

Netherlands

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1. LEGAL FRAMEWORK

In the Netherlands three regulatory authorities have direct control of the media sector:
The Netherlands Media Authority (CvdM, short for *Commissariaat voor de Media*);
The Independent Post and Telecommunications Authority of the Netherlands (OPTA,
or *Onafhankelijke Post en Telecommunicatie Autoriteit*);
The Radiocommunications Agency (AT or *Agentschap Telecom*).

Both CvdM and OPTA are so-called autonomous administrative bodies, AT being only an administrative agency, falling under the direct control of the Ministry of Economic Affairs, Agriculture and Innovation. Carrying out functions that are operational rather than strategic in nature, at least when compared with OPTA and CvdM, AT is specifically in charge of obtaining and allocating frequencies and monitoring their use.

As far as fair competition in general is concerned, the Netherlands Competition Authority (NMa or *Nederlandse Mededingingsautoriteit*) is the designated authority. In 2006 the NMa adopted separate supervision programs for media and telecom businesses. Programs like these serve strategic and practical needs: when required and in order to proactively monitor the market and collect relevant data, the NMa is able to take immediate action. Whenever media companies are involved in a potential merger, the NMa informally seeks the opinion of CvdM. For general matters concerning consumer protection the Consumer Authority (CA or *Consumentenautoriteit*) can also be involved. Although newspapers and magazines are addressed by chapter 9 of the Media Act via the Netherlands Press Fund [SvdP or *Stimuleringsfonds voor de Pers*] – an autonomous administrative body whose mission it is to improve diversity of news media and to fund innovation within all possible media sectors

dealing with news and news reflection – printed media are not explicitly covered by media regulation in a similar way as television, radio, online and mobile services are.

The three regulatory authorities are subject to laws defining their status, their responsibilities, their operations and procedures as well as their administration and management. In the case of the Media Authority the legislation concerned is the Media Act, which came into force in 1987 and has been updated several times since [*Mediawet 2008*]. With regard to OPTA, the laws concerned are the 2007 Independent Post and Telecommunications Authority Act [*OPTA wet 1997*] and the 1998 Telecommunications Act [*Telecommunicatiewet 1998*].

In addition the following act is relevant with regard to autonomous administrative bodies like OPTA and the Media Authority: the 2006 Framework Act for autonomous administrative bodies [*Kaderwet zelfstandige bestuursorganen 2006*].

Independence

Autonomous administrative bodies [so-called *zelfstandige bestuursorganen* or ZBO's] are also referred to as 'independent administrative authorities', their independence being explicitly defined in the 2006 Framework Act. Nevertheless, the independence of autonomous administrative bodies whose specific task it is to oversee the media sector should be interpreted as a 'formal' independence: they perform a number of legal tasks, but are kept at arms' length from the Dutch government. Independent functioning of the Media Authority is guaranteed in that the Minister does not intervene in its research endeavours or complaint procedures. However, the Minister can overrule decisions of the Media Authority [2008 Media Act, article 7.9]. The Media Authority has policy-implementing powers, as enshrined in the Media Act, and no general rule-making or policy-setting powers. In practice, the Media Authority and the Minister meet regularly to discuss a variety of issues, on a structural basis (law and policy issues) as well as with a view to specific issues (e.g., reorganizing the public service broadcaster).

Similarly to the Media Authority, OPTA operates at arms' length from the Ministry of Economic Affairs, Agriculture and Innovation. However, in contrast to the Media Authority, the Minister has no direct control over decisions made by OPTA. Although he/she can give instructions, the Minister cannot interfere with individual cases. The ministry does bear political responsibility for OPTA, appointing the members of its board and approving its budget, thus guaranteeing its continued existence.

Self- and co-regulation

In the area of co-regulation, a formal link exists between the Media Authority and the Netherlands Institute for the Classification of Audiovisual Media (NICAM). Founded in 1999, NICAM has developed a uniform classification system for audiovisual media [the so-called *Kijkwijzer* or 'watching guide'] with the intent to warn parents against content that is potentially harmful to minors. In this sense it is meant to be an advisory tool and not an instrument of censorship. Legally enshrined within the Media Act [chapter 4], the Media Authority and NICAM have developed a co-operation protocol. The Media Authority regularly monitors the compliance of the media sector with the *Kijkwijzer* and can impose fines in case of

non-compliance. In addition, the *Kijkwijzer* classification system is evaluated on a yearly basis by the Media Authority.

A formal link also exists between the Media Authority and the Advertising Code Authority (*Stichting Reclamecode*, SRC), a self-regulatory body for advertisers. SRC has developed a code aimed at ensuring responsible advertising and the prevention of misleading and aggressive advertising. Membership is compulsory for all linear and non-linear audiovisual media services that publish advertising (Media Act, articles 43b & 71r). In order to obtain a broadcasting license from the Media Authority, applicants have to submit a written statement, thus proving their membership of SRC.

There is also an informal link with the Committee for Integrity of the Public Service Broadcaster (*Commissie Integriteit Publieke Omroep*, CIPO). Dedicated to improving the compliance of the PSB with its own governance code, CIPO consults with the Media Authority four times a year.

Furthermore, a co-operation protocol exists with OPTA dealing with must-carry program-related issues, and with AT on the supervision of compliance with format obligations on part of private radio broadcasters which acquired terrestrial frequencies in 2003 on condition that they respect these format obligations. Meanwhile, a protocol between the Media Authority and NMa – entered upon in the framework of the Temporary Law on media concentration on which the Media Authority advised NMa in case of mergers of media companies – has become redundant following the law's withdrawal on January 1st of 2011 (for further information see www.cvdm.nl; www.opta.nl; www.nma.nl).

2. FUNCTIONS

The Media Authority is responsible for tasks laid down in the Media Act. The Media Authority's central mission is to supervise public and private broadcasters, thereby contributing to independence, quality and plurality of media information services for the public, non-commerciality of public media, creating a level playing-field between public and private media and fostering transparency of media ownership.

OPTA is responsible for tasks laid down in the Telecommunications Act. According to the organization's mission statement, OPTA ensures fair competition and trustworthy conditions within the telecommunication sector on behalf of the consumer.

Regulation of (new) media sectors

Regarding the division of tasks in the field of regulatory responsibility, the following responsibilities are to be distinguished:

- Audiovisual content: Media Authority (always ex post, based on Media Act article 7.20);
- Transmission (or network) aspects of audiovisual content: Media Authority (partly, as described under section about self- & co-regulation); AT (to a lesser extent);
- Distribution (or service) aspects of audiovisual content: Media Authority (partly); OPTA (to a lesser extent, ex ante). Commercial broadcasters have to apply for a

license with the Media Authority. In awarding licenses, the Media Authority does not distinguish between analogue and digital broadcasts, as the type of transmission is determined by negotiations between network provider and broadcaster, and not by the Media Authority. OPTA can act when a broadcaster is refused access to the cable operator's network on unfair grounds;

- Spectrum: AT;
- Electronic communications (network and general services): OPTA.

In response to convergence in the media landscape both the Telecommunication Act and somewhat later the Media Act 2008 have adopted a platform-neutral and technology-independent regime. The changes have also affected the scope of audiovisual media services that have to comply with certain requirements of the Media Act. With the implementation of the 2009 EU Audiovisual Media Services Directive, online and mobile audiovisual media services have become subject to the Dutch Media Act. In this way the government wants to create a level playing-field for all 'television-like' services, regardless of whether they are offered through traditional distribution networks or through new digital networks. The 2008 Media Act distinguishes between the provision of linear and 'on demand' commercial media services (for further reading, see EU-INDIREG-study).

Advertising

Media content regulation covers advertising as regards breaks for commercials, tele-shopping and sponsored programs for all media platforms. As the Media Act distinguishes between public and private media services, the latter are subjected to a 'lighter' regime. As mentioned above in the section on self- and co-regulation, SRC regulates the more ethical aspects, through supervising compliance with the Advertising Code of the authorities' members.

Media education

Media education/digital literacy is neither explicitly nor implicitly included in the functions performed by the media regulatory authorities.

Converging bodies

The current liberal-conservative government is preparing legislation to merge NMa, OPTA and the Consumer Authority into one regulatory body. One of the reasons is that telecommunication regulations, in response to increased competition, are moving more and more towards general competition regulation. Specific ex-ante regulation for operators of telecommunication networks is decreasing and therefore it becomes more logical to have one regulatory body that applies (to a large extent) the same principles to each economic market. By January 1st 2013, NMa, OPTA and the Consumer Authority will merge into the new Consumer and Market Authority (ACM).

It has frequently been suggested to include the Media Authority in such a merger, thus copying the British OFCOM model. The main argument is that the convergence of media and telecommunication networks and services would logically also lead to a converged

regulatory authority. Another argument is that a merger would lead to a more efficient system, reducing the coordination costs as well as some overlap in competencies. Against such a plea for a merged regulatory authority, one could argue that although content in all formats (text, audio, video) can now be distributed over different networks and although telecommunication networks now also carry media content, there is still a difference between the network and the content. So far these discussions have not resulted in any concrete proposals for change from government or parliament. The constellation in which the Media Authority is mainly concerned with the content and the Telecommunications Authority with the networks has largely remained in place (for further details, see 2011 OPTA's annual report and market monitor).

3. LEGITIMIZING/UNDERLYING VALUES

Founded in 1988, the Media Authority is an autonomous body responsible for implementing the Media Act. It was set up in order to create more distance between the government and the media. Tasks that used to be performed by the Ministry are now delegated to the Media Authority.

OPTA was established in 1997 as an independent regulator to stimulate the transition of a monopoly situation to a liberalized, competitive and open post and telecommunications market. This involved granting more favourable conditions for new market entrants vis-à-vis the former state-owned incumbent KPN, most importantly through ex-ante regulation to guarantee non-discriminatory access to the incumbents' fixed telecommunication network.

In this respect it is important to mention that OPTA was always meant to be a temporary regulator; once the integrated market as described above is fully implemented, NMa will take over OPTA's supervisory role.

There are differences in the kind of supervising and monitoring tasks of the telecommunications authority and the media authority that are based on different sets of principles. Whereas telecommunication law is basically a particular form of competition law, with more provisions for ex-ante regulation and consumer protection, media law is to a large extent based on a different set of principles and instruments, such as guarantees for media diversity and access to information.

4. PERFORMANCE

Daily tasks

The Dutch Media Authority, established on January 1st, 1988, has three important tasks which are laid down in the Media Act (1987, updated several times since):

- Supervision of public service broadcasters, private broadcasters and cable network operators, as far as the provisions in the Media Act apply to them, and basically in relation to the content transmitted through the networks. The supervision (monitoring) of radio and television programs is always ex post. The monitoring is largely done in order to ensure that public service and private broadcasters comply with the

regulations for advertising and sponsorship. The Media Authority also supervises the extent to which the public service and commercial broadcasters comply with their so-called program regulations: the percentage of television broadcasting time that has to be filled with European production, programs by independent producers (EU Directive) and (for the public service broadcasters only) the percentage of broadcasting time that has to be devoted to information, culture and education. The Media Authority also monitors the level of diversity and plurality in the Dutch media markets.

- Allocation of broadcasting time/permission for commercial broadcasting: the Media Authority allocates national broadcasting time to educational broadcasting organizations, religious and spiritual organizations, political parties, and for government information. It also allocates broadcasting time to regional public-services and local broadcasters, both for radio and television. Furthermore, the Media Authority gives permission for commercial broadcasting, on the national, regional and local level, both for radio and television. This permission is given for a five-year period. Commercial broadcasting includes: general interest channels, thematic channels, subscription channels, so-called 'electronic newspapers' broadcast via the cable-networks.
- Financial control: the Media Authority is responsible for the actual payment of the public-service broadcasting organizations. The budget available to them is established every year by the Minister of Education, Culture and Science. The budget has two sources: the state broadcasting contribution (directly from tax revenues), and the revenues from advertising broadcast on the public radio and television channels. The Media Authority examines the financial records of the public broadcasting organizations, and this includes the revenues they obtain from sponsors.

In addition, the Media Authority monitors the public broadcaster's secondary activities, supervising the proper functioning of NICAM's classification system (see section on self- & co-regulation) and advising the ministry on the mechanism determining the number of members of the public broadcasting organizations (i.e. the criterion upon which broadcasting time and budget are allocated), and current and future media policies.

In general, OPTA is concerned with enhancing competition within the telecom sector and safeguarding consumer protection. With regard to competition, OPTA makes an annual analysis of the markets for electronic communication, foremost the television market and the business-directed telecom market. In its analysis OPTA focuses on price variations, positions of significant power and entrance to the market for newcomers. With regard to consumer protection, OPTA upholds the Telecommunications Act, taking action against businesses that do not comply with the rules. Additionally, OPTA informs consumers of their rights and obligations by means of a web-based service called *ConsuWijzer*.

Other tasks include:

- issuing telephone numbers;
- tracking down and fining spyware distributors;

- making sure that the legally stipulated minimum level of service is provided in the postal and fixed telephony sectors;
- adjudicating disputes concerning access to and interconnection between networks;
- monitoring and assessing the rates charged by (formerly state-owned) KPN;
- regulating electronic signature certification-service providers.

In their operation both OPTA and the Media Authority struggle with discrepancies between legal duties and actual performance. The fact is that budget cuts force the regulators to make choices among their daily activities: insufficient time or inadequate human resources make it impossible for them to cover every task in the same detail. These choices are based on an estimation of which current problems are more pressing or causing social upheaval or might be damaging to the media or telecom sector. Recently, OPTA was asked to monitor compliance of all web sites with the Dutch cookie law enacted as of June 5th, 2012, principally targeting all web sites across the globe, in practice so far only the 25 web sites attracting the most Dutch visitors were monitored.

State tasks vs. co- and self-regulation

Neither OPTA nor the Media Authority experience conflicts, as co-operation protocols between state regulators and co- or self-regulators (as well as between state regulators) see to it that regulators are complementary in terms of their responsibilities and tasks.

Appeal mechanisms

All parties with a direct interest in a decision of the Media Authority have the right to lodge an appeal. Following the General Administrative Act (chapter 6), the Media Authority in this instance is obliged to take a formal legal decision. In an internal hearing, parties involved will be in a position to give their opinion and to defend their position. If the complainant disagrees with the decision of the Media Authority, (s)he can lodge an appeal to a (higher) court (administrative court, Council of State and eventually Court of Human Rights) or the national ombudsman. An appeal always has to be lodged first internally with the Media Authority. In some cases an Advisory Committee on Appeals is the appointed appeal body. A decision by the Media Authority stands pending appeal unless the appeal body suspends it. Accepted grounds for appeal are errors of law, errors of fact and a full re-examination. In case the complainant lodges an appeal with the court, the latter two grounds are accepted only when there is no appreciation margin for regulatory authority regarding specific policy.

According to section 7.9 of the Media Act, decisions by the Media Authority can also be suspended or rescinded by the Minister during the eight weeks after reception.

The Telecommunications Act has similar provisions with regard to decisions of OPTA. Parties having a direct interest can take a case to court whenever they disagree with the outcome of a direct appeal with OPTA. Only in a few specific cases, such as for instance disagreement of a stakeholder with an analysis of the market, an appeal is lodged directly with a (higher) court. Likewise, a court can overturn (part of) a particular decision (for further reading, see EU-INDIREG-study; www.opta.nl).

5. ENFORCEMENT MECHANISMS/ACCOUNTABILITY

Compliance (legal mechanisms)

If broadcasters do not comply with the rules, the Media Authority can apply sanctions, varying from warnings and administrative fines (to a maximum of €225,000) to reduction of airtime and ultimately revoking the license. Likewise, if telecom and cable operators do not comply with the rules, OPTA can apply administrative fines or a provisional order for penalty payment (maximum €450,000 or 10% of the relevant revenue).

In reality the Media Authority only applies the reduction of airtime or the revoking of a license in very rare instances, whereas it regularly issues warnings and imposes fines. In case of OPTA, both fines and provisional orders are regularly applied, particularly against business circulating of spam.

Non-binding guidelines/regulatory doctrines

Apart from outlining a more general view on how the two regulators look upon the circumstances in which they operate, neither the Media Authority nor OPTA adopt either regulatory doctrines or non-binding guidelines (i.e. recommendations).

Accountability

Commissioners should be independent of politics and media or telecom organizations. Both the Media Authority and OPTA are only accountable to their respective Ministers. Reporting obligations consist of the usual documents (annual report, financial account, budget plan, all statistically validated) for which no formal approval by the Minister is obliged. In addition, the Media Authority writes a yearly letter of maintenance, on a voluntary basis, to the Minister. Twice a year, upon submitting the annual budget plan and the annual account, a financial audit is held by a private firm. Every five years an external work audit is ordered by the Minister, and carried out by a private firm. If the Minister considers the authority's tasks seriously neglected, section 23 of the Framework Act for autonomous administrative bodies offers the tools necessary for measures to be taken (for further reading, see EU-INDIREG-study; www.opta.nl).

6. INSTITUTIONAL ORGANIZATION/COMPOSITION

Media Authority

Board	Staff	Media sector	Civil society
3 (possibility of 5)	60 (53.75 fte)	n.a.	n.a.
Appointed for 5 years, max. 1 renewal	n.a.		

Post and Telecommunications Authority

Board	Staff	Media sector	Civil society
3	134 (formation 143 fte)	n.a.	n.a.
Appointed for 4 years, 1x renewal	Only incidentally and to a very limited extent, precarious labor is made use of		

The boards of the regulatory authorities are appointed by the State. The political culture developed in the Netherlands is such that board members are first and foremost appointed because of their knowledge of the field and/or their experience in public administration or management and not because of their loyalty towards government or a particular political party. Direct political appointments to these bodies have not taken place over the past decades, although informally some balance will be sought in the composition of boards between expert members with different (political) views or affiliations, to the extent that these are known.

The Media Authority is run by three commissioners, appointed by the Minister of Education, Culture and Science for a term of five years. Reappointment for another term is possible once. Practice over the last fifteen years shows the ministry will seek consent of existing board members and takes into account suggestions of board members about a new member.

OPTA's board has three independent experts, appointed by the Minister of Economic Affairs, Agriculture and Innovation for a period of four years. They usually have different scientific backgrounds (economics, law). Daily management is the responsibility of the chair assisted by two managers.

The boards of the self-regulatory bodies usually consist of representatives from the industry, professional associations, and sometimes also from consumer associations. They are usually financed by the stakeholders themselves and sometimes receive some additional government funding (for more details, see annual reports of CvdM and OPTA).

7. FUNDING

The Media Authority is mostly funded by the State and additionally through license fees. Each year it submits a budget plan for approval by the Minister of Education, Culture and Science. OPTA's funding follows a different logic: as the authority is obliged by law to calculate fees based on its supervision activities and charge these to the supervised parties, it is mostly funded by fees and additionally by the State.

In 2011 CvdM's expenditure amounted to €6.17 million on a budget of €5.92 million. Revenues amounted to €6.13 million, 77% of which was State-funded (i.e. the ministry). OPTA's expenditure amounted to €16.11 million on a budget of €17.95 million. Revenues amounted to €17.1 million, 91% of which were fees related to supervision. The two authorities transfer money coming in from imposed fines to their respective ministries.

The Media Authority's annual accounts form part of its annual report and are published on its website. OPTA publishes its annual accounts and report separately on its website (for more details, see www.cvdm.nl and www.opta.nl).

8. REGULATION IN CONTEXT

Media landscape

In 2011, 23 television channels specifically focused on the Netherlands. Ten of them are generalist channels with wide-ranging programs and divergent genres. The others are

special-interest channels, customized for Dutch audiences. There are 19 radio stations, nearly all presenting a music format. The average viewing time per day amounts to 191 minutes, the average daily listening time is 203 minutes.

In addition to the national public channels, each Dutch province also has its own regional public television channel and radio station and there are a further 285 local public broadcasters offering television and/or radio services catering for one or more towns and villages. Dutch audiences can also tune into a large number of foreign channels, including the public television channels and radio stations of neighboring countries.

Both television and radio broadcasts are mainly received via the cable network. In less densely populated areas and in areas with a relatively large population of ethnic minorities satellite dish antennas are often used. At the end of 2011 98% of all Dutch households owned one or more television sets, and nearly three quarters of households received digital television. Eurostat statistics reveal that in 2011 94% of Dutch households had access to the internet, of which 83% made use of a broadband connection.

With regard to the print media there are 9 national, 19 regional newspapers and 2 free newspapers. The total daily circulation of newspapers stands at 3.36 million copies. Among the national newspapers, 4 quality and 2 popular newspapers can be distinguished (including the largest national newspaper of the Netherlands, *De Telegraaf*, with a circulation of 597,579). Each of the twelve Dutch provinces has at least one regional newspaper (for more details, see CvdM, 2012a; kijkonderzoek.nl).

Market concentration and coverage

The overall television market has been dominated over the past ten years by three large players: the public broadcaster (*Nederlandse Publieke Omroep, NPO*), Bertelsmann's RTL Netherlands and Sanoma Group. NPO's share of viewing time in 2011 amounted to 32%; jointly these three broadcasters controlled ten general-interest channels and little under three quarters of the television market. The overall radio market is slightly less characterized by concentration although it too is dominated by just a handful of players, among which the *NPO, Talpa media and Telegraaf Media Groep (TMG)*. In 2011 NPO's share of listening time was 33.2%.

No figures about market shares are available for the internet. On the basis of the average monthly coverage achieved by publishers and broadcasters on the internet (calculated by adding up unique visitors on all the websites which they control) we find that *Sanoma Group (nu.nl)*, *TMG* and *NPO* all rank among the top ten. Of all news sites focusing on the Netherlands *nu.nl* had the highest monthly coverage (38.1%), followed by NPO's *nos.nl* (31.9%) and *telegraaf.nl* (25.5%).

In 2010 the overall market of national, regional, free and specialist newspapers was dominated by three large groups: *TMG, Mecom* and *De Persgroep*. *TMG* is the largest of the three, with a market share of 27% on the basis of circulation. The joint total of the three groups stands at 70.3%. All Dutch newspapers together reach an average of 64.5% of the population on a daily basis, meaning that somewhere between six and seven out of ten Dutchmen read a newspaper every day. As far as readership is concerned, *De Telegraaf* is the largest paper, reaching a daily average of nearly 2.1 million readers of 13 years and over.

In 2011, and lumping together the markets of newspapers, radio and television, *NPO* (public broadcasters) had by far the biggest market share (65.2%). *TMG* occupies the second position (42.2%), and *De Persgroep* ranks third (27.4%) (for further reading, see www.media-monitor.nl and *NOM printmonitor 2010-I/2011-II*).

9. IGNORED DIMENSIONS

When it comes to self-regulation, the role of the Netherlands press council, charged with the examination of complaints against violations of good journalistic practices, seems to become more peripheral as more media actors tend to distance themselves from it and to appoint an internal ombudsman.

As to co-regulation, NICAM, the Netherlands Institute for the Classification of Audiovisual Media, merely focuses on what is not suitable content for minors rather than looking at what is suitable content; in other words, programs that are not qualified as 'inappropriate for minors' can be watched, while complementary to this coding, the question whether a program is actually made for this group is not looked into.

Finally, national supervision of media concentrations is becoming more problematic due to foreign owners (e.g., the case of RTL, operating in the Netherlands with a license from neighboring country Luxemburg) and private equity investors, both with activities and interests within and beyond Europe.

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NOM Print Monitor 2011-I/2011-II. See: <http://www.nommedia.nl/nieuws/publicatie-nom-print-monitor-2011-i2011-ii/>

NMa Netherlands Competition Authority. See: <http://www.nma.nl>

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SKO Stichting KijkOnderzoek (Primary provider of the official television audience ratings in the Netherlands). See: <http://www.kijkonderzoek.nl/>

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EXPERTS INTERVIEWED

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