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Netherlands: Trends & Developments
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Trends and Developments

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Introduction

As was the case prior to 2022, the Netherlands will continue to be governed by a centrist but overall progressive and generally pro-business coalition. The new coalition agreement suggests that we should expect a continuation in 2022 and beyond of prevailing trends in the TMT sector.

The Netherlands will remain a top jurisdiction for tech, media and telecommunications, and should be in any top three list for Europe. Its infrastructure and connectivity are top of the bill, hosting not only the AMS-IX internet exchange but also a multitude of data centres including Google and Microsoft. Its workforce is highly skilled in information technologies and media production, and its government, regulatory authorities and courts are competent, professional and generally pro-business. However, it is becoming more important than ever to act as a responsible corporate citizen: free passes for bad behaviour are no longer being handed-out liberally simply because a company is innovative.

At a high level, we discern a strong government push to speed up digitalisation throughout society to maintain the Netherlands' competitive position. Simultaneously, there is a continued increase in civil society, judicial, regulatory and parliamentary action to reduce negative impacts from digitalisation, with a strong focus on big tech. There is also a continuing increase in attention to and understanding of digitalisation in Parliament and government – due, amongst other things, to the establishment of a permanent parliamentary committee for digitalisation

– therefore, we expect an increasingly active role from government, both as a proponent of and watchdog for new technologies. At the same time, significant EU regulatory efforts are shrinking the scope of national parliamentary and regulatory powers, so that national efforts will need to concentrate more on enforcement than legislation. Below, we will discuss a number of current topics in detail.

5G Frequency Auction Delayed, Penetration of Fibre to the Home and Data Centre Push-Back Infrastructure

In June 2020, the Netherlands auctioned off its first sections of 5G spectrum, for 700 MHz frequencies. The second auction of 5G spectrum, for 3.5 GHz frequencies, was scheduled for early 2022 but has been delayed due to a court injunction issued in June 2021. As per this injunction, the relevant frequencies must be freed-up first, as they are currently in use for maritime and air emergency communications. The roll-out of significantly faster 5G networks in the third quarter of 2022 will, as a result, be delayed; this might mean that service providers who were expecting to rely on these services should review their plans.

Fibre to the home, on the other hand, is growing at pace, with approximately 50% of Dutch households having a connection in the second quarter of 2021, and full coverage expected around 2030. Growth in data centres has also continued unabated in the Netherlands, though it is now starting to draw significant criticism due to its energy and environmental impact. The recent approval for plans for a Meta (formerly Facebook) data centre led to both public

outcry and a motion passing in the Dutch senate compelling the Dutch state to refuse to sell necessary agricultural land to Meta. As such, infrastructure providers considering planning large-scale computing facilities should ensure they tackle potential environmental impacts as part of their planning.

Increase in Collective Action Damage Claims

On 1 January 2020, the Dutch Act on Redress of Mass Damages in a Collective Action took effect, allowing for US-style class action lawsuits in the Netherlands. This has resulted in suits being brought against, amongst others, Apple, Facebook, TikTok, Oracle and Salesforce based on abuse of market power and unlawful processing of personal data. It is widely believed that more class action lawsuits for the protection of consumer rights will follow in the coming years. Initially, these cases will be brought by consumer watchdogs, but there is also an expectation that lawyers and others will view these types of class actions as an attractive business model and will set up legal entities specifically to pursue them. Companies should thus be aware that consumer protection laws that were previously harmless due to a lack of regulatory capacity and the weakness of individual private enforcement may become significantly more effective.

Increase in Regulatory Oversight in Respect of GDPR Compliance and AI

The Dutch Data Protection Authority (DPA) lobbied extensively in 2021 for a quadrupling of its budget and a trebling in personnel capacity. Though it has not materialised in the most recent budgets, this may change as the new coalition agreement specifies it will invest in a strong position for the DPA. Generally speaking, enforcement by the DPA is increasing steadily, as are the level and number of fines, with seven fines exceeding EUR400,000 and one fine exceeding EUR2 million. In addition to general GDPR compliance, the coalition agreement specifies that a

new “algorithm regulator” will be created (either as part of an existing regulatory authority or as a separate entity), to ensure algorithms will be transparent, non-discriminatory and fair.

For most companies, enforcement action is relatively unlikely if they can demonstrate they are making a reasonable effort to comply with applicable data protection regulation. However, companies working with very significant amounts of, or particularly sensitive types of, personal data should tread carefully and keep up to date on the DPA’s most relevant guidelines.

Increasing Protection for Gig Workers

The Netherlands saw the re-classification of gig workers from independent contractors to employees by courts in multiple separate cases. On 16 February 2021, the Amsterdam Court of Appeal upheld a verdict by the District Court of Amsterdam against Deliveroo, finding that its delivery workers were indeed employees. The District Court of Amsterdam also found Uber drivers qualify as employees in its verdict of 13 September 2021. Both cases were brought by the workers union FNV, and in both cases appeals have been filed.

As it stands, however, digital platforms that rely on a large force of workers to perform a key activity for their business and that are in a position to exercise real control over the way workers perform their labour – be it through algorithmically determined incentives or otherwise – or the conditions against which it is performed (eg, unilateral price adjustments) should assume there is a significant probability those workers may qualify as employees (regardless of the content of the contract parties have entered into).

In this respect it is also relevant that, in December 2021, the European Commission proposed the Platform Work Package (PWF) to improve the working conditions of persons working through

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platforms in the EU, and to support the sustainable growth of these platforms. The PWF will introduce harmonised measures to determine the employment status of individuals – as workers (ie, employees) versus solo self-employed persons (ie, independent contractors) – and new material rights for both workers and self-employed persons regarding algorithmic (ie, automated systems) management. If the proposed directive is adopted without change, which is expected to take approximately 18 months, the Netherlands will have two years to transpose the proposed directive into national law.

The impact of the directive on legislative developments in the Netherlands will be interesting to see. In particular, the proposed directive's rebuttable legal presumption – with burden of proof on the platform – that the contractual relationship between a platform and an individual is one of employment would result in more gig workers needing to be treated as employees in the Netherlands.

Growing Pressure to Limit Market Power of Tech Platforms

As is the case in the wider European context, there is growing discomfort with the market power of large technology companies in the Netherlands. The new coalition agreement indicates the government will seek to modernise Dutch competition law to ensure the continued existence of a meaningful public media domain and to counteract the significant centralisation of media distribution in large tech companies. Similarly, the coalition agreement refers specifically to ensuring that tech giants do not abuse their market power, including their access to data, to stifle competition.

Although, in our view, there is only limited cause for concern for most technology companies, big tech should take care in how they structure

their platforms to ensure they are not accused of abusing a dominant position. For instance, the Dutch Competition Authority (ACM) issued a decision in August of 2021 establishing that Apple is abusing its economic dominance – in breach of the EU and Dutch antitrust rules – by imposing unfair contractual terms on dating app providers. In particular, the ACM held that Apple's conditions relating to the payment system of Apple and to anti-steering are causing harm to the dating app providers. In its decision, the ACM required Apple to amend the unreasonable terms in its App Store. This decision was contested by Apple. However, on 24 December 2021, the District Court Rotterdam largely rejected requests by Apple for preliminary injunctive relief.

In addition to these national developments, at an EU level there is a clear push to create a somewhat level playing field for businesses, consumers and governments in Europe, despite the enormous market power of tech giants. Of particular note are the EU Digital Services and Digital Markets Acts, the Data Governance Act (proposal still to be approved by European Council), the Data Act (proposal yet to be issued) and the EU regulatory framework for AI (proposal issued in April 2021).

This forthcoming legislation will have an enormous impact on technology companies operating throughout the EU. The framework set out in these legal instruments intends to circumscribe and limit the power of (big) tech companies, limit unfair business practices, protect users' fundamental rights, ensure data sharing between businesses, and between businesses and governments on fair terms, and will set limits on what AI can and cannot be utilised for in the EU. One should expect various parts of this legislation to take effect in member states between 2023 and 2026.

For the Netherlands, the foregoing may mean that we will see relatively limited efforts to adopt parallel national legislation pending the EU proposals, with most of the energy being directed towards influencing EU legislation. However, the EU proposals may nudge regulators and courts in the Netherlands towards taking a bolder stance in their interpretation of existing laws.

Cybersecurity a Key Topic for the Dutch Government and Expectations of Corporate Responsibility Increasing

Cybersecurity is a matter of increasing concern in the Netherlands and has become a clear government priority in the coalition agreement. This goes beyond just securing the public sector and critical infrastructure, and extends more broadly to the private sector.

To that end, the government's National Cyber Security Centre has started sharing its threat updates with the private sector in general, rather than merely with providers of essential services. In addition to this kind of enablement, enforcement against lax security is also increasing, with security failures and data breaches leading to significant fines by the DPA. Prevention is also increasingly viewed as necessary. A recent report by the Dutch Safety Board urges the government to seriously regulate digital safety and security in the private sector through reporting and transparency obligations akin to current obligations for financial reporting. This dovetails well with an IT security certification audit being designed by the Dutch professional association for IT auditors.

Overall, the trend towards increasing scrutiny of cybersecurity presents both opportunities for technology companies that can support the push towards a more resilient ICT infrastructure and threats for those that lag behind. There is a strong talent pool in the Netherlands, with Dutch enforcement agencies frequently leading

the pack on taking down hacking groups. This has translated into a strong growth of innovative cybersecurity companies (eg, HackerOne). The presence in the Netherlands of a highly digitalised government, an outsized financial sector, a high data centre density and key internet infrastructure means there is also a significant market to be claimed for fast movers.

Normalisation of Cryptocurrency in Ordinary Commerce and Protection of Consumers

Cryptocurrency and blockchain technologies are starting to be embedded in the formal economy and in the ordinary life of Dutch citizens, though mainly as a category of investment assets and a technology substrate for transaction platforms for financial assets. This increasing uptake is starting to pose practical problems in private law – for example, the fact that cryptocurrencies do not have a clear legal status, hobbling (eg, transactions, seizure, etc) – and the increase in investments by generally unskilled investors is an increasing cause for concern for regulators, who at this time do not have appropriate instruments to regulate consumer investments in cryptocurrency.

The Dutch approach in respect of cryptocurrency is to wait for EU legislation (the Markets in Crypto-Assets Regulation, which the Dutch Authority for the Financial Markets expects to enter into force in 2024) and other international developments (with respect to the private law treatment of cryptocurrency), rather than to implement legislation of its own.

Regulations for “Influencer” Marketing Incoming

The rise of social media platforms, such as Instagram, YouTube and Snapchat, has provided a stage to those with purported expert-level knowledge and/or social influence in their field (“influencers”). These influencers have a (seemingly) unlimited scope for sharing their vision,

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ideas, and other messages with their followers. However, they are also often of a commercial nature (eg, advertisement of products or services, offers of advice, and promoting political opinions). Given their large audience, influencers can be very effective in creating online engagement for the companies that employ their services, but also in manipulating the opinions and purchases of their followers, at least in part because followers are not always able to distinguish between genuine and sponsored advice.

At this moment the Dutch Media Authority (DMA) is in the process of setting policy rules with respect to influencers. These policy rules apply to influencers located in the Netherlands only. One of the main questions to be answered by the DMA is whether an influencer is merely an uploader of content, or should qualify as a commercial media service on demand. Should the latter be the case, the service is bound by the rules of the Dutch Media Act, and will be supervised by the DMA. An influencer qualified as a commercial media service on demand is also required to register with the Stichting Rec-lame Code and the Netherlands Institute for the Classification of Audiovisual Media. Moreover the influencer has to make clear in the broadcast that the programme is sponsored, or contains advertisements or product placement.

Once the policy rules are set, the DMA will observe a transition period. In this period the influencers that qualify as a commercial media service will have the time to comply with the policy rules. The policy rules are expected to be set in early 2022.

Unabated Move to Cloud and Schrems II poses a Serious Compliance Hazard

There is a continued and accelerating move towards the cloud happening across the private and public sector, providing a strong market opportunity. There are no particular Netherlands-

specific legal developments of great moment here – the action is mainly occurring in the EU theatre (discussed in brief in the final section).

Worth noting briefly, however, is that the European Court of Justice's Schrems II decision, which requires a data controller to judiciously review the actual protection of personal data in a non-EEA country before transferring, is being taken very seriously by Dutch government bodies and large corporates. That is to say, companies in the USA, and in major centres for outsourcing outside the EEA, must seriously consider how they can demonstrate that a data controller using their services can meet the requirements imposed by Schrems II.

FRAND Decisions

In *Huawei v ZTE*, the EU Court of Justice held that the holder of a standard essential patent (SEP) who has committed to license its SEP on fair, reasonable and non-discriminatory (FRAND) terms may violate EU competition laws on market power abuse if they seek an injunction against a potential licensee in certain circumstances. The court set out a roadmap outlining the circumstances in which a SEP holder can bring an injunction and recall action for infringing products without violating competition EU laws.

It is expected that important judgments in relation to this so-called FRAND defence are forthcoming in the Netherlands in 2022. For example, the Dutch Supreme Court's judgment in *Wiko v Philips* is currently expected to be forthcoming in February 2022. This case and others merit close scrutiny for any holder of SEPs as the court is expected to provide further guidance on the ability to enforce these patents against potential licensees, as well as the expected behaviours of both the SEP holder and the implementer of a SEP.

New Reporting Obligations for Platform Companies in Respect of Tax

In March 2021, the Council of the European Union adopted Directive 2021/514 with the aim of improving administrative tax co-operation – and countering tax fraud/tax evasion – and addressing the challenges posed by the digital platform economy. They include new rules extending the EU tax transparency requirements to “platforms” and introducing an obligation for “platform operators” to provide information on income derived by sellers through platforms. The rules affect platform operators offering sellers access to:

- the rental of immovable property, including both residential and commercial property, as well as any other immovable property and parking spaces;
- a personal service;
- the sale of goods; and
- the rental of any mode of transport.

The Netherlands must implement these rules into its local laws on 31 December 2022, so a proposal for the exact form of implementation is expected in the course of this year.

Simplification and Clarification of R&D Tax Rebate Scheme

As per 1 January 2022, the R&D tax rebate scheme, that may reduce the Dutch wage tax/national insurance contributions payable by

employers, has been simplified. The amendments include that companies can now always submit a new application for a tax rebate starting in the next calendar month, even if an application for that calendar month has been submitted previously (albeit that the maximum number of applications will remain limited to four per year). In addition, flexibility is offered to employers in respect of reporting the costs incurred for R&D work at the end of the year since it is no longer necessary to specify to which application these costs relate. Furthermore, it has been clarified that in an R&D declaration only costs and expenses may be included that were already anticipated and that were included in the R&D application.

For 2022, the R&D tax rebate percentages are 32% (start-ups may be eligible to a rate of 40%) for the first EUR350,000 of R&D wage costs and 16% for the excess amount.

Introduction of Digital Services Tax

In the coalition agreement, the parliamentary parties set out the new government’s plans and ambitions for 2021–25. One of these plans and ambitions concerns the introduction of a digital services tax in the Netherlands. Since the coalition agreement only provides for a general outline of the intended measures, no further details with respect to the introduction of the digital services tax are available at this stage.

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Greenberg Traurig LLP is an international law firm with approximately 2,300 attorneys serving clients from 40 offices in the USA, Latin America, Europe, Asia and the Middle East. The firm's dedicated TMT team consists of more than 100 lawyers, of which seven are in Amsterdam. The Amsterdam team is well versed in representing clients around the world in domestic, national

and international policy and legislative initiatives, as well as guiding them through the business growth cycle for a variety of technologies. As a result, it provides forward-thinking and innovative legal services to companies producing or using leading-edge technologies to transform and grow their businesses.

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