

OPTA - NMa Cooperation protocol

Agreements between the Commission of the Independent Post and Telecommunications Authority (OPTA) and the Director General of the Netherlands Competition Authority (the NMa) on the method of cooperation in matters of mutual interest

Disclaimer

This translation is an unofficial and therefore non-binding translation of the original Dutch document. The Dutch text is the leading version. OPTA and the NMa accept no responsibility whatsoever for misunderstandings arising from any discrepancy or as a result of mis-translation. In such circumstances reference will be made to the original Dutch text *Samenwerkingsprotocol OPTA-NMa (June, 2004)*, a copy of which is available on the websites of both OPTA and the NMa.

Preamble

1. The agreements in this Cooperation Protocol between the Commission of the Independent Post and Telecommunications Authority (hereinafter referred to as OPTA) and the Director General of the Netherlands Competition Authority (hereinafter referred to as the NMa) follow from the joint internal evaluation of the second Cooperation Protocol

between OPTA and the NMa, as published in the Netherlands Government Gazette (“Staatscourant”) of 22 December 2000. This Cooperation Protocol also contains the agreements resulting from the new regulatory framework as specified in the European directives for electronic communications, and from the amendments to the Telecommunications Act (Bulletin of Acts, Orders and Decrees 2004, 189) which took effect on 19 May 2004.

2. OPTA is responsible for the implementation and enforcement of legislation and regulations relating to electronic communications and post, as laid down in the Telecommunications Act and the Post Act, and for its other assigned duties.

3. The NMa is responsible for the implementation and enforcement of general competition rules as laid down in the Competition Act and in Articles 81, 82 and 84 of the EC Treaty, and for its other assigned duties.

4. This protocol describes agreements determining how matters that may involve the performance of duties referred to in both Item 2 and Item 3 of this preamble shall be addressed. The protocol also describes agreements on the treatment of matters in

which OPTA interprets terms used in the application of Articles 24 and 88 of the Competition Act, as well as the method of realising the general guidelines referred to in Article 18.3, Clause 2 of the Telecommunications Act and Article 15o, Clause 1 of the Post Act (consistent application of competition terms).

5. Pursuant to Article 18.3, Clause 3 of the Telecommunications Act and Article 15o, Clause 2 of the Post Act, OPTA and the NMa are obliged to reach agreements on the handling of matters of mutual interest. This obligation follows from the European directives on electronic communications and also from the case law of the European Court of Justice. The protocol also implements Article 18.19 of the Telecommunications Act, Article 24 of the Independent Post and Telecommunication Authority Act and Article 91 of the Competition Act, which concern the competence of OPTA and the NMa to exchange information.

6. Cooperation between OPTA and the NMa in exercising their powers can strengthen the effectiveness and efficiency of the implementation and enforcement of the law by both OPTA and the NMa. The protocol is intended to structure this cooperation. The

agreements are intended, in part, to enable OPTA and the NMa to:

- coordinate the exercise of coincident powers when taking decisions, in order to prevent forum shopping.
- apply a consistent interpretation of terms used in competition law, electronic communications law and post law.
- consult with each other regarding the definition of markets for electronic communications, determining the degree of effective competition in these markets, and evaluating the question of whether there is a dominant position or a position of significant market power on such a market.
- establish consistent policy rules for cases that arise.
- provide each other with information where that is of interest for each others activities relating to the abuse of dominant positions, regulation of mergers, and the regulation of the electronic communications and post sectors.
- support each other in word and deed.
- in cases that arise, act and/or communicate jointly.

For these subjects and any other subjects that involve cooperation between OPTA and the NMa, working agreements shall be drawn up, where necessary, in addition to the general agreements described in this protocol.

I Definition of coincident powers

Article 1

In this Cooperation Protocol, 'co-incidence' refers to:

A situation in which the NMa's powers pursuant to the

Competition Act or European law, or the possible exercise thereof, and OPTA's powers pursuant to the Telecommunications Act, the Post Act or European law, or the possible exercise thereof, coincide or may coincide in relation to companies in the electronic communications and/or postal sectors.

Article 2

Co-incidence of OPTA's and the NMa's powers may arise in (the preparation of):

- a) (Provisional) judgements (with or without legal consequences)
- b) Decisions on request
- c) Decisions resulting from ex officio investigations
- d) Decisions on disputes
- e) Policy rules
- f) Consultation documents including any prior regulation and/or investigations thereof.

II General provisions

Article 3

1. OPTA and the NMa will ensure that, in cases where the Telecommunications Act or the Post Act apply, interested parties will in principle be directed to OPTA.

2. In cases that may involve (alleged) abuse of a dominant position by a company operating in the electronic communication and/or postal sectors, co-incidence of the NMa and OPTA's powers may arise.

3. It is undesirable that the exercise of such coincident powers should lead to conflicting decisions or results. OPTA and the NMa will therefore consult one another

regarding the way in which to deal with matters involving possible coincident powers.

4. If OPTA's actions pursuant to its own powers lead to the conclusion that there can no longer be any question of the abuse of a dominant position, as referred to in the second clause, OPTA, as the sector-specific supervisory authority, is the first authority to act.

5. Deviation from the previous clause is possible if OPTA and the NMa, following joint discussion, are both of the opinion that, on the grounds of the effectiveness of the legal instruments and/or efficiency and/or other considerations, it would be better if the NMa or the NMa and OPTA jointly deal with the case.

6. If the NMa and OPTA, while jointly exercising coincident powers come to the conclusion by mutual agreement that, due to the effectiveness of the legal instruments and/or efficiency considerations, one authority can continue the investigation more effectively than the other, the other authority shall withdraw and shall cease its involvement in the case.

III Allocation and referral of tasks

Article 4 Referral

If an applicant approaches either OPTA or the NMa, and it is the case that the supervisory authority to which the application is addressed proves to be non-competent to handle the application, whilst the other authority may be so, OPTA or the NMa shall immediately refer the

application to the other authority pursuant to Article 2:3 of the General Administrative Law Act, notifying the applicant accordingly.

Article 5 Applications submitted to / ex officio action by, the NMa

1. If an application is submitted solely to the NMa for action against (alleged) abuse of a dominant position in the electronic communications and/or postal sectors, or if there are grounds for ex officio action against abuse of a dominant position in the electronic communications and/or postal sectors, the NMa shall notify OPTA accordingly.

2. The NMa shall request OPTA to state, within a period of three weeks (with the possibility of a single extension by mutual agreement of a further three weeks in exceptional situations) whether it is competent to handle the application and if it intends to take action itself, pursuant to its own powers, within a reasonable term.

3. If, in the view of and by agreement between the two supervisory authorities, the application would best be processed by OPTA on the grounds of the effectiveness of the legal instruments and/or efficiency considerations, the application shall be referred to OPTA with a request to process it, and the NMa shall stop the processing of the application, notifying the applicant accordingly.

Article 6 Applications submitted to / ex officio action by, OPTA

1. If an application is submitted solely to OPTA to exercise its powers in the electronic communications and/or postal sectors, or if there are grounds for ex officio action, and where there is the possibility of coincident powers, OPTA shall notify the NMa of the application.

2. If, in the view of and by agreement between the two supervisory authorities, the application would best be processed by the NMa on the grounds of the effectiveness of the legal instruments and/or efficiency considerations, with the applicant's consent, the application shall be referred to the NMa with a request to process it, and OPTA shall stop processing the application.

Article 7 Double application

1. If an application is submitted to both the NMa and OPTA, and where co-incident arises or may arise, the supervisory authorities shall inform and consult with each other in order to agree how the case is to be processed.

2. If action by OPTA on the basis of its powers leads to the conclusion that there can no longer be the question of abuse of a dominant position in the electronic communications and/or postal sector, OPTA is the first authority to act, unless in the joint view of and by agreement between the two supervisory authorities, the application would best be processed by the NMa, or jointly by the NMa and OPTA, on the grounds of the effectiveness of the

legal instruments and/or efficiency and/or other considerations.

3. The NMa shall request OPTA to state, within a period of three weeks (with the possibility, by mutual agreement, of a single extension of a further three weeks in exceptional situations) whether it is competent to handle the case and whether it intends to take action on the basis of its own powers within a reasonable term.

4. In principle, whilst a case is being processed by one of the two supervisory authorities, the other authority shall only (further) process an application in the same case, or a part thereof, if this is justified by a difference in the legal framework and following mutual consultation.

IV Processing in the case of coincident powers

Article 8 Action by OPTA

1. The NMa shall not apply Article 24 of the Competition Act, neither ex officio nor on request, in cases of conduct arising from an abuse of a dominant position in (part of) the electronic communications and/or post sectors if:

a) OPTA takes action against the misconduct on the grounds of its powers, within a reasonable term, and

b) if applicable, agreement has been reached with the NMa on the correct application of competition terms by OPTA, and

c) if applicable, agreement has been reached with the NMa with regard to market definition, determining the degree of effective competition in the markets for electronic communications, and

the judgement in respect of whether there is a dominant position or a position of significant market power in a particular market, and

d) agreement has been reached with the NMa that, as a result of OPTA's action on the grounds of its powers, there can no longer be any question of abuse of a dominant position.

2. Agreement on the correct application of competition terms by OPTA, within the meaning of Clause 1b of this Article, is deemed to have been reached if:

a) the NMa provides explicit written consent for the application of the term in advance, or

b) the application complies with general guidelines, within the meaning of Article 18.3, Clause 2 of the Telecommunications Act or Article 15o, Clause 1, of the Post Act, or

c) the application complies with a decision in an earlier, comparable case or is in compliance with a decision of the NMa in a comparable case, or

d) the application complies with an irrevocable court ruling on a decision in which agreement has been reached as specified in a, b or c or in compliance with European case law.

3. In each case, OPTA shall consider whether co-incidence could arise in the exercise of its powers, and in that case, whether agreement already exists within the meaning of Clauses 2b, 2c or 2d of this Article. In cases of doubt, the NMa, in response to a request from OPTA to that effect, shall state within a term of three weeks

(with the possibility by mutual agreement of one extension by a further three weeks in exceptional situations) whether co-incidence arises, or could arise and if so, whether there is agreement. If no statement is issued within this term, co-incidence shall be deemed not to be apparent or consent shall be deemed to have been granted.

4. In cases arising, OPTA shall include the grounds of the agreement as referred to in Clause 3 of this Article in the appropriate decision. On announcing such a decision, OPTA shall send a copy of the decision to the NMa.

Article 9 Action by the NMa

1. If OPTA does not take action against conduct that may lead to abuse of a dominant position within a reasonable term on the basis of its own powers, or if the exercise of OPTA's own powers fails to prevent the abuse of a dominant position, the NMa may still process the case (further).

2. In the situation described in the preceding clause, the NMa shall notify OPTA of the proposed application of Article 24 of the Competition Act. Within three weeks (with the possibility by mutual agreement of one extension by a further three weeks in exceptional circumstances), OPTA shall report whether implementation of such plans gives rise to any reservations from the point of view of the objectives of the Telecommunications Act or the Post Act. If no report is issued within the set term, no reservations on OPTA's part shall be deemed to exist.

3. If OPTA states that it has reservations against the proposed application of Article 24 of the Competition Act by the NMa, the NMa Director General and the Chairman of the OPTA Commission shall enter discussion in order to reach agreement.

4. In cases arising, the NMa shall include the grounds of the agreement as referred to in Clause 3 of this Article in the appropriate decision. When announcing such a decision, the NMa shall send a copy of the decision to OPTA.

V Joint processing

Article 10

1. OPTA and the NMa shall prepare cases of major mutual importance together. OPTA and the NMa may form a joint processing team for this purpose.

2. The processing team shall make proposals for the decision(s) or action(s) to be taken. These proposals shall be submitted to the OPTA Commission and to the NMa Director General for approval.

3. If the NMa and OPTA, whilst jointly exercising coincident powers, come to the conclusion by mutual agreement that, due to the effectiveness of the legal instruments and/or efficiency considerations, one authority can continue the investigation more effectively than the other, the other authority shall withdraw and shall cease its involvement in the case.

VI Interpretation of terms

Article 11

1. OPTA and the NMa shall apply consistent interpretations of terms

used in general competition law and the terms used in the Telecommunications Act and the Post Act. The NMa and OPTA shall consult each other on the interpretation of terms. Each supervisory authority shall issue an opinion regarding this interpretation within three weeks of consulting the other supervisory authority (with the possibility by mutual agreement of a single extension of a further three weeks in exceptional situations). If no opinion is issued within this term, a consistent interpretation shall be deemed to exist.

2. Pursuant to the provisions of Article 18.3, Clause 2 of the Telecommunications Act and Article 15.o, Clause 1, of the Post Act, the NMa and OPTA may establish general guidelines for the interpretation of certain competition law terms to enable a consistent interpretation of those terms.

3. OPTA and the NMa shall exercise their powers in compliance with the guidelines referred to in the preceding clause.

VII Urgent measures

Article 12

1. If OPTA or the NMa are requested to take urgent measures in relation to a case for which this protocol provides, or intend to take urgent ex officio measures, they shall consult the other supervisory authority on these plans within one week.

2. Section III of this Cooperation Protocol, 'Allocation of tasks and referrals', stating that the urgency of the matter shall be taken into

consideration when the term is fixed, applies in full to urgent measures. In cases arising, the supervisory authority shall strive to respond within a period of one week.

VIII Advice on appropriateness of competition law

Article 13

1. OPTA shall exercise its powers in compliance with Articles 81 and 82 of the EC Treaty. OPTA may request the advice of the NMa on this matter.

2. The NMa shall provide the advice referred to in the preceding Clause within three weeks (with the possibility by mutual agreement of one extension by a further three weeks in exceptional situations) of receipt of the relevant request.

IX Advice on market definition and determining a dominant position or significant market power

Article 14

1. OPTA and the NMa shall consult each other when, within the framework of exercising the powers assigned to them by law, they must define markets for electronic communications or must analyse the degree of effective competition in a market for electronic communications, including the question of whether a market party enjoys a dominant position or a position of significant market power. The terms effective competition, dominant position and significant market power shall be interpreted consistently by OPTA and the NMa in this respect.

2. Within two weeks of consulting with the other supervisory authority (with the possibility by mutual agreement of one extension by a further two weeks in exceptional situations), the supervisory authority shall provide its written opinion on the relevant analysis. If a written opinion is not provided within this term, agreement on the relevant market definition or market analysis shall be deemed to exist.

3. The terms specified in Clause 2 of this Article do not apply to the regulatory control of mergers. In the case of the regulatory control of mergers in the electronic communications sector, the NMa shall immediately inform OPTA of the merger notification / permit application. The NMa shall specify an appropriate term for a response from OPTA.

4. The advisory authority shall not make its advice public until after the authority to whom the advice is issued has taken the decision for which the advice has been issued.

5. If the advisory authority is of the opinion that no substantial change in market circumstances has occurred since a previous advice was issued, no new consultation needs to take place.

X Exchange of information

Article 15

1. Article 18.19 of the Telecommunications Act, and Article 24, Clause 2 of the Independent Postal and Telecommunication Authority Act and Article 91 of the Competition Act provides for the exchange and

provision of information between OPTA and the NMa.

2. OPTA and the NMa shall provide each other with any information obtained on a company in connection with any of their activities for the performance of their own statutory duties, if such information is necessary for the performance of the other supervisory authority's duties and if this is not excluded by any statutory provision.

3. OPTA and the NMa shall inform each other of matters and developments that are of importance for each other's operations.

4. OPTA shall provide the NMa with information on conduct in the electronic communications and/or postal sectors that could lead to action against abuse of dominant positions, as meant in Article 24 of the Competition Act.

5. The NMa and OPTA shall inform each other of electronic communications and/or postal matters raised in talks with the European Commission, among others, in so far as such matters could be of importance for the exercise of OPTA's or the NMa's powers.

6. OPTA and the NMa shall treat information received from each other as confidential, in so far as this results from the nature of the information. The information shall be used solely for the purpose for which it was provided to the other party.

7. The above obligations do not apply to information obtained by the NMa in relation to implementation of the Directives for Granting Clemency related to imposing or reducing fines in cases pursuant to Articles 6, in conjunction with Articles 56, 57 and 62 of the Competition Act (Government Gazette 122 of 1 July 2002).

8. The above obligations do not apply to information obtained by the NMa pursuant to Council Regulation 1/2003 (Regulation (EC) No. 1/2003 of 16 December 2002 for implementation of the competition rules of Articles 81 and 82 of the Treaty, PbEC L 1 of 04-01-2003).

XI Other provisions

Article 16

1. OPTA and the NMa shall provide each other with support in word and deed on request, on the basis of their own expertise.

2. The NMa and OPTA can act in each other's investigations (ex officio) as experts in the sense of Article 5:15, Clause 3, of the General Administrative Law Act. To this end, on request and where possible they shall make staff and resources available for one another.

3. The Director General of the NMa and the Chairman of the OPTA Commission shall conduct quarterly talks, and more frequently should this prove necessary.

XII Revisions and amendments

Article 17

1. The protocol may be revised or extended in the intervening period by mutual agreement, and shall be kept consistent with any changes in legislation.

2. Each year, OPTA and the NMa shall jointly consider whether any adjustments of this protocol are necessary. In particular, they shall consider the realisation of the defined objectives, the practicability of the provisions of the protocol and the desirability of adding working agreements and policy rules that have proved useful in practice to the protocol.

The Dutch language version of this protocol was signed by the Director General of the Netherlands Competition Authority, P. Kalbfleisch, and the Chairman of the Commission of the Independent Post and Telecommunication Authority, J. Arnbak, on behalf of the Commission, in The Hague on 24th June, 2004.

This protocol has been sent to the European Commission and the Minister of Economic Affairs and shall be published in the Netherlands Government Gazette ("Staatscourant").

This protocol replaces the Cooperation Protocol between OPTA and the NMa as published in the Netherlands Government Gazette ("Staatscourant") of 22 December 2000. This protocol is also available on the OPTA and the NMa websites.