



# ICLG

The International Comparative Legal Guide to:

## Telecoms, Media and Internet Laws and Regulations 2014

**7th Edition**

A practical cross-border insight into telecoms, media and internet laws and regulations

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# Netherlands



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## 1 Overview

**1.1 Please describe the: (a) telecoms; (b) audio-visual media distribution; and (c) internet infrastructure sectors in the Netherlands, in particular by reference to each sector's: (i) importance (e.g. measured by annual revenue); (ii) 3-5 most important companies; (iii) whether they have been liberalised and are open to competition; and (iv) whether they are open to foreign investment.**

(a) Telecoms sector:

KPN, as the former state owned telecom provider is (still) the largest provider for fixed communications services, both on the consumer and the business markets. Smaller, but heavily competing fixed providers are: Tele2; and cable companies: Ziggo; UPC; and Vodafone. The remaining market share is divided up amongst many small companies. There are no legal barriers to enter the market for fixed telecom services.

On the mobile telecom market, mobile network operators KPN, Vodafone and T-Mobile are the largest providers. Tele2 acquired frequencies in the 2.6 GHz-band in 2012 and in the 800 MHz-spectrum band in 2012, giving Tele2 the opportunity to become the fourth mobile network operator. In 2010, Ziggo4 (a joint venture of Ziggo and UPC) and Tele2 acquired licences for the use of 2.6 GHz-spectrum as well; however, it did not obtain any additional frequencies in the 2012 (multiband) auction of 800, 900, 1,800, 1,900 and 2,600 MHz-licences. Furthermore, there are many Mobile Virtual Network Operators (MVNOs). There are no legal barriers to enter the market for mobile telecom services.

(b) Audio-visual media distribution sector:

On the market for the provision of television and radio services, cable operators Ziggo and UPC are the largest providers, each in its own service area. The Dutch regulator ACM (Authority for Consumer and Markets) assessed in 2011 that Ziggo and UPC do not have Significant Market Power (SMP).

Furthermore, KPN offers television services via DVB-T (Digital Video Broadcasting – Terrestrial) (Digitenne), and has a fair market share of audio-visual media. KPN offers television services over its DSL-network (VDSL2) as well, as does Tele2, Telfort and Vodafone. In addition, there are a number of smaller cable companies, which only have small market shares in regional areas.

Companies offering only satellite services have a small market share, as more than 95% of the country has access to cable television.

As of 2013, the Media Act (Mediawet 2008) stipulates that cable companies are required to offer access to their cable network and

their audio-visual media services which are offered via their cable network. The purpose of the change in the Media Act was to open up the market by means of a mandatory resale of audio-visual media (television) services. It is questionable whether this provision is in accordance with the EU Regulatory Framework and the Commission has taken necessary formal steps to initiate infraction proceedings.

(c) Internet infrastructure sector:

The market is divided between DSL-based networks and cable (coax) networks and, to a lesser extent, glass fibre networks. KPN (VDSL, FttC and FttH) is still the market leader. Ziggo and UPC also have relatively large market shares. They offer their internet services via their cable (coax) networks.

As said, the market based on fibre optics (fibre to the home (FttH) and fibre to the office (FttO)) is upcoming (with a current FttH homes passed of 1.7m and a projected 3.5m in 2017), but expands mainly based on the bundling of demand, typically in newly developed areas (business parks or urban areas). Reggefiber, partially owned by KPN, is market leader in fibre optics. Market analysis decisions covering FttH-services (for the regulation period 2012-2015) have been published by ACM in December 2011 (ULL) and April 2012 (WBA). A market analysis decision for FttO entered into force on 1 January 2013. As a result of this market assessment, ACM has imposed the obligation on KPN and Reggefiber to offer access to its fibre optics network (ODF-access) against regulated prices.

**1.2 List the most important legislation which applies to the: (a) telecoms; (b) audio-visual media distribution; and (c) internet, sectors in the Netherlands.**

(a) Telecoms sector:

The Telecommunication Act (*Telecommunicatiewet*, TA) is the most important regulation, providing rules regarding registration and licensing, numbers, laying of cables and rights of way, interoperability, market analysis procedures, distribution of programmes and conditional access, universal services, consumer protection, privacy, dispute resolution between operators, lawful interception, as well as supervision and penalties by the Dutch national regulatory authority ACM and/or the Ministry of Economic Affairs, Agriculture and Innovation.

Most rights and obligations are specified in national plans, governmental decrees, ministerial regulations and (market analysis) decisions by ACM. The most important plans are the Frequencies Plan and the Numbering Plan, in which the designated use of frequencies/numbers, is laid down. Important governmental

decrees are: the Decree on Interoperability; the Decree on Frequencies; the Decree on Universal Services and End User Interests; and the Decree on Lawful Interception. More specific regulation regarding the abovementioned subjects is laid down in the Ministerial Regulation on Universal Services and End User Interests, and in Ministerial Regulations regarding interception.

Other laws and regulations that govern the operation of networks and the provision of services are laid down in the Media Act, the Competition Act, the Data Protection Act, the Act on ACM, and the Dutch Civil Code (in particular, Books 3 and 6, e.g. regarding contracts with consumers and rules regarding the use of general conditions).

(b) Audio-visual media distribution sector:

The Media Act 2008 (Media Act) is the most important regulation. The Media Act provides rules for both public (i.e. government-funded) and commercial audio-visual media distribution. It contains rules regarding licensing, obligations regarding commercials, percentages of European, independent and Dutch/Frisian language productions, protection of youthful viewers, obligations to distribute specific content, and supervision and penalties by the Dutch Commissariat for the Media. Other regulations regarding commercials can be found in the Dutch Civil Code which stipulates that commercials may not be misleading.

As of January 2013, it also contains the obligation for cable companies to offer access to their cable network and their audio-visual media services which are offered via their cable network. However, it is questionable whether this provision is in accordance with the EU Regulatory Framework and the Commission has taken steps to initiate infraction proceedings.

(c) Internet sector:

The Telecommunication Act (TA) provides rules for regarding registration for the provision of internet services (as public telecommunication service) and is bound to guarantee net neutrality, meaning that any form of unsolicited content-filtering is not allowed. The TA furthermore contains provisions regarding cookies, also in relation to privacy of end-users. As of June 2012, the rules concerning the use of cookies became stricter in order to protect the privacy of website users. The TA now requires anybody who wants to apply cookies to provide users with clear and unambiguous information about the purposes for which the cookies (or device fingerprinting) are placed. In addition, cookies may only be placed or accessed after obtaining the prior and explicit consent of the user, i.e. prior to placing the cookies. The June 2012 bill got a very negative public response. Consequently, an amendment that will exempt cookies which provide understanding of the quality or effectiveness of the website is currently pending before the Lower House.

**1.3 List the government ministries, regulators, other agencies and major industry self-regulatory bodies which have a role in the regulation of the: (a) telecoms; (b) audio-visual media distribution; and (c) internet, sectors in the Netherlands.**

(a) Telecoms sector:

- the Ministry of Economic Affairs – responsible for the regulations and policies regarding telecoms (in particular, spectrum policy);
- the Telecoms Agency (division of the Ministry of Economic Affairs) – responsible for carrying out the policies and for inspection and enforcement of the regulations and policies regarding telecoms, in particular, regarding spectrum use and interception regulations;

- the Authority for Consumer & Markets (ACM) – the independent national regulatory body responsible for e.g. market analyses, dispute settlements, and consumer regulations; and

- the Data Protection Authority – responsible for the inspection and enforcement of the Data Protection Act.

(b) Audio-visual media distribution sector:

- the Ministry of Economic Affairs – responsible for the regulations and policies regarding audio-visual media distribution;

- the Ministry of Education, Culture and Science – partially responsible for supervision of the Dutch Public Broadcasting organisation (including its budget);

- the Commissariat for the Media – responsible for carrying out the policies and for inspection and enforcement of the regulations and policies regarding audio-visual media distribution; and

- the Commercial Code Commission – the self-regulatory body for inspection and enforcement of the legal and self-regulatory regulations regarding misleading commercials.

(c) Internet sector:

- the Ministry of Economic Affairs – responsible for the regulations and policies regarding internet;

- the Authority for Consumer & Markets (ACM) – responsible for inspection enforcement of the cookie regulations (privacy) in the TA; and

- Data Protection Authority – responsible for inspection and enforcement of the Data Protection Act.

**1.4 Are there any restrictions on foreign ownership or investment in the: (a) telecoms; (b) audio-visual media distribution; and (c) internet, sectors in the Netherlands?**

(a) Telecoms sector:

Pursuant to the TA, it is not required to be established in the Netherlands or in the EU in order to provide public telecommunication services or to operate a public telecommunication network in the Netherlands. However, typically, the regulations to allocate spectrum licences, stipulate that the licence holder be established within the EU.

(b) Audio-visual media distribution sector:

Pursuant to the TA, and/or the Media Act, the TA it is not required to be established in the Netherlands or in the EU in order to provide audio-visual media distribution services.

(c) Internet sector:

Pursuant to the TA, it is not required to be established in the Netherlands or in the EU in order to provide internet services.

## 2 Telecoms

### General

**2.1 Is the Netherlands a member of the World Trade Organisation? Has the Netherlands made commitments under the GATS regarding telecommunications and has the Netherlands adopted and implemented the telecoms reference paper?**

The Netherlands is a member of the World Trade Organisation (WTO). The principle of the telecoms reference paper has been implemented in the TA.



## 2.2 How is the provision of telecoms (or electronic communications) networks or services regulated?

The TA provides that providers of public electronic communications networks or services have to register as such with ACM. ACM furthermore carries out market analyses regarding certain markets of public electronic communications networks or services, and in case of market players having Significant Market Power (SMP), it imposes necessary orders to mitigate such SMP.

## 2.3 Who are the regulatory and competition law authorities in the Netherlands? How are their roles differentiated? Are they independent from the government?

As of 1 April 2013, the former regulatory authority OPTA (Independent Post and Telecommunications Authority, *Onafhankelijke Post en Telecommunicatie Autoriteit*) and the former competition authority NMa (Dutch Competition Authority, *Nederlandse Mededingingsautoriteit*) merged into one new authority: ACM (Authority of Consumer and Markets). Therefore, ACM is responsible for regulatory subjects (e.g. market analyses), as well as competition subjects (e.g. merger control and market abuse). As an autonomous administrative authority, ACM is independent from the government which means that they have no influence over the work carried out by the ACM. Nevertheless, the government is responsible for appointing the board of directors, as well as providing the staff and providing the budget.

## 2.4 Are decisions of the national regulatory authority able to be appealed? If so, to which court or body, and on what basis?

All decisions having direct legal effect on any individual (company or person) may be appealed. As a general rule, an objections procedure before the national regulatory authority itself must be followed, in which the national regulatory authority fully reconsiders its decision. After that, an appeal on the merits may be lodged with an administrative court; in most cases, the administrative court in Rotterdam has jurisdiction. A higher appeal on the merits is then possible, in most cases, with the Trade and Industry Appeals Tribunal.

Decisions by ACM regarding market analyses and disputes between providers, however, are only open to appeal with the Trade and Industry Appeals Tribunal. As this is the highest administrative court, no higher appeal is possible.

Regarding all decisions: decisions may be appealed based on formal arguments, e.g. regarding the prudence of the procedure and competency of the authority, and also on material arguments, e.g. regarding conflict with higher law.

## Licences and Authorisations

### 2.5 What types of general and individual authorisations are used in the Netherlands?

For the provision of a public electronic communication network, or for the provision of a public electronic communication service, registration with ACM is required. For the use of radio frequencies, a licence by the Ministry of Economic Affairs is required (with the exception of certain licence-free frequency categories). For broadcasting television or radio channels, permission from the Dutch Media Authority is required, pursuant to the Media Act.

## 2.6 Please summarise the main requirements of the Netherlands's general authorisation.

The provider of a public electronic communication network or of public electronic communication services is required to observe all obligations of the Telecommunications Act, of which the most important pertain to: interoperability/interconnection; SMP regulations (if applicable); numbering; laying of cables and rights of way; consumer protection (including prevention of spam/malware and enforcement of violations of spam/malware-regulations); and privacy regulation. A registration with ACM for the provision of a public electronic communication network or for the provision of public electronic communication services is not limited in time. The registered party is required to inform ACM of any relevant changes to the registration (including a transfer of ownership of the entity which is registered as the provider of a public electronic communication network or of public electronic communication services). A registered party has to pay yearly supervision costs. The amount depends on the relevant turnover of the registered party.

## 2.7 In relation to individual authorisations, please identify their subject matter, duration and ability to be transferred or traded.

Licences for the use of radio frequencies grant the right to use radio frequencies in a specific bandwidth (for example, 900 MHz, or 2.6 GHz). All licences for 2G (GSM900/1,800), 3G (IMT-2,000) and 4G (2.6 GHz) mobile communication contain a roll out-obligation. As a result of last year's auction, all the current licences for 800, 900, 1,800, and 2,600 MHz are valid until 2030. Licences in the 1,900-2,100 MHz-band are valid until 1 January 2017.

Pursuant to the Telecommunications Act, a licence for the use of radio frequencies is transferrable with permission from the Minister of Economic Affairs. Permission may be denied, e.g. in case the holder of the licence violates the licence requirements, or if that is necessary for efficient spectrum use.

The permission for broadcasting television or radio channels from the Dutch Media Authority requires the broadcaster to observe the regulations of the Media Act, among other things, regarding advertisements, content that is potentially harmful to minors, and quota for European and Dutch language productions. The permission is valid for five years and is not transferrable.

## Public and Private Works

### 2.8 Are there specific legal or administrative provisions dealing with access and/or securing or enforcing rights to public and private land in order to install telecommunications infrastructure?

Yes. Chapter 5 of the TA provides rules regarding the laying of cables and the rights of way (digging rights), and also, in particular, regarding the installation, maintenance or removal of cables in or on public and privately owned land.

## Access and Interconnection

### 2.9 How is network-to-network interconnection and access mandated?

Providers of public electronic communication networks, as well as

providers of public electronic communications services that control the access to end-users (such as certain MVNOs) have a general obligation to negotiate on interconnection. Providers of (fixed and mobile) voice telephony have a statutory duty to achieve interoperability (by means of direct or indirect interconnection). Only a provider of a public electronic communications network may exercise a right under interconnection/interoperability rules. With regard thereto, the Trade and Industry Appeals Tribunal has ruled that a request for interconnection may only be aimed at improving communications or accessibility of the own end-users of the requesting party, as opposed to requests that are made to improve communications or contractibility for those other than its own end-users.

## 2.10 How are interconnection or access disputes resolved?

ACM is authorised to settle disputes regarding, *inter alia*, interconnection and to impose conditions on parties in the event negotiations come to an interconnection agreement fail. Additionally, ACM has the authority to resolve disputes regarding existing interconnection agreements and to amend conditions imposed, but only if the obligations in the agreement are in violation of provisions of the TA or of regulations based on the TA.

## 2.11 Which operators are required to publish their standard interconnection contracts and/or prices?

Providers that are designated as a party having SMP are, in almost all instances, obliged to publish information regarding interconnection, such as prices, though they are not required to disclose full (standard) contracts. Mobile Network Operators KPN, Vodafone and T-Mobile, as well as several 'heavy' MVNOs (i.e.: MVNOs that control access to its end-users - among which are Tele2 and Lycamobile), are obliged to provide access to their mobile networks and additionally to publish information regarding interconnection (e.g. regarding services, technical conditions, charges, and the locations of access points). All fixed network operators (among which are Tele2, UPC, Ziggo, and BT) are likewise obliged to provide access and publish similar information. KPN, as incumbent operator, is obliged to publish a reference offer for its (fixed) interconnection.

## 2.12 Looking at fixed, mobile and other services, are charges for interconnection (e.g. switched services) and/or network access (e.g. wholesale leased lines) subject to price or cost regulation and, if so, how?

Both fixed and mobile termination rates (FTRs and MTRs) are (*ex ante*) regulated by ACM, in a combined market analysis decision dated 7 July 2010. The Trade and Industry Appeals Tribunal has annulled this market analysis in August 2011 and fixed the MTRs at EUR 0.027 from September 2011 to September 2012, and dropping down to EUR 0.024 in September 2012. FTR prices were fixed by ACM at EUR 0.0037.

As of 1 September 2013, new amended MTRs and FTRs will apply. In a combined market analysis decision dated 5 August 2013, ACM stated that they will decrease the rates to a level lower than before; EUR 0.01019 as MTR and 0.00108 as FTR. However, several telecom operators have made clear that they will appeal ACM's market analysis decision. In addition, KPN's charges for (high quality) wholesale broadband access, unbundled local loop access (for MDF access, SDF access and ODF-access (glass fibre)), as well as for charges regarding certain leased lines, are all still ACM-

regulated. The exact prices of all services can be found on [www.acm.nl](http://www.acm.nl).

## 2.13 Are any operators subject to: (a) accounting separation; (b) functional separation; and/or (c) legal separation?

- (a): No.  
(b): No.  
(c): No.

## 2.14 Are owners of existing copper local loop access infrastructure required to unbundle their facilities and if so, on what terms and subject to what regulatory controls? Are cable TV operators also so required?

In principle, yes. Incumbent operator, KPN, is obliged to provide unbundled copper local loop access (MDF, SDF) in a non-discriminatory manner against regulated tariffs. The terms and conditions can be found at [www.kpn-wholesale.com](http://www.kpn-wholesale.com) or at [www.acm.nl](http://www.acm.nl).

Cable operators are not obliged to provide unbundled local loop access or WBA-services. As indicated under questions 1.1 and 1.2, the Media Act contains an obligation for cable companies to offer access to their cable network and their audio-visual media services which are offered via their cable network. However, it is questionable whether this provision is in accordance with the EU Regulatory Framework and the Commission has taken steps to initiate infraction proceedings.

## 2.15 How are existing interconnection and access regulatory conditions to be applied to next generation (IP-based) networks? Are there any regulations or proposals for regulations relating to next-generation access (fibre to the home, or fibre to the cabinet)? Are any 'regulatory holidays' or other incentives to build fibre access networks proposed? Are there any requirements to share passive infrastructure such as ducts or poles?

KPN and Reggefiber are obliged to provide unbundled access to their respective glass fibre networks to the home (ODF-access-FtH), and to the office (ODF-access-FtO), against regulated tariffs.

KPN is, in addition, obliged to provide unbundled access to its (28,000) street cabinets (SDF-access, also called Fibre-to-the-Curb or FttC), against prices fixed by ACM.

Neither KPN, nor Reggefiber, are obliged to provide access to their fibre networks by means of Wholesale Broadband Access (WBA), although this ACM decision is still subject to appeals.

In ACM's market analysis decision of 7 July 2010 regarding mobile and fixed termination, ACM imposed interconnection obligations on MNOs, MVNOs and fixed network operators, regardless of the type of network the operator uses. Charges must be cost oriented (see above, question 2.12). It is expected that this obligation will continue in a new market analysis decision on MTR/FTR that is supposed to enter into force on 1 September 2013.

No 'regulatory holiday' exists in the Netherlands for incumbent operator, KPN.

Chapter 5 of the TA provides requirements for operators to share passive infrastructure. Operators are obliged to meet any reasonable request by another operator for the shared use of facilities that fall within the scope of Chapter 5 of the TA regarding rights of ways (such as ducts or poles).

## Price and Consumer Regulation

### 2.16 Are retail price controls imposed on any operator in relation to fixed, mobile, or other services?

No retail price control is imposed on any operator with regard to one-line fixed and mobile telephony services. With regard to two-line or multiple-line fixed telephony services, KPN is obliged to provide PSTN-based lines against minimum (threshold) prices to end-users, in order to avoid margin and price squeezes.

### 2.17 Is the provision of electronic communications services to consumers subject to any special rules and if so, in what principal respects?

Chapter 7 of the TA provides rules with regard to the provision of electronic communications services to consumers. Most importantly, a provider is obliged to provide transparent information to consumers regarding the identity of the provider, the services offered, applicable tariffs, service quality and general terms and conditions, as well as the possibility of bringing complaints before a complaints committee. Pursuant to Article 7.2 of the TA, a provider is obliged to notify a consumer four weeks in advance in case of a change in a contract clause. In case the amendment does not qualify as an improvement of the contractual conditions, the provider must give its customer the possibility to terminate his or her contract free of charge. In addition, information obligations based on general civil law, for example, with regard to e-commerce, distance selling and general conditions, also apply. As of 1 July 2009, a consumer can terminate his contract regarding a communication service with a one-month notice after the initial period and in case the contract contains an automatic renewal clause.

As a result of the implementation of the new EU regulatory framework, a requirement for operators to ensure net neutrality will be introduced as of January 2013. As a result, operators are not allowed to differentiate in tariffs on the services used by end-users on the internet, so that a surcharge on VoIP and Whatsapp is not allowed.

In addition, as of June 2012, rules regarding the use of 'cookies' were tightened in order to protect the privacy of website users. The TA now requires anybody who wants to apply cookies, to provide users with clear and unambiguous information about the purposes for which the cookies (or device fingerprinting) are placed. In addition, cookies may only be placed or accessed, after obtaining the prior and explicit consent of the user, i.e. prior to placing the cookies. The June 2012 bill got a very negative public response. Consequently, an amendment that will exempt cookies which provide understanding of the quality or effectiveness of the website is currently pending before the Lower House.

## Numbering

### 2.18 How are telephone numbers and network identifying codes allocated and by whom?

The Minister of Economic Affairs, Agriculture and Innovation, after consulting the ACM, is responsible for laying out numbering plans. Upon application by providers of public electronic communications networks or services or, in certain cases, upon application by natural persons, ACM may assign numbers laid out in numbering plans. ACM has the authority to deny, alter or revoke a number assignment, or number reservation, and is required to deny an

application if assignment violates the relevant numbering plan or if it is reasonably expected that the applicant will not, or cannot, comply with the requirements under the TA.

### 2.19 Are there any special rules which govern the use of telephone numbers?

Numbers included in a numbering plan, or set out in the TA, may not be used if they have not been assigned, or if they violate an assignment. Numbering ranges intended to be used for geographic and mobile numbers may not be used to offer paid information services. Paid information services (0900-number range) are subject to further regulations related to prior indication of costs.

### 2.20 Are there any obligations requiring number portability?

Yes. Article 4.10 of the TA in conjunction with the Decree Number Portability provide for the obligation for public communications service providers to offer a customer (private person) the possibility to continue using his/her number if the customer, upon termination of the contract, chooses to sign up with a different service provider (in the case of fixed lines: provided that the customer stays within the relevant geographic area).

## 3 Radio Spectrum

### 3.1 What authority regulates spectrum use?

The use of radio frequency spectrum is regulated by the Minister of Economic Affairs: the Minister determines a frequency plan allocating specific sets of frequencies. As a result of a national 'flexibility of use' regulation, as well as the implementation of the GSM Directive (2009/114/EC) and the new EU regulatory framework, typical GSM (900/1,800), UMTS (2,000/2,100) and LTE (2,600) frequencies are not restricted to certain designated use, other than 'mobile communications services'.

### 3.2 How is the use of radio spectrum authorised in the Netherlands? What procedures are used to allocate spectrum between candidates - i.e. spectrum auctions, comparative 'beauty parades', etc.?

The granting of licences can take place in three ways, to be determined by the Minister of Economic Affairs in each specific case: i) in the order of receipt of the applications; ii) by means of a comparative test ('beauty contest'); or iii) by means of an auction. Scarce frequencies, such as frequencies for mobile communications, are almost often auctioned.

Points i), ii) or iii) do not apply to the use of frequencies for the performance of essential public (governmental) responsibilities, for responsibilities for public broadcasting, and for the execution of certain mandatory statutory rules.

### 3.3 Can the use of spectrum be made licence-exempt? If so, under what conditions?

No licence for the use of spectrum rights is required for (sets of) frequencies that, pursuant to the frequency plan, may be used by any person.

In addition, no licence is required for (sets of) frequencies used by governmental bodies charged with providing security, defence or to maintain order.



**3.4 If licence or other authorisation fees are payable for the use of radio frequency spectrum, how are these applied and calculated?**

Fees for the use of radio frequency spectrum may be charged in the interests of optimal use of available frequency space. These fees could be a certain percentage of the monetary advantage acquired from the frequencies as determined in a ministerial decree published prior to the granting of a licence. The fee may be an amount which must be paid periodically, or immediately upon granting the licence.

**3.5 What happens to spectrum licences if there is a change of control of the licensee?**

See also question 3.6. In case the licence remains in the same corporate entity (for example: in case of purchase of shares), this does not qualify as transfer and therefore no permission of the Minister is required. In case that all assets are sold from one company to another, permission of the Minister for the transfer of the licence is required (the licence being considered an asset).

**3.6 Are spectrum licences able to be assigned, traded or sub-licensed and if so on what conditions?**

See also questions 2.7 and 3.5. The transfer or assignment of a licence requires the permission of the Minister for Economic Affairs (Article 3.8 TA). Permission may be denied e.g. in case the holder of the licence violates the licence requirements, or if that is necessary for efficient spectrum use. Permission may be obtained subject to restrictions. Although this is not fully clear yet, sub-licensing will most likely qualify as a transfer, meaning that approval of the Minister is required. Under specific circumstances, the lease of frequencies by a licence holder to a third party should be possible. As a result of the implementation of the new EU regulatory framework, further regulations regarding the transfer of frequency licences entered into force on 15 March 2013, as a result of which it will be possible to deny permission for transfer in case an intended transfer would lead to a licence holder having more spectrum than he was allowed to obtain during the auction of that spectrum.

## 4 Cyber-security, Interception, Encryption and Data Retention

**4.1 Describe the legal framework (including listing relevant legislation) which governs the ability of the state (police, security services, etc.) to obtain access to private communications?**

The Code of Criminal Procedure (“*Wetboek van Strafvordering*” or “Sv”) stipulates that recording private communications with the aid of a technical device is allowed for all forms of private communication facilitated by providers of telecommunication services (Article 126m Sv), but only in case of suspicion of a crime for which the law allows pre-trial detention and only in case the crime constitutes a serious violation of the legal order. Also traffic data can be requested (Article 126n Sv). In addition, the Dutch intelligence and security services may also record private communications (Article 25 of the “*Wet op de inlichtingen - en veiligheidsdiensten 2002*”).

**4.2 Summarise the rules which require market participants to maintain call interception (wire-tap) capabilities? Does this cover: (i) traditional telephone calls; (ii) VoIP calls; (iii) emails; and (iv) any other forms of communications?**

The Telecommunications Act sets out the requirements for providers of telecommunication services to allow lawful interception (Article 13.1 TA) and must swiftly comply with any request for assistance with lawful interception or for information relating to customers and their communications traffic by a competent governmental authority (Article 13.2 TA). Lower regulation further specifies these obligations.

The law is neutral towards the technical means used and applies to all forms of private communication facilitated to the public by providers of telecommunication services. This means that all the mentioned forms of communication are subject to call interception, with the exemption of non-public networks and services.

**4.3 How does the state intercept communications for a particular individual?**

Providers of telecommunication services must ensure: (i) users of telecommunication services do not notice interception; (ii) any encryption or adaption they added is removed before transferring the data to the authorities; (iii) take measures to secure the information pertaining to the requests by authorities to intercept data; and (iv) provide daily a copy of their list of customers including names and address to the centralised date centre set up by the government for this purpose (called CIOT).

A public prosecutor can order interception for a maximum period of four weeks upon authorisation of an investigative judge. Authorities will first check whether the telephone number or IP address is still in use. Providers are required to provide daily a copy of their list of customers including names and address to the centralised date centre set up by the government for this purpose (called CIOT). In case of interception of communication via internet, data is intercepted at the IP address or home address in case of the use of dynamic IP addresses, and all communication transferred via this address is recorded.

**4.4 Describe the rules governing the use of encryption and the circumstances when encryption keys need to be provided to the state?**

The law only requires providers of telecommunication services to remove any encryption or adaption they have added to the data before transferring the data to the authorities (Article 2(e) “*Besluit aftappen openbare telecommunicatienetwerken en - diensten*”).

**4.5 What call data are telecoms or internet infrastructure operators obliged to retain and for how long?**

Providers of telecommunication services are required to retain traffic data of telephone services for a period of 12 months and of communication via internet such as e-mail and VoIP for six months. This obligation does not pertain to providers of free e-mail services such as Hotmail or VoIP services such as Skype.

## 5 Distribution of Audio-Visual Media

### 5.1 How is the distribution of audio-visual media regulated in the Netherlands?

The Media Act provides rules for both public (i.e. government funded) and commercial audio-visual media distribution. It contains rules regarding licensing, obligations regarding commercials, percentages of European, independent and Dutch and Frisian language productions, protection of youthful viewers, obligations to distribute specific content, and supervision and penalties by the Dutch Commissariat for the Media. Other regulations regarding commercials can be found in the Dutch Civil Code which stipulates that commercials may not be misleading.

A licence from the Commissariat for the Media is required to distribute audio-visual media via a channel.

### 5.2 Is there a distinction between the linear and non-linear content and/or content distributed over different platforms?

A licence must be obtained from the Commissariat for the Media to provide either linear or non-linear content via a distribution channel. The Commissariat for the Media makes a distinction between linear and non-linear content. However, the regulations regarding content are largely the same.

### 5.3 Describe the different types of licences for the distribution of audio-visual media and their key obligations.

A prescribed amount of commercials is allowed in distributing audio-visual media content. Furthermore, fixed percentages of European, independent and Dutch and Frisian language productions are required for distribution content via a channel. For the protection of youthful viewers, the licence holder must adhere to agreements with the institute for the protection of youthful viewers. The licence holder must have a statute regarding the editorial staff.

### 5.4 Are licences assignable? If not, what rules apply? Are there restrictions on change of control of the licensee?

No. The licence is not assignable pursuant to Article 3.2 sub 2 of the Media Act. There are no restrictions on change of control of the licence.

## 6 Internet Infrastructure

### 6.1 Are conveyance services over the internet regulated in any different way to other electronic communications services? Which rules, if any, govern access to the internet at a wholesale (i.e. peering or transit) and/or retail (i.e. broadband access) level? Are internet service providers subject to telecommunications regulation?

No retail regulation regarding broadband or small band internet access has been imposed by ACM. These markets are considered to be effectively competitive.

With regard to wholesale access, ACM's market analysis findings resulted in the incumbent operator KPN being designated as having significant market power (SMP) in the unbundled local loop market (ULL). No low quality WBA regulation is currently in force, although appeals against ACM's deregulation are pending. KPN

was designated as having SMP on the market for high quality WBA. Current remedies are laid down in a market analysis decision of April 2012.

### 6.2 How have the courts interpreted and applied any defences (e.g. 'mere conduit' or 'common carrier') available to protect telecommunications operators and/or internet service providers from liability for content carried over their networks?

See below, in question 6.3.

### 6.3 Are telecommunications operators and/or internet service providers under any obligations (i.e. provide information, inform customers, disconnect customers) to assist content owners whose rights may be infringed by means of file-sharing or other activities?

Article 6:196c Dutch Civil Code ("DCC") provides a legal basis for defence to protect providers for 'mere conduit', 'caching' and 'hosting'. Article 6:196c DCC is the implementation of Articles 12, 13 and 14 of European Directive 2000/31/EC on Electronic Commerce.

In accordance with ECJ 19 February 2009 (C-557/07, LSG-Tele2), in several recent cases on file-sharing, it has been held that mere conduit access providers must be regarded as 'intermediaries' within the meaning of Article 8(3) of Directive 2001/29 (on the harmonisation of certain aspects of copyright and related rights in the information society). As such, a mere conduit provider can, for instance, be ordered by a court to cease his services which are being used to infringe content owners' rights, albeit without prejudice to Article 6:196c DCC (implementing the limitations of liability for providers as laid down in Articles 12, 13 and 14 of European Directive 2000/31/EC on Electronic Commerce). This could, for instance, lead to an order to block a certain website (via domain name and IP-address blocking), even if it is not clear which individual end-users are actually infringing said rights and regardless of whether such block is effective. In cases where a mere conduit provider is requested to provide information on an individual customer, it is more or less clear that only after a binding court judgment, is a content provider actually obligated to provide said information. In general, if it is sufficiently clear that the acts in question are unlawful and that the person from whom the name and address details are requested is in fact committing said acts, the provider can indeed be ordered to provide the details, provided the common weighing of certain interests so permits.

Where it concerns hosting providers of file-sharing websites or e.g. online trading/auction platforms (such as e-Bay), in several cases it has been held that, although the provider may not be infringing any rights himself, he could be considered to act unlawfully towards the content owners for facilitating the infringement. Certain (non-exhaustive) criteria to assess the unlawfulness have been developed in case law, such as *knowledge* (does the provider know of, or should he be aware of, the infringing acts), *profit* (does he generate income with the infringing acts) and his *role or involvement* in the infringing acts. The provider's *intention* can also play a role as whether or not he has an effective 'Notice and take down' procedure in place. In general, it can be assumed that a hosting provider is liable if it is unmistakably clear that content is unlawful and he does not remove the content upon request of the content owners. Up until now however, the courts have not granted requests by rights owners to impose obligations on service providers that entail active filtering of content (to discover infringement) or to disconnect an individual customer from the internet altogether.

**6.4 Are telecommunications operators and/or internet service providers able to differentially charge and/or block different types of traffic over their networks? Are there any 'net neutrality' requirements?**

As of 1 January 2013, operators are obligated to ensure net neutrality. They are not allowed to differentiate in tariffs on the services used by end-users on the internet (no Deep Packet Inspection in relation to VoIP and WhatsApp and no surcharge on VoIP and WhatsApp allowed).

**6.5 Are telecommunications operators and/or internet service providers under any obligations to block access to certain sites or content?**

As a result of several court orders (most of them in 2011), Ziggo

and other ISPs were obligated to block access to the Pirate Bay website. Appeals are still pending.

**6.6 How are 'voice over IP' services regulated?**

Voice over internet services, such as the 'Skype'-type services, are not regulated. However, providers of Voice over Broadband services - i.e. telephony services that make use of an IP-based network and not of traditional PSTN-networks - have the same obligations as providers of PSTN-telephony services.



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He has been active in these fields for more than twenty years. He drafts and negotiates technology related contracts, advises and litigates in commercial and regulatory matters. Piet has been involved in land mark transactional work relating to media companies, IT providers and communication networks. He is also active in other regulated industries such as transport and healthcare. Piet frequently represents clients before various regulators.

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**Paul Waszink** has extensive experience as a telecoms and media law specialist since his admittance to the Dutch Bar in 2000. Within the field of telecommunications and media law, Paul has a special focus on administrative (regulatory) litigation. He represented several telecommunications operators in many telecommunication and media law related proceedings, among others, against ACM (regarding fixed and mobile telephony and MTRs and FTRs, ULL, wholesale broadband access and wholesale broadcasting transmission services), against the Minister of Economic Affairs, Agriculture and Innovation (in 2G and 3G frequencies related proceedings, recently in the 2.6 GHz auction and enforcement proceedings regarding spectrum frequency use), and against the Media Authority (regarding cable network access disputes). Paul is mentioned in both The European Legal 500 and Chambers' Global Directory.

## ● NautaDutilh

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