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Netherlands: Trends & Developments

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NETHERLANDS

Trends and Developments

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Introduction

In 2023, the Netherlands will continue to be governed by a centrist but overall progressive and generally pro-business coalition and will remain a top jurisdiction for tech, media and telecommunications in 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.

In 2022, the Netherlands reached a high degree of pushback against the dominance of big tech platforms, seeing, for example, multiple class action suits, the scuttling of Meta's plans for a hyperscale data centre, high-profile regulatory cases against Apple (among others), and significant political posturing. This discussion has recently died down with other issues taking centre stage in the public's attention, especially the war in Ukraine, and as a result the government and politicians will have the space to take a more nuanced view going forward. However, Dutch regulators, in particular the competition authority and the data protection authority, are seeing their regulatory scope and powers expanded due to new EU regulations and other factors; therefore, it seems likely that there will more enforcement action in the near future, even in a context that is friendlier overall.

The main topics for concern for the government at this time seem to be the following:

- AI, after a number of high-profile cases where the government itself overstepped its boundaries; and
- cybersecurity, with the war in Ukraine raising threat awareness.

There have also been interesting developments arising out of social media platforms and the new media environment, including new policy rules in respect of influencer marketing and increasing discussion on synchronisation copyrights. From a media infrastructure perspective, 2023 also looks to be an interesting year, with spectrum auctions for commercial FM radio stations upending an established market, and auctions for faster 5G frequencies having the potential to alter competitive dynamics in telecommunications.

Below, discussion will cover a number of relevant developments in the Netherlands in more detail.

5G and FM Frequency Auctions to be Held

2023 will be a busy year for media companies and telecommunications companies, with auctions of both 5G and FM frequencies taking place.

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, is now set for 2023. The

ultra-high speed, low coverage 26 GHz bands will follow, but the exact timing is not yet clear.

The Dutch government must also reallocate the nine FM frequencies for commercial radio stations, the Trade and Industry Appeals Tribunal (*College van Beroep voor het Bedrijfsleven*) ruled in December 2022. The Tribunal thus drew a line under the government's intention to extend the existing licensees' licences for the use of these FM frequencies from 31 August 2022 onwards.

The nine FM frequencies were first allocated by auction in 2003. At the time, five FM frequencies were subject to programme content requirements, such as broadcasting news and current affairs or broadcasting dance music. The remaining four FM-frequencies had a free format. The highest bid was made by John de Mol's Radio Noordzee, with a bid of over EUR80 million for a FM frequency with a free format.

The FM frequencies were distributed in 2003 for a period of eight years and three months, and the licences ended on 31 August 2011. Since then, the licences have been extended several times, and current licence holders retained their FM frequencies. This precluded new parties from entering the market. In 2022, the Dutch government again decided to extend the existing licences for a period of three years to allow the licence holders to recover from the damage they allegedly suffered as a result of the COVID-19 pandemic. However, the Trade and Industry Appeals Tribunal ruled in December 2022 that this extension was a disproportionate measure, and that it was unlawful towards newcomers to the commercial radio station market. The FM frequencies must therefore be reallocated.

Once again, nine FM frequencies are at stake in 2023. The licence term will be 12 years. Only two

FM frequencies are subject to content requirements, namely a radio station for broadcasting Dutch-language music and a radio station for broadcasting news and current affairs. The Dutch government limits the number of FM-frequencies a commercial radio provider can have to three. This means that John de Mol's Talpa, now holder of licenses to use four separate FM-frequencies, will lose at least one FM frequency. The allocation must be completed by 1 September 2023, the Trade and Industry Appeals Tribunal ruled.

Contours for Algorithm Oversight Released, High-Profile Cases in Government Use of Algorithms for Decision Making

From 2023, the Dutch Data Protection Authority (DPA) will start acting as the Dutch regulator for algorithms. An extensive policy document on the intended approach to these tasks was issued in December 2022. Based on the policy document, the DPA will, at first, play an important role in co-ordinating the effective regulation of algorithms as many other sectoral regulators have their own independent responsibility in this respect. It will focus on creating platforms for co-operation between regulators, creating risk-based assessments of where to act in particular, and developing tools and methods to improve regulation. It will also continue to take direct regulatory action based on the power granted to it under the GDPR and its budget to do so has been expanded. It is as such fair to expect that from 2023 onward, scrutiny of the use of algorithms and AI will continue to increase.

In this respect, it is worth noting that 2022, and the end of 2021, saw a number of high-profile cases in respect of the use of algorithms by governments. The two most egregious breaches were by the Dutch tax authority. Both related to the use of extensive racial, ethnic and other

forms of discriminatory profiling by the Dutch tax authority, and resulted in the two highest fines ever issued by the DPA, EUR2.75 million and EUR3.7 million.

Increasing Protection for Gig Workers

The re-classification of gig workers from independent contractors to employees is still a hot topic in the Netherlands. On 17 June 2022, Advocate General (AG) De Bock issued an advisory opinion in a landmark court case between FNV, a Dutch trade union, and online meal delivery company Deliveroo. The main question in her view should be whether the work is “organisationally embedded” in the company. When the work carried out forms part of the company’s core activities, the work is organisationally embedded, which would immediately mean that there is employer authority or “control” over the work, implying the individual conducting such work activities qualifies as an employee. The Supreme Court’s decision was expected on 23 December 2022 but has been postponed. As it stands, digital platforms that rely on a large force of workers to perform a key activity for their business should assume there is a significant probability those workers may qualify as employees (regardless of the content of the contract into which parties have entered).

Active Competition Regulator Gearing-Up for DMA and DSA Oversight

The Dutch Competition Authority (ACM) has taken an active stance on monitoring and regulating major tech companies, developing its own views and approaches complementary to the EU competition regulators. Exemplary for this is its August 2021 decision establishing that Apple was abusing its economic dominance by forcing dating app providers to accept terms by which they must either utilise Apple’s payment service or use less customer-friendly alternatives,

rather than other third-party payment providers. Apple complied with the ACM’s decisions in June 2022, after having fought the decision in court and forfeiting EUR50 million in penalties for delayed compliance.

In 2022, the digital economy was also one of the ACM’s key focus areas, with a specific focus on combating unfair terms for online services, undue influencing of minors, misleading or fake reviews and likes, and a study into the market for cloud services, among other things. Though not formally stated, it can be seen that the ACM is anticipating new EU regulations, in particular the Digital Markets Act (DMA), the Digital Services Act (DSA), the Data Governance Act, and the Data Act.

The DMA will represent a shift in competition enforcement in the EU – for example, while in the past enforcement was largely done ex post, the DMA sets out ex ante rules. The objective of the DSA is to ensure transparency, user safety, and accountability for online platforms. Both the DMA and DSA will have a considerable impact on business in the Netherlands in 2023, as market players gear up to comply. The DMA will become applicable in May 2023. The so-called designated “gatekeepers” will have a maximum of six months after their designation decision by the European Commission – which is expected at the latest in September 2023 – to ensure compliance with the obligations set out in the DMA; thus, ultimately, compliance should be ensured in March 2024. The DSA will apply from February 2024. As regards the obligations for so-called “very large online platforms” and “very large online search engines”, the DSA will apply from an earlier date – four months after their designation.

The ACM has also proposed amendments to the Data Act, based on its study into the market for cloud service providers. The key risks it has identified in the market for cloud service providers are its extreme concentration and the switching costs, due to both actual financial costs imposed for switching (such as data migration fees) and the high level of technical integration of services, which hobbles customers in using services from multiple sources. Though the DMA will resolve some of these issues, in particular high financial impact of migration and data portability, interoperability is not covered fully as a separate topic, and the ACM has therefore proposed that the Data Act contain specific and more extensive provisions on interoperability, as a separate topic from data portability, to address these risks more fully.

Increasing Merger Control

The complexity for transactions in the tech space in 2023 will increase. Key drivers are:

- future notifications under the EU Foreign Subsidies Regulation regime (adopted on 28 November 2022 and due to apply by mid-2023), intended to limit the ability of entities subsidised by foreign states to acquire EU companies;
- pre-closing submissions pursuant to the forthcoming Dutch National Security Investment Act (*Wet veiligheidstoets investeringen, fusies en overnames*), intended to keep vital infrastructure and services under national control, which is expected to enter into force in the first quarter of 2023; and
- increasing EU merger control for transactions with effects only in one member state as a result of Case T-227/21, *Illumina, Inc v European Commission*, which will require EU merger control analyses to be applied even

for transactions that only impact the market in the Netherlands.

Cybersecurity Strategy and New Opportunities

Cybersecurity is a matter of increasing concern in the Netherlands and has become a clear government priority in the coalition agreement. The Netherlands issued its cybersecurity strategy for 2022-29 on 10 October 2022 along with a plan of action with high level timelines. Most relevant for participants in the Dutch market is that the plan has a heavy focus on public/private shared action and responsibility, development and implementation of security technology, and skills and capability building – ie, it is likely that the market for these services will expand significantly over this period, as will the Dutch talent pool (which is already excellent).

Regulations for “Influencer” Marketing Being Tested

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, ideas, and other messages with their followers. However, their content is 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.

On 1 July 2022, Dutch Media Authority (DMA) set policy rules with respect to influencers,

determining which influencers would fall within the regulatory scope of the Dutch Media Act as a commercial media service on demand. If so classified, the influencer is required to register with Stichting Reclame Code and the Netherlands Institute for the Classification of Audio-visual Media. Moreover, influencers must now meet extensive requirements for fair advertising, including making clear in the broadcast that the programme is sponsored or that it contains advertisements or product placement. In the policy rules, the DMA determined that influencers active on YouTube, Instagram or TikTok with over 500,000 followers or subscribers who regularly upload videos, obtain compensation in cash or in kind for their videos and are registered with the Dutch Chamber of Commerce will be considered commercial media services on demand.

The DMA is now undergoing a transition and trial period, wherein it is testing the effectiveness of the rules and providing influencers with time and guidance to become complaint.

Sync Rights are Increasing in Popularity

There has been a significant spike in the use of popular songs in combination with short videos on major video platforms, such as TikTok, YouTube, and Instagram. Typically, this is referred to as synchronisation, ie, the simultaneous integration of music used as a soundtrack with visual images. Prominent examples of such use are the Oscar-winning movie “Bohemian Rhapsody” and the use of Kate Bush’s “Running Up That Hill” in the Netflix series Stranger Things, both resulting in substantial royalties.

Synchronisation rights involve to the right to authorise the inclusion of musical works in audio-visual works. However, this right is not recognised at the international level by any of the copyright agreements and treaties, nor is it

embedded in the Dutch Copyright Act (*Auteurswet*) or the EU Copyright Directive (Directive 2001/29).

The Dutch courts have generally been evasive with regard to carving out a definition for synchronisation rights, with one exception where the District Court (*rechtbank*) of Amsterdam ruled on a case wherein music was synced to a theme park attraction in Efteling, a Dutch theme park. The District Court of Amsterdam held that the use of a musical work at an attraction was exclusively a form of publication within the meaning of Article 12 of the Dutch Copyright Act. Publication is the exclusive right of the copyright holder to communicate the work (eg, a musical work) to the public.

The Court of Justice European Union (CJEU) has only decided on synchronisation rights in relation to neighbouring rights (eg, the rights to a sound recording). In *Atresmedia v AGEDI and AIE*, the CJEU confirmed that fusion of a sound recording into an audio-visual work does not constitute a reproduction of that sound recording. Therefore, the synchronisation does not fall under the umbrella of the (exclusive) neighbouring right.

In reality, synchronisation rights receive more recognition in business practice, where collective rights organisations (eg, Buma/Stemra in the Netherlands) play a distinct role in enforcing the synchronisation rights of artists and record labels. However, the enforcement actions available are only those following the breach of contract wherein the synchronisation right defined and granted.

Article 17 of Directive 2019/790 on Copyright in the Digital Single Market creates a system in which the content service provider such as Tik-

Tok, YouTube and Instagram must obtain permission from the rights-holders for the use of copyrighted work. This directive is expected to ensure an increase in the amount of synchronisations on the internet, and consequently an increase in revenue for rights-holders.

Government Cloud Policy

There is a continued and accelerating move towards the cloud happening across the private and public sector, providing a strong market opportunity. In this context, the Dutch government issued its government-wide cloud policy in August 2022, under which it sets the guidelines for using cloud service providers. These guidelines are practical and implementable, including for US service providers, and thus enable the Dutch public sector, the semi-public sector and concerned companies in the private sector to access the benefits of cloud services going forward, thus opening up significant new markets.

New Reporting Obligations for Platform Companies in Respect of Tax

In March 2021, the Council of the European Union adopted Directive 2021/514 (also known as DAC-7), with the aim of improving administrative tax co-operation, countering tax fraud/tax evasion and addressing the challenges posed by the digital platform economy. They include new rules extending EU tax transparency requirements to digital “platforms” and introducing an obligation for “platform operators” to provide

information on income derived by sellers through those 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 implemented the DAC-7 directive into its local laws as per 1 January 2023.

Delayed Introduction of Digital Services Tax

In their December 2021 coalition agreement, the Dutch parliamentary parties that agreed to form a new government set out their new government’s plans and ambitions for 2021–25. These plans included the introduction of a digital services tax in the Netherlands. However, unlike several other EU member states, the Netherlands has not yet introduced such tax. Instead, it seems likely for now that the Netherlands will await global acceptance of the OECD’s initiative to adapt the multilaterally agreed international tax system currently in place in such a way that some of the world’s largest multinational e-commerce businesses would need to start paying income taxes not based on where they are located or are otherwise active, but based on where their consumers are located (also known as “Pillar 1”).

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Greenberg Traurig, LLP is an international law firm with approximately 2,650 attorneys serving clients from 44 offices in the United States, Latin America, Europe, Asia, and the Middle East. The firm's dedicated TMT team consists of more than 100 lawyers, seven of whom are located 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, the firm provides forward-thinking and innovative legal services to companies producing or using leading technologies to transform and grow their businesses.

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Herald Jongen is co-managing shareholder at Greenberg Traurig. He focuses his practice on outsourcing, technology transactions, data protection, strategic relationships and M&A.

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Radboud Ribbert has over 25 years of extensive experience and is an experienced entertainment and media lawyer. He is a well-known expert on media law, copyright law and

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