteem voor de tariefregulering van door KPN aangeboden interconnectie en bijzondere toegangsdiensten, en een nieuwe model voor de tariefregulering van door KPN aangeboden interconnectorende buurlijnen);
- OPTA 1 November 2002, OPTA/IBT/2002/203590, Draft decision on call termination on different public telephony networks provided on a fixed location (Ontwerpbesluit gespreksafgifte op afzonderlijke openbare telefoonnetwerken verzorgd op een vaste locatie);
- OPTA 22 July 2002, OPTA/IBT/2002/201827 Modification of the policy rules re the regulation of MTA tariffs (Aanpassing van de beleidsregels inzake de regulering van mobiele terminating tarieven);
- OPTA 27 June 2002, OPTA/IBT/2002/201682 Decision on approval of cost allocation system KPN Telecom (Besluit goedkeuring kostentoekennings systeem KPN Telecom);
- OPTA 30 May 2002, OPTA/IBT/2002/201358 Guidelines re operator controlled notification system for carrier pre-selection (Gedragregels inzake operator controlled aanmeldingsysteem Carrier PreSelection);
- OPTA 16 May 2002, Consultation Document on Cable Access, rebalancing cable tariffs (Consultatiedocument inzake Toegang tot de kabel, herbalancing kabeltarieven);
- OPTA 26 April 2002, OPTA/ EGM-IBT/2002/201084, Memorandum of findings regarding integral tariff regulation (Nota van bevindingen inzake het integrale tariefbezichtig);
- OPTA 19 December 2001, OPTA/IBT/2001/203784, Consultation Document on the regulation of mobile terminating tariffs (Consultatiedocument inzake de regulering van mobiele terminating tarieven);
- OPTA 30 November 2001 Consultation Document on forms of special access to mobile networks and the reasonableness of requests thereto (Consultatiedocument 'Vormen van bijzondere toegang tot mobiele netwerken en redelijkheid van verzoeken hiertoe') www.opta.nl;
- OPTA 26 November 2001, OPTA/EGM/2001/203548, Consultation Document on integrated tariff regulation for end-user and interconnection services (Consultatiedocument Integrale tariefregulering voor eindgebruikers- en interconnectiediensten);
Interconnection Regulation and Contract Law

- OPTA 25 July 2001, OPTA/EGM/2001/201551, Consultation Document on tariff regulation leased lines (Consultatiedocument tariefregulering huurlijnen);
- OPTA 29 June 2001, OPTA/IBT/2001/201828 Decision on interconnection and special access tariffs 1 July 2001 – 1 July 2002 (Bepaling tarieven interconnectie en bijzondere toegang 1 juli 2001 tot 1 juli 2002);
- OPTA 1 May 2001 Exhibit to the Guidelines on tariff regulation on interconnection and special access – report of findings (Bijlage bij de Richtsnoeren Tariefregulering interconnectie en bijzondere toegang – rapport van bevindingen);
- OPTA 13 April 2001, OPTA/IBT/2001/200850, Guidelines on tariff regulation interconnection and special access services (Richtsnoeren tariefregulering interconnectie- en bijzondere toegangsdiesten);
- OPTA 4 April 2001, Decision on internet without telephone units (Besluit over Internet zonder telefoontikken);
- OPTA 21 December 2000, OPTA/IBT/2000/203518, Consultation Document on tariff regulation for interconnection (Tariefregulering voor interconnectie);
- OPTA 20 December 2000, OPTA/IBT/2000/203357 Guidelines on co-location and one-time cost as regards access to the local loop (Richtsnoeren over colocatie en eenmalige kosten met betrekking tot toegang tot de aansluitlijn);
- OPTA 4 December 2000, OPTA/IBT/2000/202891 Decision on interconnection and special access transitional tariffs 1 July 2000 – 1 July 2001 (Bepaling overgangstarieven interconnectie en bijzondere toegang 1 juli 2000 tot 1 juli 2001);
- OPTA, 9 October 2000, www.opta.nl, Consultation Document price squeeze (Consultatiedocument prijssqueeze);
- OPTA, 20 October 1999, OPTA/S&c/99/7870, Decision on appointment KPN Telecom as SMP undertaking (Beslissing aanwijzing KPN Telecom als partij met aanmerkelijke marktmacht);
- OPTA Guidelines on determination of significant market power on the market (Richtsnoeren aanwijzing aanmerkelijke marktmacht op de markt), Sterr. 2000, 48;
- OPTA, 4 January 1999, Sterr 1999, 2, Cooperation Protocol between OPTA and NMa (Samenwerkingsprotocol OPTA/NMa);
- OPTA, 4 June 1998, Consultation Document on special access services (Consultatiedocument bijzondere toegangsdiesten);
- OPTA, 26 March 1998, Consultation Document I on cost accounting for interconnection and special access services (Consultatiedocument II over kostentoerekening voor interconnectie en bijzondere toegangsdiesten);
- OPTA, 22 August 1997, Consultation Document I on cost accounting for interconnection and special access services (Consultatiedocument I over kostentoerekening voor interconnectie en bijzondere toegangsdiesten).
OPTA decisions on reference interconnection offer ('RIO') KPN
- OPTA 12 December 2001 Interim Document regarding the RIO consultation (Tussenstand-document OPTA behorende bij de RIA-consultatie);
- OPTA 29 June 2001, OPTA/IBT/2001/201679, Review of KPN reference offer unbundled access to the local loop and additional facilities (Beoordeling KPN referentie-aanbod onthubdelde toegang tot het aansluitnet en bijbehorende faciliteiten);
- OPTA 28 July 2000 Decision regarding OPTA’s review of KPN Telecom B.V.’s reference interconnection offer (Besluit inzake de beoordeling door OPTA van de referentie-interconnectie-aanbieding van KPN Telecom B.V.);
- OPTA, 13 April 2000, Guidelines on tariff regulation for interconnection and special access (Richtsnoeren Tariefregulering interconnectie en bijzondere toegang);
- OPTA 22 March 2000 Draft Decision regarding OPTA’s review of KPN Telecom B.V.’s reference interconnection offer (Concept-Besluit inzake de beoordeling door OPTA van de referentie-interconnectie-aanbieding van KPN Telecom B.V.);
- OPTA, 9 September 1999, Consultation Document regarding the new KPN Telecom B.V. model agreement for interconnection (Consultatiedocument met betrekking tot de nieuwe modelovereenkomst inzake interconnectie van KPN Telecom B.V.).

RegTP
- Regulierungsbehörde für Telekommunikation und Post, Notification, Call origination on, Call Termination on and Transit Services in the Fixed Public Telephone Network(s) of Recommendation 2003/311/EC (Notifizierung, Zuführungs-, Terminierungs- und Transitleistungen im öffentlichen Festtelefonnetz, Märkte Nr. 8 bis 10 der Empfehlung 2003/311/EG).
Chapter 6. INTER-OPERABILITY OF SERVICES AND CONFIDENTIAL INFORMATION

Article 6.1

1. A provider of public electronic communications networks or public electronic communications services that controls the access to end users within that context must, at the request of another provider of public electronic communications networks or public electronic communications services, enter into negotiations with that provider with a view to concluding a contract on the basis of which the necessary measures will be taken, if necessary by means of interconnection of the relevant networks, in order to establish end-to-end connections.

2. Providers of public electronic communications networks or public electronic communications services may only use information, provided to them before or during the negotiation of interoperability agreements, and information which has been or may be obtained during the performance of the agreement, for the purpose for which this information was provided, respectively use it only to perform the agreement. The information obtained or saved will be treated as confidential and will not be passed on to any third party, in particular other departments, subsidiaries or partners, who – by obtaining such information – could thus gain a competitive advantage.

3. At the request of a provider of public electronic communications networks or public electronic communications services that is of the opinion that another provider has failed to comply with the obligation to enter into negotiations with it, the National Regulatory Authority (below: the ‘NRA’) may issue instructions with respect to the manner in which the negotiations must be conducted, without prejudice to the providers’ right to jointly terminate the negotiations. In their negotiations, the relevant providers must comply with the instructions issued by the NRA.
Article 6.2
1. If the negotiations referred to in Article 6.1 above do not lead to a contract being concluded between the providers referred to in that Article, at the request of one of those providers the NRA may require the other provider—insofar as that provider controls the access to end users and if the NRA is of the opinion that further negotiations in all reasonableness will not lead to a contract being concluded—to establish and guarantee the end-to-end connection desired by the provider, under conditions to be set by the NRA, provided that the NRA is of the opinion that the other provider's interests, which prevented a contract from being concluded, in all reasonableness do not outweigh the interests of the party that submitted the request.

2. In addition, the NRA can set requirements for providers of public electronic communications networks or public electronic communications services that control the access to end users ex officio, possibly within the context of a request within the meaning of the first paragraph, with respect to the establishment and guarantee of end-to-end connections if that is justified in the case at hand in light of the purposes within the meaning of Article 1.3.

3. A decree within the meaning of the first or second paragraph will be published in the Dutch Official Gazette (Staatscourant). No publication will be made with respect to data within the meaning of Article 10(1)(c) of the Dutch Government Information (Public Access) Act (Wet Openbaarheid van Bestuur).

Article 6.3
1. If justified in light of the purposes referred to in Article 1.3, categories of public electronic communications services may be designated by general order in council with respect to which the providers of the services that fall within a designated category and providers of the related networks, insofar as they control access to end users, must establish and guarantee end-to-end connections in the Netherlands.

2. At the request of providers that supply electronic communications services outside of the Netherlands that belong to the category of services pursuant to the first paragraph, the providers referred to in the first paragraph must take the measures necessary to establish and guarantee end-to-end connections with respect to the services provided abroad.

3. If it is technically or economically unfeasible to establish end-to-end connections, or if the necessary measures cannot otherwise reasonably be expected to be taken in light of the available resources, the NRA may grant a provider an exemption from the obligation, within the meaning of the first or second paragraph, to establish and guarantee the end-to-end connections.
4. Notwithstanding the third paragraph, in pursuance of the first or, in the event of a request, the second paragraph, the provider referred to therein will enter into negotiations with the other providers referred to therein in order to conclude contracts on the basis of which measures will be taken so that end-to-end connections will be established and guaranteed.

Article 6.4
Requirements within the meaning of Article 6.1(3) or obligations within the meaning of Article 6.2(1) or (2) must be objective, transparent, proportional and non-discriminatory.

Article 6.5
1. Rules will be applied for providers of public telephone networks or public telephone services by or pursuant to general orders in council:
   a. with respect to the handling of calls from the European telephone numbering space;
   b. that are intended to ensure that subscribers located in the Netherlands that use a non-geographic number allocated by the NRA pursuant to Article 4.2(1) above can be called at that number by end users who are located in other Member States of the European Union; and
   c. that are intended to ensure that subscribers located in other Member States of the European Union that use a non-geographic number allocated by a national regulatory authority can be called at that number by end users located in the Netherlands.

2. Duties may be imposed on, and powers may be granted to, the NRA pursuant to the rules referred to in the first paragraph.

Article 6.6
Article 6.1, Section 2, shall apply mutatis mutandis to negotiations to obtain access to the network of a provider of public electronic communications networks.

Y

To chapters have been inserted after Chapter 6, which read as follows:

CHAPTER 6A. OBLIGATIONS OF COMPANIES THAT HAVE A STRONG POSITION ON THE MARKET

§ 6A.1 Identifying significant market power

Article 6a.1
1. The NRA will specify in accordance with the principles of general European competition law, the relevant markets in the electronic communications sector with respect to which the product market or service market corresponds to a
recommendation within the meaning of Article 15(1) of EC Directive no. 2002/21/EC. The NRA will determine which markets constitute the markets within the meaning of the first sentence as soon as possible after a recommendation within the meaning of that sentence has entered into force.

2. The NRA will specify in accordance with the principles of general European competition law, markets other than the relevant markets in the electronic communications sector within the meaning of the first sentence, if it is of the opinion that there is reason to do so or if such a specification arises from Article 6a.4 or Article 27 of EC Directive no. 2002/21/EC.

3. The NRA will investigate as quickly as possible the markets specified as relevant in accordance with the first and second paragraphs.

4. The NRA will investigate a transnational market as quickly as possible after a decision of the Commission of the European Communities underlying it has entered into force and subsequently at regular intervals.

5. The investigation referred to in the third and fourth paragraphs is in any event intended to determine:
   a. whether the relevant market is actually competitive and whether companies that offer public electronic communications networks, associated facilities or public electronic communications services that have significant market power are active on that market; and
   b. which obligations within the meaning of Articles 6a.6 to 6a.10 and 6a.12 to 6a.15 are appropriate for the companies referred to in subparagraph a above that have significant market power.

6. After the investigation referred to in the third or fourth paragraph has been completed, the NRA will implement the provisions contained in Article 6a.2(1) or Article 6a.3.

7. In performing its duties and complying with its obligations pursuant to this Chapter, the NRA will take into consideration guidelines laid down by the Commission of the European Communities pursuant to Article 15(2) of EC Directive no. 2002/21/EC.

8. In determining whether two or more companies jointly have an economic power within the meaning of Article 1.1(s), the NRA will in any event apply the criteria referred to in Appendix II to EC Directive no. 2002/21/EC.

9. The NRA will perform its duties and comply with its obligations pursuant to this Chapter with respect to transnational markets in consultation with the relevant national regulatory authorities.
Article 6a.2
1. If it appears from the investigation referred to in Article 6a.1(3) or (4) that a relevant market or a transnational market is not actually competitive, the NRA will determine which companies providing public electronic communications networks, associated facilities or public electronic communications services have significant market power and:
   a. it will impose obligations within the meaning of Articles 6a.6 to 6a.10 or 6a.12 to 6a.15;
   b. it will maintain obligations that were already imposed or upheld, insofar as they relate to the same market; or
   c. it will revoke obligations that were already imposed or upheld, insofar as they relate to the same market, if they are no longer appropriate.
2. On the ground of Article 6a.2(1)(a), the NRA will impose:
   a. obligations within the meaning of Articles 6a.12 to 6a.15 only on companies that offer public electronic communications networks or associated facilities;
   b. obligations within the meaning of Article 6a.12 to 6a.15 only if the relevant market or transnational market is an end-user market and the obligations referred to in Articles 6a.6 to 6a.11 and 6a.17 are insufficient to generate genuine competition or to protect the interests of the end users.
3. An obligation within the meaning of the first paragraph is appropriate if it is based on the nature of the problem that has been ascertained in a relevant market and it is proportional and justified in light of the purposes referred to in Article 1.3.
4. In determining whether imposing an obligation in order to comply with reasonable requests for access within the meaning of Article 6a.6, the NRA will take into consideration in particular the factors referred to in Article 12(2) of EC Directive no. 2002/19/EC.

Article 6a.3
1. If it appears from the investigation referred to in Article 6a.1(3) or (4) that a relevant market or a transnational market is genuinely competitive, the NRA will confirm that that is the case and will revoke any obligations that were already imposed or upheld pursuant to Article 6a.2(1) insofar as they relate to that market.
2. If it appears from the investigation referred to in Article 6a.1(3) or (4) that a company on a relevant market or transnational market that is not competitive
must comply with obligations that were already imposed or upheld pursuant to Article 6a.2(1), the NRA will revoke those obligations insofar as they relate to that market if the company on the relevant market or transnational market does not have significant market power.

3. If it appears from the investigation referred to in Article 6a.1(3) or (4) that a relevant market or a transnational market is not actually competitive and the obligations referred to in Articles 6a.6 to 6a.11 are sufficient to generate genuine competition or protect the interests of end users, the NRA will revoke any obligations that were already imposed or upheld pursuant to Article 6a.2(1) within the meaning of Articles 6a.12 to 6a.15 insofar as they relate to that market.

Article 6a.4
No later than three years after a decree as referred to in Article 6a.2(1), concerning the imposing or upholding of obligations with regard to a company that has significant power in a relevant market, has entered into effect, the NRA may decide:

a. to uphold those obligations on the ground of Article 6a.2(1)(b); or
b. to revoke those obligations on the ground of Article 6a.2(1)(c).

Article 6a.5
The NRA will publish notification in the Dutch Official Gazette of a decision as defined in Articles 6a.2(1) or 6a.3. No publication will be made with respect to data within the meaning of Article 10(1)(c) of the Government Information (Public Access) Act.

§ 6A.2 Obligations related to access

Article 6a.6
1. Pursuant to Article 6a.2(1), the NRA may impose the obligation to comply with reasonable requests for forms of access to be determined by the NRA, among other things if the NRA is of the opinion that to refuse access or stipulate unreasonable conditions with the same effect would impede the development of an end-user market characterised by permanent competition or if it would not be in the end users’ interests.

2. The obligation referred to in the first paragraph could mean, among other things, that the relevant company must:

a. give providers of electronic communications services access to certain network elements or facilities, including unbundled access to the local loop;

b. negotiate in good faith with providers of electronic communications services requesting access;
c. refrain from revoking access to facilities that has already been granted;

d. offer certain services on a wholesale basis for resale by the providers of electronic communications services;

e. grant public access to technical interfaces, protocols, or other core technologies that are indispensible for the inter-operability of public electronic communications services or virtual services;

f. offer co-location or other forms of shared use of facilities, including shared use of cable conduits, buildings or masts;

g. offer certain services that are necessary for the inter-operability of the end-to-end services provided to users, including facilities for intelligent network services or roaming within mobile electronic communications networks;

h. provide access to operational support systems or comparable software systems that are necessary for fair competition in the provision of electronic communications networks or network facilities;

i. ensure interconnection of public electronic communications networks or network facilities.

3. The NRA can make the obligation referred to in the first paragraph subject to conditions with respect to fairness, reasonability and opportunity.

4. If it is necessary to guarantee the normal functioning of the relevant public electronic communications network, the NRA may impose technical or operational conditions that:

a. a company on which an obligation has been imposed within the meaning of the first sentence must comply with when granting access; or

b. a company that has been granted access on the basis of a request as referred to in the first paragraph must comply with.

5. Article 6.4 applies mutatis mutandis with respect to the conditions referred to in the fourth paragraph.

6. Insofar as necessary pursuant to the Notification Directive, the NRA will not impose the conditions until they have been submitted to the Commission of the European Communities in draft form and the applicable terms referred to in Article 9 of the Notification Directive have lapsed.

7. Insofar as the conditions contain technical standards or specifications, such standards or specifications must be consistent with the standards referred to in Article 7(1) and (2) of EC Directive no. 2002/21/EC.
Article 6a.7
1. Pursuant to Article 6a.2(1), the NRA may impose an obligation in respect of forms of access to be determined by the NRA with regard to controlling the relevant rates to be charged or allocation of costs if it appears from a market analysis that the relevant operator can maintain excessively high prices due to the lack of genuine competition or that it can undermine the margins,* in both cases at the expense of the end users.

2. An obligation within the meaning of the first sentence can include a requirement to charge a cost-oriented rate for access or that an NRA-approved or specified cost-allocation system must be used.

3. If the NRA has obliged a company to charge a cost-oriented rate for access, the company must demonstrate that the rates are actually cost-oriented.

4. Notwithstanding the second sentence of the first paragraph, the NRA may attach conditions to the obligation to set up a cost-allocation system with respect to the submission of the results of the application of the system by the company on which the obligation has been imposed.

5. If an obligation to set up a cost-allocation system has been imposed:
   a. the relevant company must provide, in an adequate manner with due observance of the conditions imposed by the NRA, a description of the system containing in any event the primary categories in which the costs are classified and the rules applied for allocating the costs;
   b. the NRA, or an independent expert third party appointed by the NRA, will investigate once every year whether the company has acted in accordance with the system.

6. The results of the investigation referred to Article 6a.7(5)(b) will be published in the Dutch Official Gazette.

Article 6a.8
Pursuant to Article 6a.2(1), the NRA may, with respect to forms of access to be determined by the NRA, impose the obligation that, under similar circumstances, access must be granted under similar conditions. That obligation also means that the company must employ similar conditions to those that would apply to itself, its subsidiaries or its parent companies under similar conditions.

Article 6a.9
1. Pursuant to Article 6a.2(1), the NRA may impose the obligation to disclose certain information, to be determined by the NRA, with respect to forms of

* Translator's note: sic. Dutch text unclear.
access to be determined by the NRA. That information may relate, among other things, to:

a. rates and other conditions that apply in granting access;

b. technical and other characteristics of the network.

2. Pursuant to Article 6a.2(1), the NRA may impose the obligation to disclose a reference offer containing a description of the forms of access determined by the NRA. The reference offer must be divided into the relevant rates and other conditions.

3. If an obligation within the meaning of Article 6a.6 that relates to unbundled access to the local loop is imposed on a company on which an obligation within the meaning of the second paragraph has also been imposed, the company’s reference offer must in any event fulfil the requirements contained in Appendix II to EC Directive no. 2002/19/EG.

4. If the NRA is of the opinion that the reference offer is not in accordance with the obligations imposed pursuant to this Chapter, it will give the company instructions with respect to the changes to be made.

5. The NRA can make the obligation referred to in the first and second paragraphs subject to conditions with respect to the specification and manner of disclosure.

Article 6a.10

1. Pursuant to Article 6a.2(1), the NRA may impose the obligation to keep separate accounts, in which the proceeds and the costs of forms of access to be determined by the NRA, to the company itself or to other companies, are listed separately from the other activities conducted by the companies.

2. The NRA can make the obligation to keep separate accounts subject to conditions with respect to the manner in which the accounts are set up and to providing the NRA with accounting documents, including data regarding income received from third parties.

Article 6a.11

1. Under exceptional circumstances, the NRA may impose other access-related obligations, to be indicated by ministerial regulation, on a company that the NRA has determined, pursuant to Article 6a.2(1), has significant market power in respect of offering public electronic communications networks or associated facilities.

2. The ministerial regulation referred to in the first paragraph may contain rules concerning the imposition by the NRA of the obligations indicated in that decree. Those rules will in any event relate to:
Interconnection Regulation and Contract Law

a. the circumstances that must occur before obligations may be imposed; and
b. the nature of the obligations.

3. The NRA will revoke a decision within the meaning of the first paragraph if:
   a. it has determined pursuant to Article 6a.3(1) that the relevant or transnational market involved is genuinely competitive;
   b. it has appeared in accordance with Article 6a.3(2) that the company referred to in the first paragraph no longer has significant market power.

4. The NRA will also revoke a decision within the meaning of the first paragraph if:
   a. there are no longer exceptional circumstances; or
   b. the obligation that has been imposed or upheld is no longer appropriate.

5. No later than 18 months after a decision within the meaning of the first paragraph has entered into effect, the NRA will determine whether there are still exceptional circumstances and whether the obligation that has been imposed or upheld is still appropriate and will decide to
   a. uphold the decision pursuant to the first paragraph; or
   b. revoke the decision pursuant to the fourth paragraph.

§ 6.a.3 Obligations at end-user level

Article 6a.12
Pursuant to Article 6a.2(1), the NRA may impose the obligation:
   a. upon delivery of end-user services to be determined by the NRA, to treat the end users of those services similarly under similar circumstances;
   b. to unbundle end-user services to be determined by the NRA from other services; and
   c. disclose certain information to be determined by the NRA to a category of end users to be determined by the NRA in a manner to be determined by the NRA.

Article 6a.13
1. Pursuant to Article 6a.2(1), the NRA may impose obligations with respect to the amount of the end-user rates.

2. If the NRA imposes an obligation within the meaning of the first paragraph, pursuant to Article 6a.2(1) it will also impose the obligation to use a cost-allocation system to be determined or approved by the NRA. Pursuant to
Article 6a.2(1), the NRA may impose the obligation referred to in the prior sentence separately from the obligation referred to in the first paragraph.

3. A company on which the obligation referred to in the second paragraph has been imposed must submit to the NRA each year in May, as from a date to be determined by the NRA, the result of the application of the relevant cost-allocation system for the preceding calendar year.

4. If the obligation referred to in the second paragraph is imposed, each year after the result referred to in the third paragraph has been submitted the NRA or an independent expert third party to be appointed by the NRA will examine whether the relevant cost-allocation system has been properly applied. The result of the examination will be published in the Dutch Official Gazette.

5. The NRA may make the obligations referred to in the first and second paragraphs subject to such further conditions as may be necessary for the proper implementation of those obligations.

Article 6a.14

1. If the NRA imposes or maintains the obligation referred to in Article 6a.13(1) pursuant to Article 6a.2(1), pursuant to Article 6a.2(1) it may also impose the obligation not to implement new or adjusted end-user rates until after the NRA has approved those rates.

2. Within three weeks after it has received a request for approval the NRA will determine whether the new or adjusted end-user rate is in accordance with the obligation that has been imposed or upheld within the meaning of Article 6a.12(1). If the information referred to in the seventh paragraph is missing, the company that submitted the request will be so informed within three days after the request has been received.

3. The NRA may extend the term referred to in the first sentence of the second paragraph once by three weeks. The NRA will accordingly inform, in writing, the company that submitted the request.

4. If the NRA is of the opinion that the new of adjusted end-user rate is in accordance with the obligation that has been imposed or upheld within the meaning of Article 6a.13(1), it will approve the use of that rate.

5. If the NRA is of the opinion that the new or adjusted end-user rate is not in accordance with the obligation that has been imposed or upheld within the meaning of Article 6a.13(1), it will inform the company that submitted the request. Within four weeks after it has done so, the NRA will inform the company referred to in the first sentence, in writing, as to what parts of the obligation referred to in the first sentence have not been complied with.
Interconnection Regulation and Contract Law

6. The NRA will assess a request for approval following a written notification within the meaning of the second sentence of the fifth paragraph within two weeks after receiving the request.

7. No later than the time at which a decision within the meaning of Article 6a.2(1), with respect to the imposing or upholding of the obligation not to implement new or adjusted end-user rates until after the NRA has approved those rates, enters into effect, the NRA will determine the information that the relevant company must provide with a request within the meaning of the second paragraph and in what form that information must be provided. The NRA will inform the relevant company in that regard.

Article 6a.15
In pursuance of Article 17 of EC Directive no. 2002/22/EC, obligations other than the obligations referred to in Articles 6a.12 to 6a.14 may be designated by general order in council, which pursuant to Article 6a.2(1) the NRA may impose on companies that have significant power in a relevant end-user market or transnational end-user market.

§ 6A.3 'Carrier selection' and 'carrier pre-selection'

Article 6a.16

1. If it has been established pursuant to Article 6a.2(1) that a company has a significant power in a relevant market or transnational market or in several relevant markets or transnational markets jointly when providing access to and the use of public telephone networks at a fixed location, that company will be so designated by the NRA.

2. The NRA will revoke a designation within the meaning of the first paragraph if it appears from an investigation within the meaning of Article 6a.1(3) or (4) that:
   a. a relevant market or transnational market that is related to the provision access to and use of public telephone networks at a fixed location has become genuinely competitive; or
   b. the relevant company no longer has significant power in the market in providing access to and use of public telephone networks at a fixed location.

3. The NRA will publish a notification of a decision within the meaning of the first or second paragraph in the Dutch Official Gazette. The data referred to in Article 10(1)(c) of the Government Information (Public Access) Act will not be published.
Article 6a.17
1. A company that has been designated pursuant to Article 6a.16(1) is obliged, insofar as it has been designated, to ensure that the facilities are available to its subscribers so that they can purchase services, either for each call individually by means of a selection code or by default by means of pre-selection, from providers that have access to its public telephone network at a fixed location and that offer the public service, or a substantial portion thereof, at a fixed location.

2. It must be possible for the subscriber to change the pre-selection referred to in the first paragraph by choosing the appropriate number from the numbering plan drawn up by the Minister pursuant to Article 4.1.

3. The NRA may give instructions to a company that has been designated pursuant to Article 6a.16(1) with respect to the functionality of the facilities referred to in the first paragraph.

4. A company that has been designated pursuant to Article 6a.16(1) must comply, insofar as it has been designated, with reasonable requests for access to its public telephone networks at a fixed location from providers that wish to offer at least a substantial portion of the public telephone service at a fixed location by means of the selection or pre-selection referred to in the second paragraph. The rates for the access referred to in the first sentence must be cost-oriented.

5. In order to prevent subscribers from being discouraged from using the facilities referred to in the first sentence, regulations may be set by ministerial decree with respect to the maximum amount that a company designated pursuant to Article 6a.16(1) may charge its subscribers for those facilities.

§ 6.4.3 The minimum package of leased lines

Article 6a.18
1. If it has been established pursuant to Article 6a.2(1) that a company has significant power in a relevant market or transnational market in providing a type of leased line from a minimum package of leased lines will be so designated by the NRA.

2. The NRA will revoke a designation within the meaning of the first paragraph if it appears from an investigation within the meaning of Article 6a.1(3) or (4) that:

a. a relevant market or transnational market of which the relevant type of leased line from the minimum package of leased lines forms part has become actually competitive; or
b. the relevant company no longer has significant power on the market in providing the type of leased line from the minimum package of leased lines with respect to which it has been designated.

3. A designation within the meaning of the first paragraph will lapse as from the time at which the relevant type of leased line from the minimum package of leased lines no longer forms part of the minimum package of leased lines.

4. The NRA will publish a notification of a decision within the meaning of the first or second paragraph in the Dutch Official Gazette. The data referred to in Article 10(1)(c) of the Government Information (Public Access) Act will not be published.

Article 6a.19
1. A company that has been designated pursuant to Article 6a.18(1) must provide the types of leased lines from the minimum package of leased lines for which it has been designated upon request and within a reasonable term.

2. In pursuance of Appendix VII of EC Directive 2002/22/EC, regulations may be imposed by ministerial decree with respect to companies that have been designated pursuant to Article 6a.18(1). In that context, duties may be imposed on, and powers may be granted to, the NRA.

CHAPTER 12. DISPUTES

Bb

A paragraph reference will be inserted before Article 12.1, reading:

§ 12.1 Dispute settlement by Consumer Complaints Board

Bc

Article 12.1 will read as follows:

Article 12.1
A provider of a public telephone service or other public electronic communication services to be designated by a General Order in Council must join a Consumer Complaints Board recognised by the authorities to handle disputes on an agreement related to the provision of a public electronic communication service between a provider as referred to above and a consumer.

Bd

Two paragraphs will be inserted after Article 12.1, reading:

§ 12.2 Dispute settlement by the NRA
§ 12.2.1 Disputes between market parties
Article 12.2
1. If a dispute has arisen between holders of a permit, between providers, between providers and companies, or between companies, concerning the performance of an obligation that applies by law or pursuant to the law to a permit holder, a provider or a company that offers public electronic communication networks, related facilities or public electronic communication services, the NRA may settle the dispute at the request of a party involved in that dispute, unless the settlement of that dispute has been assigned to another body in this Act.

2. A dispute as referred to in paragraph 1 includes a dispute on the question whether, if the permit holders, providers, providers and companies, or companies referred to in that paragraph have concluded an agreement on the basis of an obligation that applies to them by or pursuant to this Act, the obligations that exist between them in that respect, or the manner in which those obligations are performed conflict with the provisions of or pursuant to this Act.

3. Paragraphs 1 and 2 apply accordingly if a dispute has arisen between the parties referred to in Article 3.11(4).

Article 12.3
The NRA does not have the right to settle a dispute presented pursuant to Article 12.2 if the parties involved in that dispute request the NRA no longer to handle the dispute.

Article 12.4
1. At the request of the NRA, the parties involved in a dispute will provide the NRA within two weeks, or within another reasonable period to be set by the NRA, with all the information that is relevant to the assessment of the dispute.

2. The parties involved in the dispute must immediately, but in any event within the reasonable period set by the NRA, lend their cooperation to the full extent that the NRA may reasonably demand for the assessment of the dispute.

Article 12.5
1. The NRA will decide on a request as referred to in Article 12.2 within seventeen weeks after receipt of that application.

2. Without prejudice to paragraph 1, the NRA may in urgent cases adopt a provisional resolution that will apply between the providers in question until the NRA makes its final decision.

3. In exceptional cases, the NRA may extend the period referred to in paragraph 1. The NRA will inform the providers in question accordingly and will state
Interconnection Regulation and Contract Law

the period within which it will settle the dispute, on the understanding that that period will not exceed eight weeks from the end of the period referred to in paragraph 1.

B) 1998 Tw

CHAPTER 6 INTERCONNECTION AND SPECIAL ACCESS

§ 6.1 General obligations pertaining to interconnection
(Interconnection of telecommunications networks)

Article 6.1
1. Providers of public telecommunications networks and public telecommunications services in the Netherlands, who thereby control the access of end-users to network termination points, shall provide for the interconnection of the telecommunication networks concerned in order to ensure that the users connected to them can communicate with one another reciprocally.

2. At the request of those who provide public telecommunications networks and public telecommunications services outside the Netherlands, and thereby control the access of end-users to network termination points, the providers referred to in paragraph 1 shall also provide for the interconnection of their telecommunications networks with the relevant foreign telecommunications networks in order to ensure that the users connected to those networks can communicate with one another reciprocally.

3. The NRA may grant an exemption from the obligation to provide interconnection under paragraphs 1 and 2 if other technically and commercially feasible possibilities exist for the interconnection concerned, or if such interconnection cannot reasonably be expected in the light of the means available.

4. Subject to the provisions of paragraph 3, and subject to any obligations under treaties or decisions of international organizations which are binding on the Netherlands, Our Minister may grant an exemption from the obligation under paragraph 2 to provide interconnection if compliance therewith would result in a disturbance of competition.

5. The provisions of the paragraphs 1, 2, 3 and 4 shall apply mutatis mutandis to providers of leased lines.

6. Subject to paragraphs 3 and 4, in order to implement paragraphs 1, 2 and 5, every provider as referred to therein must negotiate with other providers as referred to therein, for the purpose of concluding agreements on the basis of which the interconnection will be effected. In the event that the obligation
referred to in the preceding sentence serves to implement paragraph 1, if no agreement has been concluded the NRA may stipulate a period for the providers within which it must be concluded. After the expiry of this period, the providers concerned will be in default, unless one or more of them have invoked Article 6.3, paragraph 1.

7. By or pursuant to a governmental decree, more detailed rules may be laid down in respect of the interconnection to be effected. These rules may differ with regard to the categories of public telecommunications networks or public telecommunications services to be distinguished by these rules.

Article 6.2
(Copy of agreement on interconnection)
1. Copies of the agreements within the meaning of Article 6.1, paragraph 6, and any alterations thereto must be filed with the NRA as soon as possible, but no later than within a week after the agreements concerned have been concluded or the alterations in question have been agreed.

2. If the NRA finds that an agreement is in conflict with the provisions laid down by or pursuant to this Act, it will notify the parties to the agreement of this, specifying the parts that it considers to be in need of alteration. As long as this request for alteration has not been complied with, the providers concerned will not have complied with the provisions of Article 6.1.

3. The NRA may make the agreements filed with it available to interested third parties upon request, with the exception of company data which the NRA deems to be confidential.

Article 6.3
(Rules instead of agreement)
1. If the providers are unable to conclude an agreement as referred to in Article 6.1, paragraph 6, at the request of one or more of them the NRA may lay down the rules which will be applicable between them. A decision of the NRA shall not affect the possibility of a foreign provider within the meaning of 6.1, paragraph 2, to decide against interconnection.

2. Disputes between the providers involved in interconnection within the meaning of Article 6.1 on whether or not the obligations existing between them with respect to interconnection, or the manner in which they are performed, are in conflict with the provisions laid down by or pursuant to this Act, shall be settled by the NRA at the request of one or more of the providers involved. If the NRA is of the opinion that there is a conflict with the provisions laid down by or pursuant to this Act, it may lay down rules to put an end to this situation which will apply between the providers. In cases that arise, these rules will take the place of the obligations existing up to then.
3. With regard to a request as referred to in paragraphs 1 and 2, the NRA:
   a. will render a decision on the request within six months of the request;
   b. will render a provisional decision in urgent cases which will apply
      between the providers concerned until the final decision.

4. The NRA will not render any decision on a request as referred to in paragraph
   1, if in accordance with Article 6, paragraph 1, the providers concerned have
   filed the copy of an agreement concluded between them with the NRA which
   satisfies the provisions given by or pursuant to this Act before the decision is
   due to be rendered, or if a foreign provider is concerned, the latter makes it
   known before the decision is due to be rendered that it has decided against
   interconnection.

§ 6.2 Provisions relating to providers with significant market power
(Providers with significant market power will be designated)

Article 6.4
1. Providers of fixed public telephone networks and fixed public telephone
   services, the providers of mobile public telephone networks and mobile
   public telephone services, and the providers of leased lines having significant
   power in the area of the Netherlands within which they are active on the
   market for fixed public telephone networks or fixed public telephone service,
   or on the market for mobile public telephone networks or mobile public
   service, or on the market for leased lines, shall be designated as such by the
   NRA.

2. The NRA shall also designate providers of mobile public telephone networks
   and mobile public telephone services which have significant power on the
   national market for both fixed and mobile public telephone service.

3. The NRA shall designate as providers with significant market power within
   the meaning of paragraphs 1 and 2 providers having a share of more than
   twenty-five percent on the relevant market.

4. Contrary to the provisions of paragraph 3, the NRA may designate providers
   having a share of less than twenty-five percent on the different markets as
   providers with significant market power, or not designate providers having a
   share of more than twenty-five percent on the particular market as providers
   with significant power on the relevant market. In doing so, in both cases the
   NRA will assess the capacity of the provider in question to influence market
   conditions, its turnover relative to the size of the market, its control of the
   means of access to the end-users, its access to financial resources, and its
   experience with supplying products and services on the market.
Article 6.5
(Obligations)
Providers designated by the NRA pursuant to Article 6.4, paragraph 1:

a. shall offer interconnection to other providers who request interconnection pursuant to Article 6.1 under the same conditions under the same circumstances;

b. shall supply interconnection to other providers who request interconnection pursuant to Article 6.1 under the same conditions as those which apply to themselves or their subsidiaries in the same circumstances;

c. shall supply providers as referred to in Article 6.1 upon request with all necessary information as well as with the intended alterations that will be introduced in the next six months;

d. shall use the information supplied to them exclusively for the purpose for which it was supplied.

Article 6.6
(Setting tariffs)

1. Providers of fixed public telephone networks, fixed public telephone services and of leased lines, designated by the NRA pursuant to Article 6.4, paragraph 1, as well as providers of mobile public telephone networks and mobile public telephone services designated pursuant to Article 6.4, paragraph 2, shall ensure that the tariffs for interconnection are determined in a transparent manner and are cost-based.

2. Providers of fixed public telephone networks, fixed public telephone services and of leased lines, designated by the NRA pursuant to Article 6.4, paragraph 1, shall also ensure that the tariffs for interconnection are sufficiently unbundled.

3. In order to implement paragraph 1, the various providers shall set up a cost allocation system for interconnection. The system must be approved by the NRA.

4. The NRA, or a competent third party designated by the NRA, will examine annually whether the system referred to in the third paragraph has been adhered to properly. The results of the examination will be published in the Official Gazette.

5. More detailed rules may be laid down by ministerial regulation in respect of the obligations referred to in paragraphs 1 and 2. These rules may also assign further tasks and grant further powers to the NRA.
Article 6.7
(Reference interconnection offer)
1. Providers of fixed public telephone networks, fixed public telephone services and leased lines designated by the NRA pursuant to Article 6.4, paragraph 1, shall publish a reference interconnection offer.

2. A reference interconnection offer will contain a description of what is offered in the area of interconnection, itemized by components, tariffs and other terms and conditions which are part of it.

3. If the NRA should find that a reference interconnection offer is in conflict with the provisions given by or pursuant to this Act, the NRA will make this known to the provider in question, stating the parts which in its opinion need to be altered.

Article 6.8
(Separate accounts)
1. Providers of fixed public telephone networks, fixed public telephone services and leased lines, designated by the NRA pursuant to Article 6.4, paragraph 1, who supply interconnection to other providers shall keep separate accounts for their activities relating to interconnection and for the rest of their activities.

2. A ministerial regulation may provide that the first paragraph does not apply to providers whose annual turnover from telecommunications activities in the European Union does not exceed an amount to be determined by that regulation.

§ 6.3 Special access

Article 6.9
(Non-discrimination and special access)
1. Providers designated by the NRA pursuant to Article 6.4, paragraph 1, shall comply with all reasonable requests for special access.

2. Articles 6.2, 6.3 and 6.5 shall apply mutatis mutandis, on the understanding that the requirement of non-discrimination laid down in Article 6.5 under a. and b., subject to the provisions of paragraph 3, will also apply to the special access provided for the purpose of effecting interconnection within the meaning of Article 6.1.

3. Subject to paragraphs 1 and 2, Article 6.6 shall apply mutatis mutandis to the providers of fixed public telephone networks or fixed public telephone services designated under Article 6.4, paragraph 1, with respect to requests for special access made by the providers of fixed public telecommunications services in or outside the Netherlands.
4. Subject to any obligations arising from treaties or decisions of international organizations which are binding on the Netherlands, Our Minister may grant an exemption from the obligations laid down in the first, second and third paragraphs if the special access concerns the provision of public telecommunications services to and from another country and compliance with the obligation would result in a disturbance of competition.

5. By or pursuant to a governmental degree, more detailed rules may be given with respect to effecting special access. These rules may be distinguished according to the different forms of special access.


Article 6.10


2. The ‘Board’ is the national regulatory authority referred to in Article 4 of the Regulation.

3. For the purpose of supervising compliance with the obligation to apply cost-oriented tariffs for unbundled access to the local loop and related facilities set forth in Article 3, paragraph 3, the notified operator referred to in Article 2(a) of the Regulation will set up a system for the allocation of the costs of that unbundled access to the local loop and the related facilities. That system requires the approval of the NRA.

4. The NRA or an authorized third party designated by the NRA will assess compliance with the system referred to in paragraph 3 annually. The findings of that investigation will be published in the Dutch Official Gazette.

5. Article 6.2 shall apply mutatis mutandis to agreements regarding unbundled access to the local loop and related facilities as referred to in Article 2(a) or Article 2(f) of the Regulation to which a notified operator as referred to in Article 2(a) of the Regulation is party.
Register

**Acceptance**, 298ff.
- counterproposal, 305-307.
- offer, 300, 307-308.
- partial agreement, 302-303.
- RIO, 300ff.
- definition, 124, 168ff.
- originating, 177-178
- terminating, 177-178.
**Access agreements**, See also **Access**, **Interconnection**, duty to negotiate, 275.
- qualification, 266.
- and good faith, 275-277.
- purpose and scope, 138.
- reasonability of request, 407
- special access, 124, see also
- Special access.
- wide screen television service, 144.
**Accounting separation**, see ONP, NRF.
**Anti-monopoly rationale**, see also **essential facilities**, 3, 125, 154, 269.
**Application Programme Interfaces (API)**, 145-146.
**Asymmetric regulation**, freedom of contract, 8-9.
**Bottom-Up Long Run Incremental Cost** (BU-LRIC), 62.
- Broadband, 225.
- BT, 59, 168, 180, 185, 227, 382ff.
**Cable TV (CATV) networks**, 103, 113, 230.
- Capacity, obligation to offer, 408-412.
- Carrier pre-selection, 177, 187.
- disputes, 407.
- Change of circumstances, 343-344.
- Circuit switching, 35.
- Commercial negotiations, 72, 139.
- ITU models, 73-76, see also ITU.
**Commission**, Guidelines, 221-222.
- Recommendation, 222-223.
**Communications Act**, 172, 294.
**Communications Review**, 97-102, 434.
**Communications Competition Directive**, 113.
**Competencies**, see courts, NRA.
**Competition**, Competition Authority, NMa.
**Competition**, see also **Dominance**.
- economic considerations, 47-64.
- excessive pricing, 56.
- innovation, 26.
- predatory pricing, 56
- regulatory, 64
**Conditional access systems**, 144.
**Consumer protection rationale**, 3, 131, 154.
inequality of parties, 11.

Contracts,
derogation, 327-328.
formation, 161, 263, 435ff.
interpretation, 323-326.
negotiation, see Commercial
negociations, Duty to negotiate.
non-performance, see Non-
performance.

performance, see Performance.
reasonableness, 12.
supplementation, 327.
termination, see Termination.

Convergence, 29-30, 68, 74, 86, 97,
99, 113, 162, 189, 206-207, 240,
261, 438.

Cooperation, 44, 77, 111, 210, 214,
447.
Cost accounting, see ONP, NRF.
Costs, see Prices, Tariffs.

Courts, 4-5, 10-12, 20, 25, 129, 131,
175, 193, 206-210, 219-220, 232,
237-249, 255, 277, 287-292, 312,
321-323, 395, 411-413, 417, 423,
440ff.
administrative, 64, 113.
arbitration, 293.
civil law, 289ff.
competence, 289ff.
intervention, 289-291.
NRA and, 242-249.
role, 450.
CvdM, 239, 241.

**Damages**, 291, 322, 340-342.
Decision making,
publication of information, 211
Decision RIO 2000, see RIO.
Derogation, see Contracts,
Interconnection agreements.

Direct interconnection, see
Interconnection.

Dispute resolution, see also
Interconnection agreements
(under conflicts).
access disputes, see Access,
Interconnection.
interconnection disputes, see
Access, Interconnection.

Disputes, see dispute resolution.

Dominance, see also Competition,
assessment, 109.
collective dominance, 107-109
joint dominance, 107-109.
DTAG, 174.

Duty,
and right to negotiate, 127-153.
to contract, 153, 208, 268.
to negotiate access, 404-406.
to negotiate interconnection,
153, 179-182, 190-195, 269ff.,
401-406.
to provide interoperability, see also
Interconnection, Interoperability,
195-200, 404-406.
urgent interest and duty to
negotiate, 406.

**Economic(s),**
aspects, 32ff., 47ff., 398, 417, 449.
technology and, 7, 25.
Electricity sector, 155-157.
Electronic communications
network (ECN), 34.
definition, 113, 120, 171, 191.
operators, 5.
Electronic communications services
(ECS),
definition, 122, 191.
providers, 122, 191, 199.
Efforts obligation, 267.
Embedded direct costs (EDC), 61.
End-to-end connectivity, 2, 140, 177.
Enforcement, 182, 234-244, 272, 292-293, 339, 347, 374, 396, 412, 426, 434, 449.
England, see UK.
Error, 122, 344.
Essential facilities, 3, 17, 20, 154, 269, 278, 337.
European Regulators Group (ERG), 250-254.
   available standard remedies, 252-254.
   standard competition problems, 251-252.
Ex ante intervention, 9, 16, 101, 110, 137, 140, 262.
Ex post intervention, 9, 101, 109, 140, 262.
Force majeure, 342-343.
Formation,
   of contracts, 161, 263, 435ff.
Full Competition Directive, 91-94.
Fully Distributed Cost (FDC), 61.
Gas sector, 157-158.
GATS, 71-72.
General terms and conditions, 161, 311ff., 319-320.
RIO as, 311-313.
Germany, 23, 166, 186, 231-233, 273, 276, 291, 321, 357, 426.
Good faith,
   administrative law, 276.
   application to failed negotiations, 285-287.
duty to negotiate, 269-270.
efforts or results obligation to provide interconnection, 279-281.
in the absence of a duty to negotiate, 277-279.
failed negotiations, 281-282.
freedom of contract, 271-274.
parallel negotiations, 281.
principle, 269.
reasonableness and the interconnection agreement, 323-324.
Harmonisation, 94, 157.
Indirect interconnection, see Interconnection.
Information provision of, 367.
Intention to create a legal relationship, 296-298.
Interconnection, see also Interconnection agreements, Interconnection Directive, basic forms, 92.
by-pass, 43-44.
contract law, 10-11, 259ff.
cooperative, 46.
definition, 92, 123-124, 168ff., 399-400.
direct, 42-44, 400.
Dutch law, 165ff.
duty to negotiate, 127-128, 179-182, 267ff., 404ff.
horizontal, 47.
indirect, 42-44, 176, 400.
interoperability, see also Interoperability, 117ff.
logical, 32, 36, 118
negotiation models, see ITU.
obligation to offer capacity, 408-412.
parallel, 46.
physical, 32, 36, 118.
primary rule, see primary interconnection rule.
reference offer, see RIO.
secondary rule, see secondary interconnection rule.
simple, 42.
transit, 42.
vertical, 47.
Interconnection agreements. See also Interconnection, 2, 4.
commercial negotiations, see Commercial negotiations.
conflicts, 14, 183, 395ff.
derogation, 327-328.
interpretation, 323-326.
qualification, 266.
performance, see Performance.
realization, 348.
standardization, 348.
supplementation, 327
termination, see Termination.
written contract, 414.
and good faith, 275-277.
purpose and scope, 125, 179ff.
Interested third party, 403.
International Organisation for Standardisation (ISO), 40.
International Telecommunications Union (ITU), 40, 72.
models for regulatory intervention in access and interconnection, 73-76, 160-161.

Internet, 29-45, 77, 113, 121, 189, 227-228, 371, 391.
Interoperability, 117ff., 171-172
definition, 1.
duty, 191-200, 404-406.
Interpretation, see Contracts,
Interconnection agreements.
Intervention, 17, 287.
by the NRA on its own initiative, 216.
in contract terms, 287, 392, 412-414.
prior to completion of market analysis, 414.
request to intervene, 215.
timing, 9.
Invitation to treat,
RIO as, 313-319.
KPN, 361ff., 395ff.
Leased lines, 187-188, 225.
Liberalisation, 91.
Local exchange, 423.
Local Loop, 47, 55, 98, 123, 143.
LLU, 143, 188.
Long-Run Incremental Cost (LRIC), 62.
Long-term wholesale tariff-system (LWTS), 63.
Market analysis, see under Competition.
Minimum standard package,
RIO as, 319-320.
Mobile telephone networks,
market analysis, 225
Mobile terminating access (MTA), 176.
tariffs, 54ff: 246, 419-423.
Monopolies, 2.
National Regulatory Authorities (NRAs),
appeal, 219, 238.
civil courts, 242-249.
competencies, see also powers,
consultation, 209, 211-213.
co-operation, 209, 214.
CvdM, 239, 241.
dispute resolution, 129, 209, 395ff.
enforcement measures, 237.
ERG, 206, 250-254.
international dispute resolution,
219.
intervention, 12.
NMa, 224, 239-240.
policy objectives, 216.
powers, see also competencies,
129, 250ff.
regulatory principles, 210, 233,
353ff.
right to lay down technical or
operational conditions, 217.
setting the terms, 130-131, 182,
288-289.
SMP, 220, 223-229, see also SMP.
Timelines, 130, 163, 182, 218,
287-288.
Negotiations, see Commercial
negotiations.
Netherlands, 165ff., 321, 324, 353ff.
Network Termination Points
(NTPs), 35, 123, 132, 146, 171,
171, 179.
Network, see Electronic
Communications Networks
(ECNs),
architecture, 38-39.
topology, 37-39.
New Regulatory Framework
(NRF), 67ff., 102.
Accounting separation, 151.
Cost-orientation, 149.
Non-discrimination, 146-147.
Principles, 146ff.
transparency, 147-148.
Non-discrimination, see ONP, NRF.
Non-performance, see also
Performance, 331ff., 342ff.
Offer, 295-296, see also RIO.
Office of Communications (UK)
(Ofcom), see also NRA, 59, 195,
200, 202, 227-228, 233.
Oftel (UK), 59, 181, 195, 197, 227.
Onafhankelijke Post- en
Telecommunicatie Autoriteit
(NL) (OPTA), see also NRA, 25,
166, 222-226, 229, 237, 242-243,
247, 357ff.
Open Network Provision (ONP),
5, 69.
accounting separation, 90, 136,
185.
competition law, 94-97.
cost-orientation, 90, 134-135,
186, 417.
non-discrimination, 87-88, 132-
133, 184, 423-425.
framework, 83.
principles, 86-91.
principles and non-performance,
328-331.
review, see Communications
Review.
transparency, 89, 133, 184-185, 425.
Operator, see Other Licensed
Operators and Telecommunications
Operator.
Interconnection Regulation and Contract Law

Other Licensed Operators (OLOs), 25ff., 261.

Packet switching, 35.
Peering, 45.
agreements, 391ff.
Performance, 322-327, 412-414.
Claim, 334-335.
interconnection agreements, 349.
non-performance, 333ff.
rescission, 336-337.
suspension, 335-336, 369.
termination, 349.
Points of Connection (PoCs), 6, 7,
31, 36, 174.
Postal sector, 159-160.
Prices, see also Costs, Tariffs,
cost orientation, see ONP, NRF.
excessive prices, 56.
predatory pricing, 56.
Primary interconnection rule, 21,
48-51, 65, 74, 92, 99-100, 118,
129, 159, 180, 203, 233, 254, 261,
270-272, 280-281, 314, 320, 347,
401, 435-436, 443-445, 446.
Principles applied by NRA, see also
NRA regulatory principles,
general, 236.
material, 235-236.
procedural, 234-235.
Principles of European Contract
Law (PECL), 24, 264ff.
Privacy and Electronic
Communications
PSTN, 122, 361.
Public communications network,
definition of, 122-123.
Public offer,
RIO as, 313-319.

Reference Interconnection Offer
(RIO), 13, 133, 148-149, 186,
297, 300-309, 311-320, 351ff.
decision RIO 2000, 354ff.
formal assessment, 358ff.
Indicative Reference
Interconnection Offer, 133, 226.
Model Interconnection
Agreement (MIA), 371ff.
negotiations, 300-309.
NRA, 148.
practical importance, 352.
qualification, 311-320.
RO, 358.
SIP, 148-149.
suggestions for improvement,
386ff.
Reasonableness NRA, 236, 323-325.
Reference Offer (RO), see RIO.
Regulated markets, see also electricity,
gas, transport and postal sector,
22, 153ff., 163, 437.
Regulatory Framework,
principles, 1.
Regulation,
effectiveness, 19, 205, 440-441.
proportionality, 19, 210, 235,
440-443.
sustainability, 19, 205, 440-443.
Regulierungsbehörde für
Telekommunikation und Post
(RegTP), see also NRA, 140, 174,
197, 229.
Results obligation, 267.

Secondary interconnection
rule(s), 21, 47-50, 52-54, 65, 75-78, 87, 93, 112-113, 118, 125,
131, 140, 152, 162, 181, 190, 200,
203, 229, 240-241, 260, 270, 279,
Service levels, 10, 13-14, 202, 274, 300-301, 316, 334, 340, 367-368, 372, 374, 382, 388, 391. Service providers, see ECS, OLOs.
Services Directive, 83.
Services interoperability, 50, 65, 197, 203.
Services of general interest, 105, 153.
Significant Market Power (SMP), 67, 220.
assessment, 98, 223-229.
definition, 93, 106, 190.
market analysis, 98, 109.
obligations, 131ff., 141ff.
Software interoperability, 118-119.
Special access, 124, 171, 401-403.
Standardisation, 40-41.
RIO, 311-320, 348.
Supplementation, see Contracts, Interconnection agreements.
Switching nodes, see also circuit switching, 35.
Tariffs, regulation, 150, 415ff., 428.
Technological progress rationale, 3, 30, 131, 154.
Technology (technological), economics and, 7, 25.
influence on regulation, 65.
eutrality, 30-31, 103, 440.
technological aspects, 30, 65ff., 417, 437, 440, 449.
Telecommunication networks, see ECNs.
Telecommunication services, see ECS.
Telecommunications Operator (TO), 25ff., 261.
Terminal equipment, 37, 83-84.
Termination, 332, 345ff.
consequences, 346.
contracts, 332, 370.
damages, see Damages.
for convenience, 344-346.
non-performance, 332, 336-337.
Transparency, see ONP, NRE.
Transport sector, 158-159.
Transaction cost rationale, 3, 154.
Transmission links, 34.
Unbundling, 187, 415-416.
Universal Services Directive, 114.
Urgent interest, 404.
UNIDROIT Principles (UP), 24, 264ff.
Voice over Internet Protocol (VoIP), 2, 30, 433.
Wide screen television service, see Access Directive.
WTO, 71-72.
Acknowledgements

Thank you:
Jan-Paul de Wit and Claudia Zuidema, my dearest ‘old’ friends/fellow lawyers and graduates of the ‘class of 1988-1989’, who supported my thesis defence; Professors Jan Smits and Kees Stuurman who acted as promotores and provided insightful and stimulating comments on the draft versions; The members of the reading committee: Professor Corien Prins, who stimulated me to start this project in the first place and who has been a faithful mentor and motor; Professor Pierre Larouche, for his excellent comments and very thorough feedback on the final version; Professors Jan Vranken and Professor Jens Arnbak for thoughtful points; dr. Colette Cuypers, dr. Simone van der Hof, dr. Sjaak Nouwt and dr. Maurice Schellekens (all TILT) for a highly enjoyable feedback session; Professor dr. Joachim Scherer, for providing resources on Germany, Ross McKean and Helen Kemmit, Baker & McKenzie London, for providing input on England; Jan-Pieter Verwiel (T-Mobile Netherlands B.V.), for providing invaluable insight and reports that helped me further develop my thinking; Inez Jolink (bbned N.V.), who regularly provided me with information on the telecommunications market; Saskia ten Asbroek (KPN Telecom N.V.), for enlightening me on KPN’s point of view as regards the reference interconnection offer; Eric van Goor, Mark Pijning and Paulien Sneekes (OPTA) explained the NRA’s role; Sylvia Schoofs, who prepared and improved the contents and managed the production; Elizabeth Bok, Vera Former and Saskia Meijer of Baker & McKenzie’s document centre, who went out of their way to obtain the literature to support my research; Colleagues from our support centre (especially Lilia Alvarez and Vivien Borillo) for editing and setting the text and Lydia Romme for double-checking the footnotes and case law references.

Foremost, my most heartfelt appreciation goes to Alewijn de Bruijn, for his never-ending support and understanding, and for dealing with occasional despair good-naturedly.

Status in|ris: 1 January 2006. Any errors or omissions are entirely my own.
Resume

Serge Gijrath (1964) is a law graduate from the University of Amsterdam (1988) and holds an L.L.M. degree from the European University Institute at Florence, Italy (1989). Having qualified as an attorney in Amsterdam (1990) he joined Baker & McKenzie in 1996, and worked in the San Francisco office in 1997. He became principal in 2001 and chairs the Amsterdam information technology ('IT') and telecommunications practice. He is also the coordinator of the European IT practice group of Baker & McKenzie. Mr. Gijrath specializes in all aspects of IT and telecommunications law, with a particular emphasis on the areas where IT, media and telecommunications converge. He has considerable experience in drafting, negotiating and advising on a broad range of computer, IT and telecommunications related contracts, including technology licences, strategic cooperation and outsourcing arrangements.

Serge Gijrath regularly speaks at international conferences on a host of IT and telecommunications related legal topics and has been part-time lecturer at the Tilburg Institute for Law, Information and Society ('TILT') since 1999 where he teaches on various IT related topics, such as, IT and contract law, computer security and electronic commerce. He defended this book as a doctoral thesis on April 5, 2006.
INTERCONNECTION REGULATION AND CONTRACT LAW

PROEFSCHRIFT

ter verkrijging van de graad van doctor
aan de Universiteit van Tilburg, op gezag
van de rector magnificus, prof. dr. F.A. van der Duyn Schouten,
in het openbaar te verdedigen ten overstaan van
een door het college voor promoties aangewezen commissie
in de aula van de Universiteit
op woensdag 5 april 2006 om 16.15 uur

door

Serge Jan Hans Gijrath

geboren op 3 augustus 1964 te Amsterdam
Promotores
Prof. mr. drs. C. Stuurman
Prof. mr. J.M. Smits
This book explores the relation between European Union's framework for electronic communications and principles of contract law. The European Union has achieved considerable progress in further opening up electronic communications markets and continues to monitor market behaviour. A review of the new regulatory framework (2002) that was implemented into the Member States' law is expected for 2006. The emphasis of regulation continues to lie on the application of competition law and sector-specific regulation especially to control significant market power.

This book discusses the EC regulatory framework for access and interconnection and posits that the time has come for the European Union to also pay serious attention to contract law issues surrounding access and interconnection.

Even if the emphasis continues to be on asymmetric regulation, positive network effects should lead to more reliance on operators' and service providers' capabilities to successfully negotiate interconnection agreements without regulatory intervention. The duty to negotiate interconnection is discussed especially in light of contract law practice; whereas the effectiveness and sustainability of intervention in significant market power is discussed as well.

The national regulatory authority's interference with the reference interconnection offer is explored. Disputes that arose as regards the formation and performance of access and interconnection agreements that occurred in the Netherlands over 1997-2005 are also discussed. The remedies that have been applied are to some extent compared with available remedies under contract law.

The analysis provided hopes to offer a new approach to the question whether freely negotiated interconnection agreements are to be preferred over commercial negotiations under a regulatory framework.