

REGULATING THE REGULATORS



Magnus Franklin

Policing 27 boisterous national telecoms regulators would present even the most seasoned policymaker with a formidable challenge. But Chris Fonteijn is a man surmounting it, and with a certain panache to boot. **Magnus Franklin** goes to The Hague to find out how he does it

The Body of European Regulators of Electronic Communications did not have an easy birth. It went through a number of reincarnations, was in various drafts dubbed Bert, Gert and Eecma. It experienced increasingly fractious focus points in the negotiations over the new European telecoms package, pitching then-European Commissioner for telecoms Viviane Reding, who pushed for a ‘Euro-regulator’ for telecoms, and member states that refused to give an inch on the independence of their national authorities.

Berec, as the body eventually became known in the new 2009 telecoms framework, was, in the words of one of the key commission officials that served as its midwife, “a certain beginning of a common regulatory culture, which might lead to more consistency and coherence of the regulatory landscape for remedies, not only market definitions.”

Running up to the end of its second year in existence, the body is now adolescent, having overcome the transition from its predecessor, ERG, and the near-completion of the opening of its official seat in the Latvian capital Riga, and it has been the job of one man in particular – its sitting chairman Chris Fonteijn – to turn the tortuously compromised final setup of Berec into a living, working part of the EU telecoms-regulation machinery.

“People are watching Berec closely. I find, and feel, that all the time. It had a rocky history in coming about, you know, and me and my colleagues are very aware of that,” says Fonteijn.

But those that might have expected the Berec chairman to merely polish the cogs in the gears of the new body have been soundly mistaken, and Fonteijn is well on track to turn an administrative office on the borders of Europe into a key influential force in the shaping of telecoms policy and beyond.

Driven by intuition

Chris Fonteijn spent his career approaching the age of 50 as a lawyer specialised in the energy market, until one day in 2005, after working on a project with the Dutch government, the

call came to ask if he would be willing to serve as a chairman of the national telecoms regulator Opta.

“At some stage I got this strange request on whether I wanted to be the chair of Opta. Maybe someone close to the minister had said, ‘well, you know, let’s ask but he won’t do it,’” Fonteijn jokes in his office near the top of the brick-and-green-steel skyscraper that houses Opta, the Dutch competition authority NMa, and a couple other administrative bodies in the centre of The Hague.

“I thought ‘well now either you jump or you don’t,’” Fonteijn says, adding “but I’ve done it, like many things, on my intuition, rather than anything planned.” The decision set him off on a path to chair not only Opta, but also Berec, and more recently, the competition authority. He is now set to land a seven-year stint

Berec’s reputation will hinge on its response to regulatory proposals that fall out of line with ‘best practice’

as the head of the new, merged Dutch competition-telecoms-consumer-energy authority, once it is set up in January 2013.

But it was also a brave move to go from private practice into public service. “In Holland it is not frowned upon, but it is regarded as very unusual. The whole interchange between private practice and industry and government is very, very limited.”

Incidentally, the Dutch member of the European Commission, Neelie Kroes, shares a chequered background which, at least in that respect, has a parallel with Fonteijn, having served in the private sector before moving on to lead the commission’s work on competition policy, and most recently, the ‘Digital Agenda.’

Their relationship has become even more intertwined since Fonteijn assumed the chairmanship of Berec. Fonteijn’s

body is one that Kroes has to take ‘into utmost account’ when implementing her Digital Agenda, making his influence a force to be reckoned with.

Influence and power

Despite the rich authority that has been bestowed on him, Fonteijn is the embodiment of two of the stereotypically Dutch characteristics – humble, yet surprisingly frank.

Wearing his Berec hat, Fonteijn insists that “the chair of Berec doesn’t have that much power really, but he has influence” over the other colleagues on the board of the European body.

But the board itself does have real power. It is able to force national regulators to re-draft proposals, but also to scupper European Commission attempts to bring regulators into what it considers to be the right way to do things, under the ‘Article 7 procedure’ – which during the telecoms framework review, was unfortunately not renamed into something more catchy to reflect its heightened status.

And this power will be tested during Fonteijn’s remaining stint leading Berec. All regulatory drafts from national authorities must now pass through the new procedure, and Fonteijn is all too aware that Berec’s reputation – and indeed existence – will hinge on its response to regulatory proposals that fall out of line with what is considered best practice by peers and the commission.

But while the focus in the public debate around the new Article 7 procedure has to date been on the ‘second phase,’ in which the commission and Berec can jointly require a national authority to redraft a proposed regulation, Fonteijn’s focus is on the more informal first phase of notification.

The second phase, Fonteijn says, is “somehow reactive, because we can say that it’s good or it’s bad, and we have to form an opinion on that. But there is another stage, which perhaps I would hope is even more interesting, which is the phase-one stage before that. We are now trying to develop a system, whereby even before this thing goes further we already engage and give an opinion as Berec to



Kroes has engaged with tech company bosses. Fonteijn 'likes' this

the [national regulator] in question.”

He says this process will allow Berec to shape policy “earlier than when it becomes much more political and harsh in phase two. I would hope, certainly after a bit of time, that the informal part becomes perhaps even the most influential one,” he says.

Fonteijn is not hesitant to use the word harmonisation, which caught the attention of members of the European Parliament at the opening of the autumn season at the end of September.

“What someone called the ‘H-word’ is key to me. People will watch whether the independent regulators are able to perhaps cede a bit of that [independence] to a commonality and to really understand that something about harmonisation has to be done.”

Broadening horizons

As far as the Article 7 procedure and advisory reports are concerned, Berec has pretty much stuck to the kind of narrow role that many envisaged when it was created. But that is clearly not stopping Fonteijn from thinking big, and he has a vision to turn Berec into one of

the cornerstones of broader digital and internet policy.

His vision is “to take the issues outside the formal remit [of Berec] and to be, if we want, a real player in the toekomst [future],” he explains, momentarily slipping into his native Dutch as a sign of his passion for this part of his work.

Fonteijn's desire to turn Berec into a key actor in other areas is reflected in his interaction with outside stakeholders

His ambition to broaden the role of Berec, Fonteijn insists, is not just him diligently flying the flag of his public office, but is a matter that has grown close to his heart. “Maybe you always start believing in things you are doing,” he laughs. “But the creation of Berec, and the way it was created, has brought about a lot of sort of dynamics in the group.

I’ve become really enthusiastic about the whole thing.”

“I could have said in my heart, what are we doing? But I really think this is the way we can get somewhere. Maybe that is just a sort of normal reaction people have when they do something – they believe in it.”

The evidence of Fonteijn’s mission to turn Berec into a cornerstone of the European discussion around the digital world will come in a strategy paper which Fonteijn intends to have approved at the final Berec board meeting in Bucharest in December.

Contemplating what is clearly going to be the main legacy he will bring to Berec’s long-term existence, Fonteijn muses “the strategic agenda for the next three to five years. Berec has traditionally, and the ERG as well, been looking in one- to two-year cycles of revolving things, on work plans and products and outputs. What we try to do now is really to have an – or at least to develop – a view on the subjects that are going to be at the forefront in the coming years.”

The Berec board will now seek to finalise its long-term strategic plan at an upcoming plenary in Barcelona, and subsequently the opening of the Berec office in Riga in mid-October, where there will be a seminar dedicated to the subject.

“Then I would hope to have, in my final plenary in Bucharest in December, to have something which would deserve the beginning of the name ‘strategic agenda,’” Fonteijn says, adding that it is likely to include topics such as wireless spectrum, piracy, security and the co-operation between telecoms and media industries.

Fonteijn is also keen to highlight an area of policy that until now has not garnered much attention in the regulatory debate, namely the ways in which demand for broadband and internet services can be stimulated.

“I think [what is important], and I know my successor [Georg Serentschy] is very interested in that, if you talk about next generation networks and broadband for all, is the demand side.”

“Many people focus on supply, but

the demand side, which is a real issue, has been perhaps undervalued a bit and we are going to develop that a lot more. And I know that Serentschy is going to develop that into a real focus.”

This desire to turn Berec into a key actor not just in its core remit but other, linked areas, is also reflected in Fonteijn’s interaction with stakeholders outside the inner circle of the body itself.

Later this autumn, Berec will be embarking on a working mission to visit the US telecoms regulator, the Federal Communications Commission.

Stirring debate

Indeed, during the nine months of his chairmanship to date, Fonteijn has not hesitated to stir controversy in his public interventions. He has argued for a more limited scope of court reviews of regulators’ decisions, a role for telecoms authorities in the development of state aid rules, the creation of a new “recommended” market for bundled

services, and a more hands-on approach to mobile licensing.

And he appears to relish the debates that have ensued. “That was a stone in the pond,” he chuckles, reminiscing over the debate on court reviews of regulatory decisions.

“One of my complaints in this country has been that the judgments were so late, sometimes, that they came after the next round of market analysis,” he says, notably referring to Opta’s well-documented battle with the Dutch market court, which overturned regulation of cable-TV networks in the country in August 2010, and subsequently a proposal for the regulation of fibre broadband, in May this year.

“That has caught quite a bit of media attention, and I think now the courts have offered to have some extra people involved, and they show a bit better what they do,” Fonteijn suggests, pointing out that the debate has yielded some positive results.

“So the debate – and I think that’s the crucial part of what I’m trying to do – the debate is getting going on whether we are well-served by endless waits for judgments, and judgments of 150 pages second-guessing everything the regulator does.”

“So by putting it on the agenda, and I know full well it was a bit provocative, it has – in this country at least – created certainly a discussion,” he says.

Fonteijn is clear on Berec’s role when dealing with politically sensitive topics, amid concerns that it might jeopardise the body’s view as independent and objective.

“If you take net neutrality for example, it’s mostly treated as a very political issue: Either you have these people saying ‘access to the internet is a human right, and should not be restricted.’ You have the operators saying you have to pay for it. And both are at the extreme.”

“Regulators are not in life to take a position, but I think they are in life to do what we are doing now – to say

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'listen what is the problem, how is it actually done in various countries, and how is transparency translated to regulation, what is quality of service?'"

"Of course, you can't say 'this is factual and this is political', but you don't need to be too afraid to overstep the line sometimes a little bit. At the same time you should be careful, because everybody is so touchy about regulators becoming part of politics."

In short, Fonteijn says, "so we should be factually-based, and check empirically what is going on, and what's the problem, but do not be too afraid to engage in a discussion and where things perhaps should go."

Window for persuasion

Fonteijn acknowledges that regulation can not happen in a self-enclosed bubble. His experience of having moved from the private to the public sector is testimony to this conviction, and he speaks with a tone of respect of his compatriot, commissioner Neelie Kroes.

Kroes has not been afraid to test new consultation models, including her famed 'CEO Summit,' where she got the heads of leading companies in the IT, media and telecoms sector to sit around the table to discuss broadband investments, net neutrality and internet standards. And while the reaction to her approach was a mixed bag of respect for trying out new approaches and criticism over the way she managed the process, Fonteijn has no doubts about where he stands: "Yeah, I like that," he exclaims.

"I think one of the key things really is to engage with stakeholders, and then you have to find ways how to do that, and not just in the official ways," Fonteijn asserts, pointing out that when possible, he tries to attend conferences and dinners and "engage in the debate."

"You can also take a very restrained approach and say 'listen, we're independent'. I think we are well advised



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Fonteijn: 'Unafraid to overstep the line'

to reach out and do what Kroes has done, and perhaps we should be part of that and really be at the table, so I see her point very well."

Fonteijn adds that by taking initiative in this way, a policymaker is in better control "than being lobbied at moments when you are perhaps not ready to do or say something."

In terms of what kind of role stakeholders have vis-à-vis Berc, Fonteijn goes back to his remarks about

the Article 7 procedure, stressing that in the phase-two investigation level, the timescales are far too short to engage interested parties. "It's so tight you can't even afford to lose a day or two, so I don't think it works there."

"It works perhaps much more in an informal way, that you engage all the time. I believe more in that than these formal consultations," Fonteijn adds.

Beyond Berc

Whether the Berc model will work as a blueprint for a regulatory approach in other sectors, Fonteijn reverts to some of the scepticism that featured in the debate on the creation of Berc itself.

"The risk, of course, is that you have 27 people voting and talking all the time without coming to a conclusion. Madame Reding, sometimes, she was concerned about that."

But he adds that "I think that is changing, also because of outside pressure. And as long as there is that sort of pressure and people expect you to agree, and expect you to come up with something, and expect an opinion, then I think that if there's a situation it will work better than when you would say, 'listen, I'm going to do all this as a central European regulator. The acceptance bottom-up is going to be considerably higher."

As for Fonteijn himself, the work of Berc in the coming months will be key to his potential legacy as the man who had the vision to shape

what Berc will ultimately be. Out of his control, in a sense, will be the regulatory proposals that Berc will need to take a standpoint on, and even Fonteijn himself acknowledges that it is too early to know how that will pan out.

But assuming that his stint regulating the regulators is a success, then he will no doubt be remembered as the man who brought a broader vision to Berc, and turned it into a permanent fixture in the internet policy debate. ■