

**7. Media agencies in legal and public dispute**

- 243 No relevant national case law related to media agencies was found.

**III. Miscellaneous Facts and Remarks**

- 244 None.

**F. Rechtliche Rahmenbedingungen für Mediaagenturen in den Niederlanden**

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**I. General Overview**

- 245 The Dutch media landscape has changed significantly over the past decades. Holland has a rich media tradition and represents one of the most divers and interesting media fields in Europe. Already during the enlightenment period, free press was a hallmark of Dutch society, and many writers and intellectuals came to Holland to publish their writings. Since then, free press has remained a character trait of Dutch society. Article 7 of the Dutch constitution specifies: 'No one shall require prior permission to publish thoughts or opinions through the press, without prejudice to the responsibility of every person under the law. Rules concerning radio and television shall be laid down by Act of Parliament. There shall be no prior supervision of the content of a radio or television broadcast.'<sup>131</sup> Doing so, it lays down a stricter regime than Article 10 of the European Convention on Human Rights, as it prohibits any prior restriction on the freedom of speech and only allows for reactive actions.

<sup>131</sup> <<http://bit.ly/1n6U7st>>.

Holland has always been on the forefront of new media developments. In 1618, the first newspaper appeared and seven years later, booksellers placed their first advertisements.<sup>132</sup> The first radio program in the Netherlands was broadcasted from Scheveningen in 1919.<sup>133</sup> Like in most countries, broadcasting of television and radio was originally government controlled. Public broadcasting agencies still play a very important role on both radio and television. Typical of the Dutch media landscape is the pillarization. Dutch society, until the sixties of the last century, was divided in three pillars: catholic, protestant and liberal/socialist. Schools were divided along those lines, clubs, bars and sports organizations too; each group having their own school, football club, bar, etc. Media were also divided; each group had their own newspaper and the government distributed the broadcasting time on radio and television equally over the three groups. 246

Although some commercial parties entered the media market earlier, significant media fragmentation began around 1990 with the upcoming of commercial television and radio broadcasting in the Netherlands.<sup>134</sup> Similarly, new media (especially the internet and related digital innovations) arose. Consequently, the media options for advertising in the Netherlands currently consist of TV, print, radio, cinema, outdoor, POS (point of sale) and a plethora of possibilities on the internet. Given this fragmentation, it is becoming more and more difficult to reach specific target groups for advertisers.<sup>135</sup> Media planning and buying had been done by advertising agencies before, but roughly after 1990, they came to realize that media planning needed a different expertise and the media agencies as we now know them came to life.<sup>136</sup> 247

Another important reason for the up rise of media agencies is the concentration of media companies in the Netherlands. Already in 2002, the Dutch Media Authority (Commissariaat voor de Media) signaled that the media landscape (newspapers, television, cable) is dominated by the activities of three players.<sup>137</sup> This principle is also known as: 'three is the rule'.<sup>138</sup> For example, the daily papers are owned by three major publishers, with a joint market share of 90 percent of the market. De Persgroep (formerly PCM) owns five national dailies (de Volkskrant, Algemeen Dagblad, NRC Handelsblad, nrc.next and Trouw) and an Amsterdam daily (Het Parool). Its total market share is near 40 percent.<sup>139</sup> Telegraaf Media Group owns the biggest national newspaper (De Telegraaf) and several regional dailies. Finally, Mecom owns several regional newspapers.<sup>140</sup> In similar vein, public broadcasting is 248

<sup>132</sup> P. Bakker en O. 'Scholten, *Communicatiekaart van Nederland*, Amsterdam: Kluwer 2011 p. 259.

<sup>133</sup> <[http://ejc.net/media\\_landscapes/the-netherlands](http://ejc.net/media_landscapes/the-netherlands)>.

<sup>134</sup> <<http://dare.uva.nl/document/227944>>, p. 27.

<sup>135</sup> <<http://dare.uva.nl/document/227944>>, p. 30.

<sup>136</sup> <<http://dare.uva.nl/document/227944>>, p. 30.

<sup>137</sup> <<http://dare.uva.nl/document/227944>>, p. 30.

<sup>138</sup> <<http://77.87.161.246/wp-content/uploads/2013/08/Concentration-and-Diversity-of-the-Dutch-Media-2002.pdf>>, p. 5.

<sup>139</sup> <[http://ejc.net/media\\_landscapes/the-netherlands](http://ejc.net/media_landscapes/the-netherlands)>.

<sup>140</sup> <[http://ejc.net/media\\_landscapes/the-netherlands](http://ejc.net/media_landscapes/the-netherlands)>.

facing two strong commercial competitors (RTL and SBS) in the television sector and the three players jointly control 85 percent of the market.<sup>141</sup>

- 249 This trend towards concentration has not taken place in the advertising branch. Many advertising agencies have a relatively small market share, which means that advertising agencies often have a relatively weak bargaining power.<sup>142</sup> This is one of the reasons why media agencies have arisen,<sup>143</sup> as they can bundle the budgets of advertisers.<sup>144</sup> A good example might be Kobalt, which is one of the largest media agencies in the Netherlands.<sup>145</sup> In 1998, five Dutch multinationals (Vendex KBB, Ahold, Laurus, Heineken and ABN AMRO) decided to join their powers and created their own media agency.<sup>146</sup> Over the years, it has gained power, expertise and volume, and it now represents several smaller businesses and parties. There are also several other media agencies active in the Netherlands. Given the increasing importance of the internet and web-based applications, several media agencies have arisen that specialize in internet profiling, behavioral targeting and online add-sales.
- 250 However, traditional media are still dominant in the Dutch media landscape. According to the Dutch Media Authority, the newspaper market in the Netherlands is relatively strong with thirty newspapers distributed per 100 residents. Dailies reach about 70 percent of the population, a large majority of which spends more than half an hour a day reading a daily paper. Although the market for regional newspapers has declined, still some 15 independent regional newspapers exist.<sup>147</sup> In 1999, two free dailies were launched: Metro and Spits. Readership has been around 1.9 million for Metro en 1.7 million for Spits.<sup>148</sup> Metro was part of an international initiative, Spits was a reaction by the Telegraaf Media Group to downplay this initiative. To everyone's surprise, there was market for two free dailies; however, in 2012, the Telegraaf has gained control over Metro and the editorial boards of both Metro and Spits have been merged.
- 251 Television is still generally seen as the most important medium in the Netherlands,<sup>149</sup> both for political opinion, cultural influence and advertising revenues, even with internet use growing exponentially. The average viewing time is more than three hours a day. Already in 1999, 95 percent of the households had a cable; the high cable coverage is still striking about the Dutch landscape. A choice is mostly granted to television viewers of between 30 channels at least. Digital television was introduced in the media landscape several years ago. 'The Netherlands was the second country in Europe to switch off traditional analog television. On 11 De-

<sup>141</sup> <<http://77.87.161.246/wp-content/uploads/2013/08/Concentration-and-Diversity-of-the-Dutch-Media-2002.pdf>>, p. 5.

<sup>142</sup> Bakker en Scholten, 'Communicatiekaart van Nederland', Amsterdam: Kluwer 2011, p. 268.

<sup>143</sup> Bakker en Scholten, 'Communicatiekaart van Nederland', Amsterdam: Kluwer 2011, p. 268.

<sup>144</sup> Bakker en Scholten, 'Communicatiekaart van Nederland', Amsterdam: Kluwer 2011, p. 268.

<sup>145</sup> <<http://retro.nrc.nl/W2/Nieuws/1997/07/17/Med/02.html>>.

<sup>146</sup> <<http://retro.nrc.nl/W2/Nieuws/1997/07/17/Med/02.html>>.

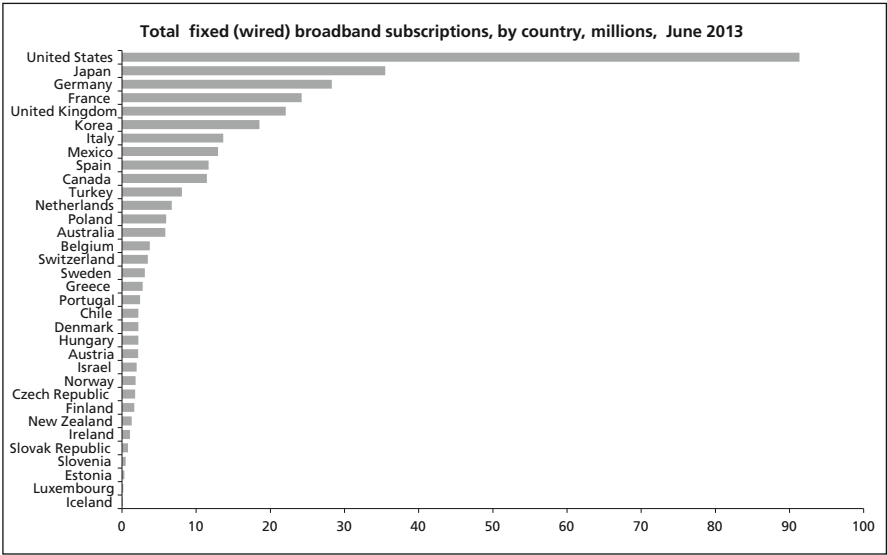
<sup>147</sup> <[http://ejc.net/media\\_landscapes/the-netherlands](http://ejc.net/media_landscapes/the-netherlands)>.

<sup>148</sup> <[http://ejc.net/media\\_landscapes/the-netherlands](http://ejc.net/media_landscapes/the-netherlands)>.

<sup>149</sup> <<http://www.mediamonitor.nl/english/television/>>.

ember 2006, some three months after Luxembourg had taken this step, the analog terrestrial signal was switched off and the same frequencies are now primarily used for digital broadcasting.’<sup>150</sup>

All twelve provinces in the Netherlands have their own public regional radio station. Cities and local communities often also have their own local station, subsidized by a levy on the community tax.<sup>151</sup> Commercial radio in the Netherlands mostly broadcasts music and aims at a younger audience. However, there is also one commercial radio channel in the Netherlands that broadcasts news-only: BNR (Business News Radio), which is connected to the financial daily (Het Financiële Dagblad). With around three hours a day on average, radio listening has been stable since around 2000. However, only a few Dutch commercial stations make a profit, such as Radio538 (RTL Nederland), Sky Radio (De Telegraaf) and Qmusic (De Persgroep). There are several public radio channels; radio 1, mainly focuses on news, radio 2, mainly focuses on the older listener and plays pop music from the sixties and seventies, radio 3 aims at a younger audience and plays contemporary pop and dance music, radio 4 plays classical music, etc.<sup>152</sup>



The Netherlands has one of the highest broadband subscriptions per capita of the world. The Dutch Mediamonitor considers the internet an important platform in the media landscape; its popularity and its effects on public opinion cannot be ignored.<sup>153</sup> In the Netherlands, 86 percent of the people use the internet regularly.

<sup>150</sup> <<http://www.ivir.nl/publications/sloot/switch-off.pdf>>.  
<sup>151</sup> <[http://ejc.net/media\\_landscapes/the-netherlands](http://ejc.net/media_landscapes/the-netherlands)>.  
<sup>152</sup> Graphic is taken from: <<http://www.oecd.org/sti/broadband/oecdbroadbandportal.htm#Penetration>>.  
<sup>153</sup> <<http://77.87.161.246/wp-content/uploads/2013/08/Mediamonitor-The-Dutch-media-in-20101.pdf>>, p. 78.

Increasingly, radio and television are brought to people via the internet. In the fourth quarter of 2009, there were 7,312,579 households in the Netherlands. Of these, 77 percent received cable television (analog or digital), 12 percent satellite television, 12 percent digital terrestrial television (DTT), and 5 percent Internet Protocol Television (IPTV).<sup>154</sup> Internet is increasingly used for video streaming and as second screen. Consequently, internet advertising is a growing market. Most media agencies use a multi-media mix.

## II. The Business Models of Media agencies

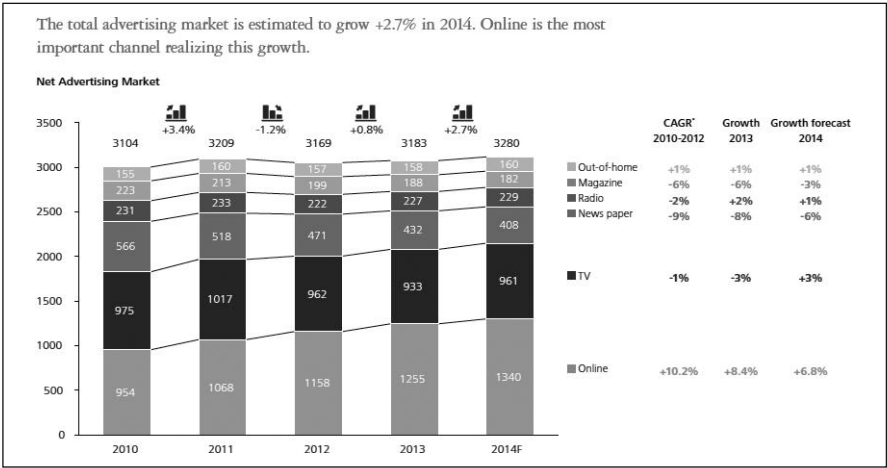
- 254 'Media fragmentation has had major consequences for advertisers and media agencies too. Advertisers used to have a small number of options, but now, they can choose between a wide range of providers of advertising space. Of course, advertisers are not alone in making such important choices. Media agencies have arisen as a result by the advent of commercial television and radio in 1990. Media planning was done by advertising agencies before 1990, but after 1990, agencies quickly came to realize that media planning would be a separate expertise. Due to the ongoing media fragmentation, the role of media agencies has gradually changed. In the early years, the focus was primarily on media buying, but currently, media agencies are becoming strategic partners of advertisers. Their role is not confined to media buying. Of course, advertisers still expect that media agencies effectively buy media space. Media agencies feel that advertisers are increasingly demanding; they want more and more for the same money. However, the opinions of media agencies on the types of media and titles (strategic and tactical media planning) have become at least as important. Many advertisers design their strategic plans for their campaigns in consultation with a media agency and an advertising agency. Everyone is involved from the start, so that the targets of the campaign will eventually be achieved. It involves all kinds of campaigns, strategic corporate campaigns, more action-oriented campaigns and thematic campaigns. Media agencies themselves acknowledge that advertisers increasingly want advice about what is the most effective and efficient use of media to their goals. To convince advertisers that a particular use is effective, media agencies issue structural studies on the effects of different media types.'<sup>155</sup>
- 255 Kobalt, Universal Media, Aegis Media Nederland B.V. (Carat), Mindshare and Zenith Optemedia are five well-known (international) media agencies operating in the Netherlands. The most common activities of media agencies in the Netherlands are: media strategy, media planning, media purchase, media administration and account management. It is common that media agencies buy the media space for advertisers, because of the strong bargaining position they have. At first, the advertiser will ask the media agency to develop a media plan, which will be done by a media strategist: a media-concept proposal is made. It contains a preliminary advise by the agency to their clients on how to spend their advertising budget in the most

<sup>154</sup> <<http://www.ivir.nl/publications/sloot/switch-off.pdf>>.

<sup>155</sup> <<http://dare.uva.nl/document/227944>>, p. 28.

effective and efficient way,<sup>156</sup> among other things, in connection to target groups, media reach, figures, cost effectiveness, data and new media. An organization normally formulates a company strategy, a marketing plan and a communication plan.<sup>157</sup> A media-plan will be developed, which consists of media objectives, based on the mentioned marketing objectives, the concept media-budget, the strategy and tactics, and finally the media placement scheme. Media agencies can often give an accurate indication of the needed OTS (opportunity to see) of a TV commercial by their target group. Media agencies make their profit by buying media space of media companies with a media retour-commission (kick back or media discount), which officially is 15 percent of the overall value.<sup>158</sup>

The figure below shows the media expenses per media type. The expenses of 256 advertisements on the internet are still among the fastest growing. In the online environment, the business model of parties is based on tracking people by following their behavior.<sup>159</sup> These types of media agencies seek to study the characteristics of this behavior through actions (repeated site visits, interactions, keywords, etc.) in order to develop a specific profile and provide advertisements tailored to match an individual's (inferred) interests.<sup>160</sup> Mostly, though, this is done through group profiling, e.g. people with red bikes have a 76 percent likelihood of buying cereal products. The payment models differ from fixed fees, to a model where the advertiser pays per thousand views.<sup>161</sup>



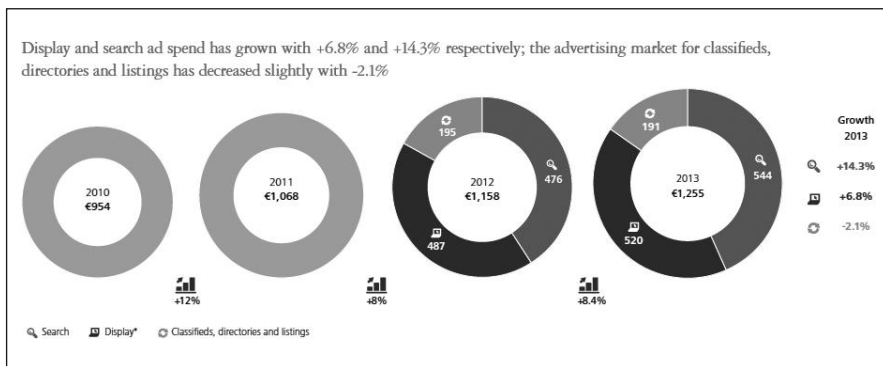
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<sup>156</sup> <<http://www.communicatiecoach.com>>.  
<sup>157</sup> <<http://dare.uva.nl/document/227944>>, p. 22.  
<sup>158</sup> <<http://www.zigt.nl/news/1711/76/Ster-heeft-besloten-de-15-bureaucommissie-de-rug-toe-te-kere>>.  
<sup>159</sup> <[http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2010/wp171\\_en.pdf](http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2010/wp171_en.pdf)>, p. 4.  
<sup>160</sup> See also: [http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2010/wp171\\_en.pdf](http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2010/wp171_en.pdf).  
<sup>161</sup> <<http://www.iab.nl/wp-content/uploads/downloads/2013/03/Online-Ad-Spend-2012-nieuw.pdf>>, p. 28.  
<sup>162</sup> <[http://www.iabeurope.eu/files/2713/9833/5500/IAB\\_Netherlands\\_2013\\_ad\\_spend\\_report.pdf](http://www.iabeurope.eu/files/2713/9833/5500/IAB_Netherlands_2013_ad_spend_report.pdf)>.

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- 257 For advertisers such as Unilever Nederland and KPN, the online exposure is of utmost importance.<sup>163</sup> The websites of the advertisers should be optimally accessible and findable (for example through search engine indexing) by the targeted group.<sup>164</sup> There are several media agencies which have specialized in online advertising, such as the international firm (partially originating from the Netherlands) Iprospect.<sup>165</sup> Such companies offer, inter alia, display advertising, CRM-software, Search Engine Advertising, Search Engine Optimization and Performance Based marketing, Universal Search, Facebook advertisement, customer loyalty programs, etc. Such new media agencies arise because traditional media agencies are often said (whether rightly or wrongly) to lack expertise of the online-media environment.<sup>166</sup>

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### III. Media Agencies from other the Perspective of other Market Participants

- 258 Being the fifth largest economy in the Euro Zone and the third largest exporter in the region, the Netherlands is an attractive country for advertising. The Dutch economy is highly dependent on foreign trade and derives more than 65 percent of its GDP from both port activities and merchandise exports. With the port Rotterdam being the largest port in Europe and the third busiest in the world, the Netherlands remains a stable country for investments. As a result of its stability, high skilled workforce and developed infrastructure, the country is the sixth biggest destination of foreign direct investment in the world.<sup>167</sup> The economic growth has a substantive impact on advertising spend. Like most European countries, the Netherlands has suffered from an economic depression the last few years, but the

<sup>163</sup> P. Aelen en J. Nissen, *Online adverteerders worden steeds beter met search*, Tijdschrift voor Marketing, 2009 afl. 12 vol. 43, p. 25.

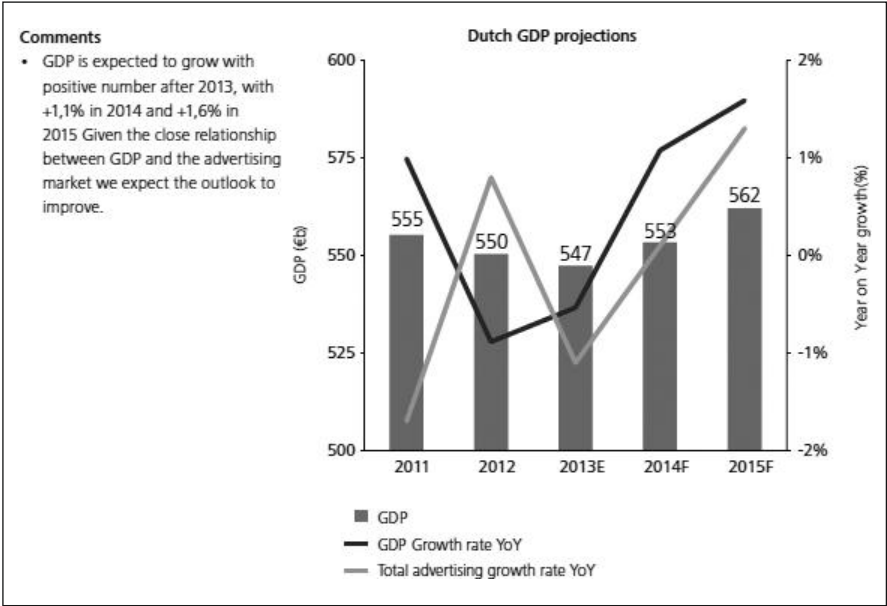
<sup>164</sup> P. Aelen en J. Nissen, *Online adverteerders worden steeds beter met search*, Tijdschrift voor Marketing, 2009 afl. 12 vol. 43, p. 25.

<sup>165</sup> <<http://www.iprospect.nl/who-we-are>>.

<sup>166</sup> Graphic: <[http://www.iabeurope.eu/files/2713/9833/5500/IAB\\_Netherlands\\_2013\\_ad\\_spend\\_report.pdf](http://www.iabeurope.eu/files/2713/9833/5500/IAB_Netherlands_2013_ad_spend_report.pdf)>.

<sup>167</sup> <<http://www.tradingeconomics.com/netherlands/gdp-growth>>.

economic recession is projected to end in 2014. This has an important influence on the projected advertising spend in the Netherlands.<sup>168</sup>



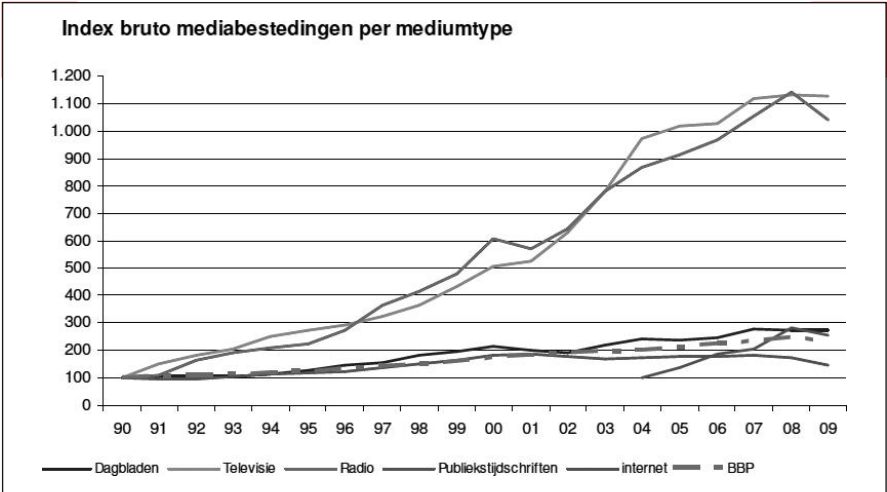
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The graphic below shows the trend in gross media expenditure per medium type 259 in the Netherlands. Television (televisie) and Radio (radio) being the favorite medium type for advertisers and media agencies. Television, according to most media agencies, will remain one of the or the most popular medium type for advertising and media spend; about the role radio will play in the future, no consensus exists. The last few years, there seems a decline in media spend for radio. Newspapers (dagbladen) and Magazines (publiekstijdschriften) represent a relatively small percentage of media spend; the feeling is that this will remain so and that their share may even dwindle in the future. Finally, this graphic already shows the rise of media spend on the internet from 2005 till 2009. This trend is continuing and most advertisers and media agencies believe it will only continue to grow over the years. Whether it will replace television as most important medium type for advertising is unsure and opinions differ on this point.

A report by the Internet Advertising Bureau (IAB) shows that media agencies are 260 responsible for nearly half of the online display advertising sales and suggests that growth from Ad Networks and Ad Exchanges may be expected. Reinier Breij, Trading Manager of Aegis Media, suggests that 'ad network and ad exchange platforms is expected to increase in the future as more publishers will use their own platforms for automated trading and RTB. This will take share from the direct sales of pub-

<sup>168</sup> Nextgraphic:<[http://www.iabeurope.eu/files/2713/9833/5500/IAB\\_Netherlands\\_2013\\_ad\\_spend\\_report.pdf](http://www.iabeurope.eu/files/2713/9833/5500/IAB_Netherlands_2013_ad_spend_report.pdf)>.

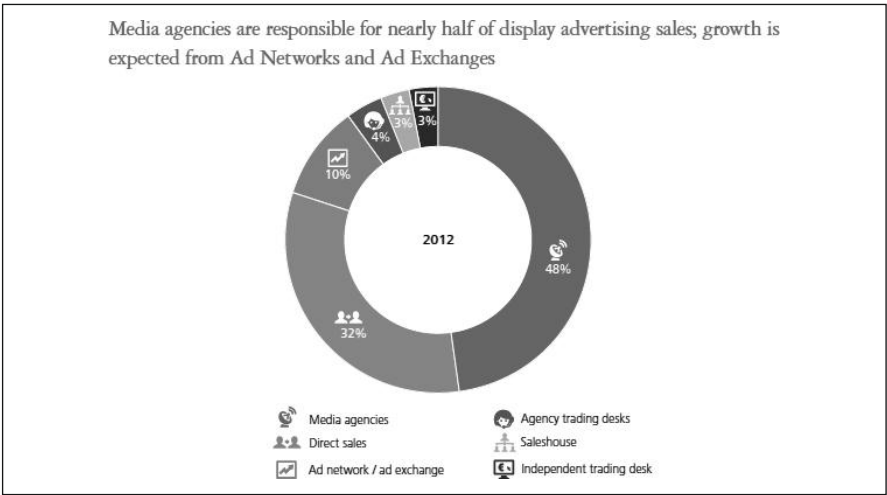
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lishers<sup>170</sup> Jeroen Verkoost, Chief Digital Officer of the De Persgroep, stated that media agencies are important to the online advertising: ‘It is surprising how much discussion there still is about the branding effect of online advertising. Yes, brand activation via banner advertising remains complex. In 2013, publishers acknowledged this and acted on it by offering new, innovative propositions, more video and larger interruptive formats. Now the ball is in the court of the advertiser and the creative- and media agencies to increase the digital share of branding campaigns.’<sup>171</sup>

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<sup>169</sup> <<http://dare.uva.nl/document/227944>>, p. 15.  
<sup>170</sup> <[http://www.iabeurope.eu/files/9713/6852/1352/iab20netherlands\\_online20ad20spend-20study202012.pdf](http://www.iabeurope.eu/files/9713/6852/1352/iab20netherlands_online20ad20spend-20study202012.pdf)>, p. 18.  
<sup>171</sup> <<http://iab.nl/wp-content/uploads/downloads/2014/03/Programmatic-Trading-maart-2014-def.pdf>>, p. 12.

#### IV. Legal Issues concerning the Contract between a Media Agency and an Advertiser/Marketing Enterprise.

Advertisers are organized in the Association of Dutch Advertisers (Bond van Adverteerders – BVA), while advertising agencies are united in the Union of Communication Consultancy Agencies (Vereniging van Communicatie Adviesbureaus – VEA). The contract between a media agency and an advertiser is a B2B contract. In the Netherlands, there is no specific regulation that concerns the contract between a media agency and an advertiser or a marketing enterprise. Book six ‘Obligations and Contracts’ of the Dutch Civil Code however, sets standard rules and regulations for both parties concerning contracts. Article 6:213 specifies that an agreement is a more-sided (multilateral) juridical act under which one or more parties have subjected themselves to an obligation towards one or more other parties. Article 6:217 continues by stating that an agreement comes to existence by an offer and its acceptance. Of course, an agreement which has been entered into under the influence of a mistake with regard to the facts or legal rights and which would not have been concluded by the mistaken party if he would have had a correct view of the situation, is voidable: (a) if the mistake is caused by information given by the opposite party, unless this party could assume that the agreement would be concluded even without this information; (b) if the opposite party, in view of what he knew or ought to have known about this mistake, should have informed the mistaken party about his error; (c) if the opposite party, at the moment on which the agreement was entered into, had the same incorrect assumption as the mistaken party, unless he could have believed that the mistaken party, if this party had known the mistake, still would have entered into the agreement.<sup>172</sup>

Rights and duties of both parties are based on the contract between the media agency and the advertiser. Contracts between advertisers and media agencies are mostly performance-based. Recent case law concerns these performance-based agreements. In one of the more important cases, the facts were as follows:<sup>173</sup> EMM commissioned Kobalt to conduct regular media services, as mentioned in the draft agreement. Kobalt accepted this agreement and executed it. EMM’s payment was due at Kobalt for the provision of such media services. It followed from the statements of the parties that the amount of compensation for these regular media services depended on whether at a later moment in time, Kobalt and EMM would reach an agreement with respect to a performance-based investment contribution. In this case, EMM stated that in a conversation, an agreement had been concluded, which entailed, among other things, that a performance-based investment contribution of € 500 000, – would be paid; no agreement would be necessary about marketing actions that could be performed by Kobalt in order to achieve results. This would have been agreed and set out in a draft agreement. The Court, however, ruled that the draft agreement pointed to the contrary and consequently, the claim of EMM was rejected.

<sup>172</sup> <<http://www.dutchcivillaw.com/civilcodebook066.htm>>.

<sup>173</sup> Rechtbank Midden-Nederland, Kobalt/EMM, C/16/325039/HA ZA 12-822, 17-07-2013.

- 263 Advertisement regulation and enforcement in the Netherlands is expressed in a wide range of statutory and self-regulatory rules and regulations. The contracts between media agencies and advertisers or marketing enterprises must take these into account. Likewise, the actions of the media agencies must accord to these principles, to avoid liability. Of importance are among other rules, the Civil Code, the Copyright Act and the Advertising Code (self-regulation). The relevant rules applicable to media agencies and their partners will be discussed briefly below.
- 264 The Dutch Civil code includes special provisions on misleading and comparative advertising. Article 6:194 provides, inter alia, that a person who makes public or allows to be made public an announcement regarding goods or services which he, or the person on whose behalf he acts, presents in the course of a professional practice or business, acts tortiously (unlawfully) if this announcement is misleading in one or more of the following respects, for example as to the nature, composition, quantity, quality, characteristics or possibilities for use; the origin, the way and the time of manufacturing; the size or volume of the goods in stock; the price or its method of calculation; the grounds for or the purpose of the offer; etc. Article 6:194a specifies that comparative advertising shall, as far as the comparison is concerned, be permitted when it is not misleading; it compares goods or services meeting the same needs or intended for the same purpose; it objectively compares one or more material, relevant, verifiable and representative features of those goods and services, which may include price; etc.
- 265 The Copyright Act protects intellectual property and it grants an exclusive right to the author of a literary, scientific or artistic work or his successors in title to communicate that work to the public and to reproduce it, subject to the limitations laid down by law. Importantly, it also specifies in article 4 that unless there is proof to the contrary, the person who is named as author in or on the work or, where there is no such indication, the person who, when the work is communicated to the public, is named as the author by the party who communicates the work to the public, shall be deemed the author of the work. If the author is not named, the person who delivers a recitation which has not appeared in print shall be deemed the author thereof, unless there is proof to the contrary.<sup>174</sup>
- 266 The Dutch Advertising Code specifies, among others, that advertising must be in accordance with the law, the truth, good taste and decency. An advertisement may not contravene the public interest, public order or morality or be gratuitously offensive or constitute a threat to mental and/or physical public health. Without justifiable cause, an advertisement may not arouse feelings of fear or superstition. Advertising may not be dishonest, which is the case if it contravenes with the requirements of professional devotion, and if it substantially disrupts or may disrupt the economic behavior of the average consumer reached, or targeted, as regards to the product. Misleading and/or aggressive advertising is considered to be (by any means) dishonest as well. When assessing whether or not an advertisement is misleading, all characteristics and conditions, the factual context, the limitations of the means of communication, and the public for which it is intended are to be taken into consideration.

<sup>174</sup> <<http://www.ivir.nl/legislation/nl/copyrightact.html>>.

The Dutch Advertising Code further specifies that an advertisement must be recognizable as such by virtue of its lay-out, presentation, content or otherwise, taking into account the public for which it is intended. There is a prohibition on aggressive advertising, such as in the event that, taking into account all its properties and circumstances, the actual context, the limitations of the means of communication and the public at which it is aimed, it considerably restricts or may restrict the freedom of choice and the freedom of action of the average consumer with regard to the product, by means of intimidation practices, pressure, including physical violence, or improper manipulation, as a result of which the consumer is enticed or may be enticed to make the decision to conclude a transaction, which decision he would not have taken otherwise.<sup>175</sup> **267**

Of course, there are often disputes about whether one of these rules is being violated through an advertisement or advertisement campaign, who is responsible for it, who ordered it and who should have foreseen the possible effects and consequences of advertisements – the media agency, the advertiser, the medium, the advertising agency or even a third party. The Dutch Civil code specifies in Article 6:162 that a person who commits a tortious act (unlawful act) against another person that can be attributed to him, must repair the damage that this other person has suffered as a result thereof. As a tortious act is regarded a violation of someone else's right (entitlement) and an act or omission in violation of a duty imposed by law or of what according to unwritten law has to be regarded as proper social conduct, always as far as there was no justification for this behavior. A tortious act can be attributed to the tortfeasor if it results from his fault or from a cause for which he is accountable by virtue of law or generally accepted principles (common opinion).<sup>176</sup> **268**

The Netherlands has also implemented the exemption for liability in the electronic sector, specified in the e-Commerce Directive. Article 6:196c of the Dutch Civil Code specifies that an information society consisting of the storage of information provided by a recipient of the service, is not liable for the information that is stored at the request of a recipient of the service, on condition that the provider: (a) does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or (b) upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.<sup>177</sup> **269**

Still, sometimes, media agencies are not exempted from liability; this is often a difficult assessment to make. Two cases will be discussed, which revolve around the interpretation of the Dutch Advertising Code, which is a self-regulatory instrument; a commission oversees the compliance with this code. The first case regarded advertising through so-called adware for the game "Pick a Vault" from BankGiro Lottery SA. The complainant stated that the adware was installed without his consent on his computer and regularly shows an advertisement for the game. The advertiser stated that it hired a media agency, which placed advertising banners and which entered into agreements with owners of various websites. Spyware and adware **270**

<sup>175</sup> <[https://www.reclamecode.nl/bijlagen/SRC\\_NRC\\_Engels\\_apr14.pdf](https://www.reclamecode.nl/bijlagen/SRC_NRC_Engels_apr14.pdf)>.

<sup>176</sup> <<http://www.dutchcivillaw.com/civilcodebook066.htm>>.

<sup>177</sup> <<http://www.dutchcivillaw.com/civilcodebook066.htm>>.

are not covered by the contract with the media agency, neither do they fall under the agreement with the website owners. Consequently, the complaint regarded an unauthorized copy for which the advertiser cannot bear any responsibility. One or more of the companies with which the media agency had agreements was, according to the advertiser, in breach of contract.

- 271 According to the Commission (12 December 2006), the advertiser was responsible for the advertising distribution by the media agency on her behalf. The fact that there is an unauthorized copy of the banner and a breach of contract by one of the website owners towards the media agency, did not alter this. Pursuant to Article 11.7 paragraph 1 of the Telecommunications Act (which is partially based on the e-Privacy Directive), the use of electronic messages to transmit unsolicited communications for commercial purposes (such as adware) to subscribers of telecommunications services is only allowed if the subscriber has given prior permission. The complainant is a subscriber of a telecommunications service. Because it had not been proven that the complainant had given consent to the advertiser to transmit the contested adware, paragraph 1 of Article 11.7 of the Telecommunications Act was violated and therewith also the Dutch Advertising Code.
- 272 In appeal, however, a different conclusion was reached. The board held that the advertiser had sufficiently demonstrated that it not directly nor through the media agency, acting under its responsibility, concluded any contract or had given permission to publish the unlawful advertisement, that it made sufficiently clear to the publishers of websites that they were not allowed to publish its banner with adware or spyware, that it had made sufficient arrangements to guarantee that these terms were respected and that it was not aware of the violation of the terms before the complaint was issued. It also executed sufficient investigations to establish the identity of the perpetrator and the fact that it could not do so with certainty did not alter this fact. Consequently, the board of appeal ruled that the advertiser was not responsible for the ad or spyware.
- 273 The second case concerned an advertising email which was sent to the complainant, with the subject line “free special Orange coin” and “unique Orange coin is available to you.” The complainant said that it did not have any relationship with eAction, the sender of the emails. Digimo works as a media agency commissioned by PostNL (the postal service in the Netherlands) and built online campaigns that are hosted on qads4.nl. Digimo claimed it was not the sender of the emails. Digimo did establish contacts with its affiliate network to pursue the online campaign, which includes companies with an opt-in database of consumers (so called – newsletter-members) to whom they can send online advertisements. However, Digimo argued that they are responsible for compliance with the applicable laws and regulations themselves. Digimo claimed that eAction/Cs02.nl is an opt-in email list and the complainant had subscribed to a newsletter herself. The complainant denied this. PostNL denied having infringed the Advertising Code, as it did not order the sending of those advertisements by either eAction or Digimo. It did not consider itself an advertiser, but thought either eAction or Digimo should be considered as such. TFM, the sender of the advertisement, said that the complainant had listed itself and by doing so, opted-in for the sending of e-mails.

The Commission considered that Digimo was not directly involved with the sending of the advertisements via e-mail and could thus not be considered responsible for violating the code. With regard to TFM, the Commission considered that it did not convincingly demonstrate that the complainant had given its consent for receiving advertisements and thus violated the Dutch Advertising Code. With regard to PostNL, the Commission decided that the advertisement promoted products of PostNL and so it must be considered an advertiser. It made the advertisement and asked Digimo to spread it. PostNL knew, or must be deemed to know, that Digimo would use its affiliate network, for the dissemination of the advertisement. PostNL should have inquired whether the subscribers to the file used for the advertisements had given their consent. As it did not, it acted in violation of the Dutch Advertisement Code.<sup>178</sup> 274

## **V. Legal Issues concerning the Contract between a Media Agency and a Media Company**

A website of the Dutch government explains: ‘The media themselves are responsible for what they broadcast. The government can influence the media in several ways, however. It takes action if the media commit an offence, for example in cases of discrimination, defamation and infringements of privacy. It sets rules to protect vulnerable groups. Laws have been passed chiefly to protect minors from potentially harmful radio and television programmes. Furthermore, tobacco advertising is forbidden and broadcasting times for alcohol advertising are restricted. National public broadcasters are required by law to serve all age groups through a variety of media (including the internet). For example, public broadcasters must broadcast at least 3,500 hours of programmes for children under 12 every year.’<sup>179</sup> 275

Still, the Dutch media law is meant to ‘keep the state at a distance’, which is why public broadcasters are not directly instructed by the government. The Dutch Media Authority regulates broadcasting – including the regulation of commercial broadcasters with a Dutch license.<sup>180</sup> It is the task of the Dutch Media Authority to oversee whether the media companies act in compliance with the rules and regulations of the Media Act 2008, the Media Decree and the Media Regulation. The Dutch Media Act makes a difference between the public broadcasters and the commercial broadcasters. There are limitations on the number of licenses for public broadcasting. For example, a national public broadcasting association is required to recruit 50,000 paying members for the first five years and 300,000 paying members for the following concession periods. Furthermore, this Commission keeps score of the maximum advertising time for broadcasters. 276

There are a number of rules which media agencies and media companies must take into account when concluding a contract, such as the rules provided in the 277

<sup>178</sup> <<https://www.reclamecode.nl/webuitspraak.asp?ID=123003&acCode>>.

<sup>179</sup> <<http://www.government.nl/issues/media-and-broadcasting/the-government-and-media/media-act-and-media-policy>>.

<sup>180</sup> <[http://ejc.net/media\\_landscapes/the-netherlands](http://ejc.net/media_landscapes/the-netherlands)>.

Media Act, Degree and Regulation and self-regulatory initiatives. These will be discussed briefly below. The Media Act specifies for Commercial parties in Article 3.7 that advertising and teleshopping messages must be clearly distinguished by acoustic, visual or spatial means from the remaining contents of the program offerings. Article 3.8 states that at most 12 minutes per hour may consist of advertising or teleshopping messages.<sup>181</sup> Article 3.11 specifies that at most once every thirty minutes, an advertising or teleshopping message block may appear when the program consists of films; of news or commentary on the news; and that are intended specifically for children under twelve years, provided that the scheduled duration of the program is greater than thirty minutes. As regards sponsoring, article 3.15 specifies that a program may only be sponsored when sufficient safeguards exist for the editorial independence of the employees responsible for the content and composition of the programs. The sponsor must be communicated to the public, according to Article 3.16. Article 3.17 states that sponsored programs may mention or show products or services by the sponsor, for example in the title of the program or the logo. Finally, articles 3.19a, 3.19b and 3.19c place severe restrictions on the possibility of product placement.

278 With regard to public broadcasters, article 2.91 specifies that national broadcasting of advertising is conducted by STER, and that regional or local public media institutions may also request STER to carry out their advertising policy and business. Article 2.94 holds that advertising and teleshopping messages must be clearly distinguished by acoustic or visual means from the remaining contents of the program offerings. Article 2.95 states that the proportion of advertising and teleshopping messages is no more than 12 minutes per hour and not more than fifteen percent of the total duration of the programs offered by the channel per day and per channel. Article 2.97 specifies that only under very special circumstances, may programs be interrupted by advertising, for example if the program last longer than one and half hour on television or 45 minutes on radio. Article 2.106 holds that public media services may be sponsored if programs regard a cultural, educational or idealistic nature or consist of the report or the appearance of one or more sports or sporting events. This is prohibited, however, in the event of a program consisting wholly or partly of news, current affairs or political information; or is specifically intended for children under twelve. Sponsor agreements are subjected to heavy scrutiny under the Dutch Media Act, laid down in articles 2.107-2.114.

279 A decree (Mediabesluit) specifies further, for public media, that the share of advertising and teleshopping messages on each program channel shall not exceed ten percent of the total duration of the programs offered by the program channel per year. It also lays down rules on 'avoidable expressions', which are expressions other than advertising or teleshopping messages that clearly lead to the purchase of products or services being promoted. A ministerial decision (Mediaregeling) specifies for local and regional public broadcasters who broadcast advertising or teleshopping messages that they must have proper accounting and bookkeeping. The books must at least contain the costs and revenues from the exploitation of advertising and te-

<sup>181</sup> See however also article 3.14 Dutch Media Act.

leshopping messages; the costs and revenues from other media content; and the costs and revenues of all other activities.

There are also self-regulatory codes applicable on the online-advertising market; these are mostly adopted on European level. In July 2009, the Internet Advertising Bureau Europe (IAB) released the Self-Regulatory Principles for Online Behavioral Advertising (OBA).<sup>182</sup> The code specifies, inter alia, rules on transparency. Third parties and service providers should give clear, meaningful, and prominent notice on their own websites that describes their OBA data collection and use practices. Third parties should provide enhanced notice of the collection of data through a clear, meaningful, and prominent link in or around the advertisement delivered on the webpage where data is collected or on the webpage where the data is collected if there is an arrangement with the first party for the provision of such notice. Third parties should be individually listed either on an industry-developed websites linked from the disclosure or in the disclosure on the webpage where data is collected for OBA purposes. When data is collected from or used on a website for OBA purposes by third parties, the operator of the website should include a clear, meaningful, and prominent link on the webpage where data is collected or used for such purposes that links to a disclosure that either points to the industry-developed websites or individually lists such third parties.

It also contains rules on consumer control and specifies that a third party should provide consumers with the ability to exercise choice with respect to the collection and use of data for OBA purposes or the transfer of such data to a non-affiliate for such purpose. Service providers should not collect and use data for OBA purposes without consent. They should also provide an easy to use means to withdraw consent to the collection and use of that data for OBA. Furthermore, data security is an important aspect of the code. Entities should maintain appropriate physical, electronic, and administrative safeguards to protect the data collected and used for OBA purposes. Service providers should also alter, anonymize, or randomize any personally indefinable information or unique identifier in order to prevent the data from being reconstructed into its original form in the ordinary course of business. Finally, the Code also provides that sensitive data, such as regarding health and financial data, should not be collected without consent and they should not collect personal data from children below the age of 13.

Only the companies that were member to the IAB are obliged to accord their behavior to these principles. However, in April 2011 the EASA (European Advertising Standards Alliance) adopted the self-regulatory instrument, named Best Practice Recommendation on OBA (hereinafter 'EASA/IAB Code'),<sup>183</sup> which also contains these principles. The Working Party 29 has expressed doubts about the consistency of this code with European privacy instruments.<sup>184</sup> Currently, the status of the latter code is insecure.

<sup>182</sup> <<http://www.iab.net/media/file/ven-principles-07-01-09.pdf>>.

<sup>183</sup> <[http://www.easa-alliance.org/binarydata.aspx?type=doc/EASA\\_BPR\\_OBA\\_12\\_APRIL\\_2011\\_CLEAN.pdf/download](http://www.easa-alliance.org/binarydata.aspx?type=doc/EASA_BPR_OBA_12_APRIL_2011_CLEAN.pdf/download)>.

<sup>184</sup> <[http://www.cbppweb.nl/downloads\\_int/med\\_20111214\\_PressRelease\\_FoP\\_final.pdf](http://www.cbppweb.nl/downloads_int/med_20111214_PressRelease_FoP_final.pdf)>, p. 1.

## VI. Media Agencies and Competition Law

- 283 The Dutch Consumer Authority, the Competition Authority (NMa) and the Independent Post and Telecommunications Authority (OPTA) have joined forces on April 1st 2013, creating a new regulator: the Netherlands Authority for Consumers and Markets (ACM). The ACM is an independent authority that creates opportunities and options for businesses and consumers alike.<sup>185</sup> Opportunities through innovation, new products, services and businesses, and options because therein lies the key to having well-functioning markets. ACM want consumers to have a real choice, and to have consumers who are not afraid of making a choice. That is why ACM want businesses to be open about what they offer. Finally, consumers should be informed of what their rights are. ACM aims for fair trade between businesses and consumers.<sup>186</sup> There are a couple of cases regarding competition law and media agencies in the Netherlands, three of which will be discussed briefly below.
- 284 The first case from 2003 regarded the media services for Nuon, a utility company. It regarded the (draft) contract concluded between Nuon and Mediaaedge, which would perform the media services for Nuon. A third party, Medialand, argued that this was in violation of laws and regulations on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors.<sup>187</sup> It argued that a public tender should have taken place and demanded further transparency about the procedure and insights in the framework contract between Nuon and Mediaaedge. The Court, however, found that the rules did not apply because the amount of money involved was insufficiently high – a monetary barrier existed for the rules to be applicable. ‘It has become insufficiently plausible that in this case, the limit of € 499.362, € was exceeded. Medialand should use the means at its disposal to find (other) evidence, which it rightly plans to use by requesting preliminary hearing of witnesses. Another court will then decide on the obligation to provide the framework agreement referred to, on the basis of the results of those examinations []. At present, the claim of Medialand – taking into account that no significant evidence is yet provided – has too much the character of a ‘fishing expedition’, which is not consistent with due process. The numerical assumptions of Medialand forms an insufficient basis in this respect.’<sup>188</sup>
- 285 A second case regarded the possible distortion of competition by the STER, the organization responsible for the advertising on public broadcasting channels. The STER performed the acquisition, administration and collection regarding the advertising exploitation of a radio program, which was broadcasted in four cities via local (public) radio broadcasting. This qualified as ancillary activities. Among others, the Dutch Media Authority assessed whether there was unfair competition, compared to

<sup>185</sup> <<https://www.acm.nl/en/about-acm/our-organization/the-netherlands-authority-for-consumers-and-markets/>>.

<sup>186</sup> <<https://www.acm.nl/en/about-acm/mission-vision-strategy/our-mission/>>.

<sup>187</sup> <<http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:31990L0531&from=NL>>.

<sup>188</sup> JAAN 2003/7 Onrechtmatige daad, Strijdig met aanbestedingsplicht, Raamovereenk., KG.02/2661.

other providers of the same or similar goods or services.<sup>189</sup> From a guideline issued by it on secondary activities, it followed that the provision of ancillary activities may only be done under the principle of full cost and using cost calculations that are similar to cost calculations used by other providers of the same or similar products or services. Among others, these cost calculations should take into account a proportional allocation of salary and other personnel expenses and the use of resources and intangible assets. Through an audit by an accountant, it should be substantiated that the calculated costs are real and realistic. The Authority held: ‘Insofar STER charges a different rate for its secondary activities than media agencies normally do for their services, it is of importance to note that, in this case, STER offers a service that is not comparable to the common services of media agencies. STER has indicated, among other things, that STER does not give advice regarding the media strategy, media type selection and the choice of a specific medium; does not evaluate the respective campaign(s); does not take care of the planning of the advertising in question; and does not provide the coordination of the broadcasting processes involved (traffic coordination). Consequently, STER performs services which are substantially more limited than the ordinary services of media agencies and from that it follows that the difference in rates charged by the STER are justifiable.’<sup>190</sup>

A third case regarded a decision by the Competition Authority about the ownership of Sanoma, one of the bigger publishers in the Netherlands, of SBS broadcasting, which might conflict with the antitrust rules. Among others, it regarded the publishing of radio and television guides or program guides. Article 27 of the Dutch Competition Act specified: ‘The term ‘concentration’ shall be understood to mean: a. the merger of two or more previously mutually independent undertakings; b. the acquisition of direct or indirect control by: i. one or more natural persons who or legal entities which already control at least one undertaking, ii. one or more undertakings of the whole or parts of one or more other undertakings, through the acquisition of a participating interest in the capital or assets, pursuant to an agreement, or by any other means; 2. The creation of a joint undertaking, which performs all the functions of an autonomous economic entity on a lasting basis shall qualify as a concentration as meant in paragraph (1)(b).’<sup>191</sup>

The activities of Sanoma and SBS overlapped in the field of magazine publishing. Sanoma provides a large number of magazines and SBS also published 2 RTV-guides. The Nma considered that a difference could be made between the market for readers and for advertising. A distinction can also be made between magazines and journals. If such a distinction is made, the parties’ activities overlap only in the field of consumer magazines. The potential readership of magazines may further be divided into segments and sub-groups. A potential market segment may consist of RTV guides. The NMA asked several media agencies for information when conducting its research. ‘The media agencies that have participated in this inquire have indicated that there are several alternatives for advertising in RTV-guides,

<sup>189</sup> See Article 57a, first paragraph, introduction and c, of the old Media Act.

<sup>190</sup> <[http://www.cvdm.nl/wp-content/uploads/besluiten/besluiten\\_d\\_d\\_\\_21\\_juli\\_2006.pdf](http://www.cvdm.nl/wp-content/uploads/besluiten/besluiten_d_d__21_juli_2006.pdf)>.

<sup>191</sup> <<http://www.dutchcivillaw.com/legislation/competitionact.htm>>.

and consequently, they feel that RTV-guides do not represent a separate market segment for advertisers.<sup>192</sup> Nma continued by specifying that Sanoma as well as SBS offer advertising space in their magazines, including the RTV guides. Assuming the possible Dutch advertising market of Sanoma magazines has a market share of 30-40% and that of SBS has a market share of 0-10%, a merger will result in a combined market share of 40-50%. There are alternatives open for advertisers in other magazines and RTV-guides.

- 288 'The media agencies that have participated in this investigation have indicated, regarding advertising opportunities in magazines, that they do not expect any competition problems arising as a result of this merger. These media agencies state that there is sufficient alternative advertising space in other magazines. Additionally, a study among media agencies shows that they have a good bargaining position with respect to the publishers of magazines. Media agencies managed to combine the demand for advertising space by advertisers, thereby obtaining a degree of bargaining power with respect to the publishers of magazines.'<sup>193</sup> According to the NMA, this meant that SBS and Sanoma could not operate independently from these media agencies, even after the merger. Consequently, it felt that there was no real threat for the competition on the advertising market for magazines in the Netherlands.

## VII. Media Agencies in Criminal Law and Administrative Law

- 289 There are several rules applicable on media agencies deriving from criminal and administrative law. Already discussed are rules in the telecommunications act, which is partially an implementation of the e-Privacy Directive, as amended by the Citizens' Rights Directive 2009. The telecommunication provisions contain rules on spam and unsolicited advertising, much along the lines as indicated in the European Directive. This limits the possibilities of media agencies for spreading their advertising and planning their campaigns. Likewise, there are rules on placing adware, spyware and cookies on the computer of users. On this point, the Dutch regulation is even stricter than the European rules, inter alia, because the presumption is that if cookies are placed, personal data will be collected, which means that the data protection rules are applicable. This point will be explored later in this paragraph.
- 290 Currently, there is considerable discussion about whether these rules are not too strict and on the other hand, whether stricter rules are necessary. For example, in the parliament, the secretary of state was asked whether he agreed that the world of online marketing is completely opaque, making it barely possible to assess whether advertising companies collect identifiable information about browsing habits.<sup>194</sup> The secretary of state answered that he recognized the 'lack of transparency in the market of online marketing. Between the person placing the advertisement (online editor) and the advertiser, many parties are active, such as media agencies and ad networks, but also suppliers of software, for example, web statistics. As a result, it is often

<sup>192</sup> <<http://bit.ly/1jxLahl>>.

<sup>193</sup> <<http://bit.ly/1jxLahl>>.

<sup>194</sup> <<https://zoek.officielebekendmakingen.nl/ah-tk-20132014-1742.html>>.

unclear for the internet user who collects their data and, possibly, processes them and for what purpose this is done. In order to make this transparent for the internet user, Article 11.7a of the Telecommunications Act contains not only a provision on consent but also a duty to provide information. This means that internet users should be provided with adequate information about the data collected or further processed, which parties are involved and what the purpose of the processing is.'

Besides the Telecommunications Act, the Media Act, the Media Decision and the Media Regulation are also applicable to media agencies, as discussed earlier. There are also several general administrative rules applicable to the dealings of the different institutions and commissions. For example, the General Administrative Act was applicable to the decisions of the NMA.<sup>195</sup> This entails that a complainant must be an 'interested party', meaning a person whose interest is directly affected by an order. When preparing an order, an administrative authority must gather the necessary information concerning the relevant facts and the interests to be weighed. Before an administrative authority rejects all or part of an application for an administrative decision, it shall give the applicant the opportunity to state his views, if: (a) the rejection is based on information about facts and interests relating to the applicant, and (b) this information differs from information supplied by the applicant himself in the matter. Further procedural safeguards and rules of due process are also provided for.

Likewise, there is also some discussion on the question of whether the contracts between media agencies and public broadcasting agencies or between the STER and other parties, fall under the freedom of information act.<sup>196</sup> This act specifies that anyone may apply to an administrative authority or to an agency, service or company carrying out work for which it is accountable to an administrative authority for information contained in documents concerning an administrative matter. In order to be successful, the applicant must specify the administrative matter or the document relevant to it about which he wishes information. The administrative authority must then decide on the application for information at the earliest possible opportunity, and in any event no more than two weeks after the date of receipt of the application. The administrative authority must defer the decision for no more than a further two weeks. The applicant must be notified in writing, with reasons, of the deferment before the first two-week period has elapsed. The administrative authority must provide information concerning the documents which contain the information required by: a. issuing a copy of the documents or conveying their exact substance in some other form, b. permitting the applicant to take note of the contents of the documents, c. supplying an extract from the documents or a summary of their contents, or d. supplying information contained in the documents.<sup>197</sup>

The Dutch penal code is of course also applicable. Several provisions are relevant for media agencies, for example in relation to the advertising and advertising campaigns they set up. Among others, article 318 provides that a person who, with

<sup>195</sup> <<http://www.rijksoverheid.nl/documenten-en-publicaties/besluiten/2006/06/21/engelse-tekst-awb.html>>.

<sup>196</sup> <[http://www.freedominfo.org/documents/NL%20public\\_access\\_government\\_info\\_10-91.pdf](http://www.freedominfo.org/documents/NL%20public_access_government_info_10-91.pdf)>.

<sup>197</sup> <<http://www.cvdm.nl/besluiten/?sq=wob>>.

the object of obtaining unlawful gain for himself or another, compels a person, by threatening him with slander, libelous defamation or exposure of a secret, to surrender any property belonging in whole or in part to that person, or to a third party or to incur a debt, or renounce a claim, or to make available data having monetary value in commerce, is guilty of blackmail and liable to a term of imprisonment of not more than three years or a fine of the fifth category. Articles 137c-137 g also provide special sanctions for offensive remarks, writings or pictures about groups, which can be regarded as discriminatory. 138a specifies sanctions for the intrusion of someone's computer, in analogy to trespassing into someone's home.<sup>198</sup> Media agencies might be held responsible for advertisements or practices to which they contribute that violate such principles.

- 294 Finally, the Data Protection Act (Wet bescherming persoonsgegevens), may be applicable to media agencies.<sup>199</sup> This act can be largely seen as an implementation of the Data Protection Directive.<sup>200</sup> Article 7 holds that personal data shall be collected for specific, explicitly defined and legitimate purposes. Article 8 specifies that personal data may only be processed where: a. the data subject has unambiguously given his consent for the processing; b. the processing is necessary for the performance of a contract to which the data subject is party, or for actions to be carried out at the request of the data subject and which are necessary for the conclusion of a contract; c. the processing is necessary in order to comply with a legal obligation to which the responsible party is subject; d. the processing is necessary in order to protect a vital interest of the data subject; e. the processing is necessary for the proper performance of a public law duty by the administrative body concerned or by the administrative body to which the data are provided, or f. the processing is necessary for upholding the legitimate interests of the responsible party or of a third party to whom the data are supplied, except where the interests or fundamental rights and freedoms of the data subject, in particular the right to protection of individual privacy, prevail.
- 295 According to article 9, personal data shall not be further processed in a way incompatible with the purposes for which they have been obtained. Article 10 specifies that personal data shall not be kept in a form which allows the data subject to be identified for any longer than is necessary for achieving the purposes for which they were collected or subsequently processed. Article 11 holds that personal data shall only be processed where, given the purposes for which they are collected or subsequently processed, they are adequate, relevant and not excessive. Article 13 states that the responsible party shall implement appropriate technical and organizational measures to secure personal data against loss or against any form of unlawful processing. These measures shall guarantee an appropriate level of security, taking into account the state of the art and the costs of implementation, and having regard to the risks associated with the processing and the nature of the data to be protected. These measures shall also aim at preventing unnecessary collection and further processing

<sup>198</sup> <<http://www.legislationline.org/documents/id/4693>>.

<sup>199</sup> See also: <[http://www.cbweb.nl/downloads\\_rapporten/rap\\_2013\\_npo-cookies-publicatie-omroep.pdf](http://www.cbweb.nl/downloads_rapporten/rap_2013_npo-cookies-publicatie-omroep.pdf)>.

<sup>200</sup> <[http://www.coe.int/t/dghl/standardsetting/dataprotection/national%20laws/NL\\_DP\\_LAW.pdf](http://www.coe.int/t/dghl/standardsetting/dataprotection/national%20laws/NL_DP_LAW.pdf)>.

of personal data. As a final example, article 14 specifies that where responsible parties have personal data processed for their purposes by a processor, these responsible parties shall make sure that the processor provides adequate guarantees concerning the technical and organizational security measures for the processing to be carried out. The responsible parties shall make sure that these measures are complied with.

There are several issues regarding these rules and media agencies. Most importantly, a recent case (march 2014), regarding the violation of such principles by a company involved in behavioral advertising, among others by placing cookies. 'For the placing of advertisements, we work together with media agencies and ad networks. These are companies that act as intermediaries between website owners and advertisers. See below for a list of cookies that these media agencies, ad networks, and we use in conjunction with advertising, what data are collected and how long they are used.'<sup>201</sup> YD mediates between advertisers and websites when placing online ads. YD is active in the Netherlands, Germany, Spain and France. YD has more than 60 employees and works for advertisers in various sectors. YD can reach specific audiences real-time, select the most favorable placement for advertisements and personalize banner advertisements. 296

To identify an internet user and be able to show as relevant as possible ads on various websites, YD places various types of cookies on the browser of computers, smartphones and tablets. YD not only uses cookies but also pixels to record information in server log files, with additional information like last visited URL and IP address. At least one of the YD cookies contains a unique number (user identifier) through which YD can keep track of advertisements on the internet the user has seen and whether he has visited the website of the advertiser. YD also makes it possible for different parties with which it cooperates to place cookies on the browsers of internet users (such as ad networks). YD keeps track of whether an internet user has been on the site of a particular advertiser, and (in some cases) whether he is interested in a certain category of products. YD is also involved practices of retargeting. Thus, YD collected personal data, which means that the Data Protection Act was applicable. 297

One of the rules, provided in article 8, is that data controllers should have a legitimate ground for processing personal data. The Dutch Data Protection Authority held in an investigation that YD did not have a legitimate ground for processing. First, it did not obtain consent of the data subject, as YD places all tracking cookies when loading a page, before the website visitor has a choice to accept it or reject it. This is contrary to the requirement of prior consent. Consent must be given prior to processing personal data, must be specific and given freely and based on adequate information. Consequently, the opt-out option YD offers to internet users is insufficient to qualify as unambiguous consent. Likewise, the Dutch DPA found that the information provided by YD on the tracking cookies and the data that it processes, was inadequate. 298

Furthermore, the DPA held that YD could not rely on article 8 sub f, as 'the weighing of interests is to the disadvantage of YD because the data processing is done 'invisibly' and the internet user, given the lack of necessary information, can be surprised by the ads that haunt him on the web. This not only regards the tracking 299

<sup>201</sup> <[http://www.cbpweb.nl/downloads\\_rapporten/rap\\_2013\\_yd-cookies-privacy.pdf](http://www.cbpweb.nl/downloads_rapporten/rap_2013_yd-cookies-privacy.pdf)>.

by YD itself, but also by ad networks that are enabled by YD to place tracking cookies. The importance to be able to surf without being tracked is connected to online communication freedom. This is not outweighed by the comfort for internet users of being reminded of the fact that they have visited the site of a particular advertiser.<sup>202</sup>

### VIII. Media Agencies in Legal and Public Dispute

- 300** There are few famous cases in the Netherlands in which media agencies were involved. Perhaps the only one which is worth mentioning is the ambush advertising by Bavaria, a beer producer, at the World Cup in South-Africa. The FIFA banned advertisements by non-official sponsors in the stadium.<sup>203</sup> Bavaria, however, sent several women wearing orange dresses. Although they did not contain a logo or advertisement text, for Dutch viewers, the dresses were clearly linked to Bavaria. They were also known as Bavaria-dresses. FIFA aimed to prohibit ambush marketing or marketing activities through which one targets the audience of the events, including ticket holders, in order to gain exposure for its businesses, products or services without authorization from FIFA.<sup>204</sup> In a public statement, the Dutch government has rejected this point: 'There is no specific "ambush marketing law" in Dutch and Belgian legislation. We consider "ambush marketing" to be covered by a) intellectual property laws, more specifically the copyright and trademark law, b) unfair competition law, more specifically misleading and comparative advertising law and the unfair commercial practices law, and c) general tort law.'<sup>205</sup> Apparently, the affair blew over and the girls were released from the police station, after being arrested, when Bavaria paid a deposit.

### IX. Miscellaneous Facts and Remarks

- 301** A brief overview of all different regulations, institutions and self-regulatory initiatives:
- 302** European rules and instruments:
- Citizens' Rights Directive: Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws

<sup>202</sup> <[http://www.cbweb.nl/downloads\\_rapporten/rap\\_2013\\_yd-cookies-privacy.pdf](http://www.cbweb.nl/downloads_rapporten/rap_2013_yd-cookies-privacy.pdf)>.

<sup>203</sup> <[http://www.joburg-archive.co.za/bylaws/2010\\_bylaws.pdf](http://www.joburg-archive.co.za/bylaws/2010_bylaws.pdf)>.

<sup>204</sup> <<http://www.mediareport.nl/reclamerecht/05072010/ambush-marketing-wearing-the-dutch-dress-would-be-permitted-in-the-netherlands/>>.

<sup>205</sup> <<http://www.rijksoverheid.nl/bestanden/documenten-en-publicaties/brieven/2010/04/20/government-guarantee-no-8-legal-issues-and-indemnification/s-3000812k.pdf>>.

Data Protection Directive: Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data	303
e-Commerce Directive: Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market	304
e-Privacy Directive: Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector	305
European Convention on Human Rights: Convention for the Protection of Human Rights and Fundamental Freedoms Rome, 4.XI.1950	306
National laws and instruments:	
Civil Code: Burgerlijk Wetboek Boek 6, Verbintenissenrecht	
Competition Act: Wet van 22 mei 1997, houdende nieuwe regels omtrent de economische mededinging (Mededingingswet)	
Constitution: Grondwet voor het Koninkrijk der Nederlanden van 24 augustus 1815	
Copyright Act: Wet van 23 september 1912, houdende nieuwe regeling van het auteursrecht	
Criminal Code: Wet van 3 maart 1881, Wetboek van Strafrecht	
Data Protection Act: Wet van 6 juli 2000, houdende regels inzake de bescherming van persoonsgegevens (Wet bescherming persoonsgegevens)	
Freedom of Information Act: Wet van 31 oktober 1991, houdende regelen betreffende de openbaarheid van bestuur	
General Administrative Act: Wet van 4 juni 1992, houdende algemene regels van bestuursrecht (Algemene wet bestuursrecht)	
Media Act: Wet van 29 december 2008 tot vaststelling van een nieuwe Mediawet (Mediawet 2008)	
Media Degree: Besluit van 29 december 2008 houdende vaststelling van een nieuw Mediabesluit (Mediabesluit 2008)	
Media Regulation: Regeling van de Minister van Onderwijs, Cultuur en Wetenschap van 18 december 2008, nr. WJZ/84447 (8240), houdende uitvoeringsregels van de Mediawet 2008 (Mediaregeling 2008)	
Telecommunications Act: Wet van 19 oktober 1998, houdende regels inzake de telecommunicatie (Telecommunicatiewet)	
Self-regulation:	
Advertising Code: Nederlandse Reclame Code	
EASA/IAB Code: Best Practice Recommendation on online Behavioural advertising	
IAB Code: Self-Regulatory Principles for Online Behavioral Advertising	
Bodies and institutions:	
De Autoriteit Consument en Markt (ACM): is the independent regulator, installed by public law, which oversees issues concerning competition law, telecommunication and consumer law. It is a merger of the Consumentenautoriteit, the NMA and the OPTA.	

De Bond van Adverteerders (BVA): advertisers are organized in the Association of Dutch Advertisers.

Het College bescherming persoonsgegevens (CBP): this is the Dutch Data Protection Authority responsible for overseeing, among others, the Dutch Data Protection Act.

Het Commissariaat voor de Media (CvdM): The Dutch Media Authority upholds the rules which are formulated in the Dutch Media Act as well as in the regulations based on this act, for example the Media Decree.

De Consumentenautoriteit: this was the Dutch Consumer organisation, installed by administrative law; it operated separately from the Consumentenbond, an association.

The European Advertising Standards Alliance (EASA): initiative for advertising selfregulation in the advertising branch in Europe.

Interactive Advertising Bureau (IAB) Netherlands: is the trade association for digital advertising and interactive marketing industry.

De Nederlandse Mededingingsautoriteit (NMa): this was the Dutch competition authority, active between the first of January 1998 and the first of April 2013.

De Onafhankelijke Post en Telecommunicatie Autoriteit (Opta): was an independent authority overseeing the legislation and rules in the field of telecommunications.

De Reclame Code Commissie (RRC): Dutch Advertising Code Authority. Since 1963 it has been the body dealing with the self-regulating system of advertising, layed down in the Advertising Code.

Stichting Ether Reclame (STER): sells advertising on television and radio stations and the websites of the public broadcaster.

Vereniging van Communicatie-adviesbureaus (VEA): advertising agencies are united in the Union of Communication Consultancy Agencies

Working Party 29: European body, consisting of members of national DPAs, which writes recommendations and advices on issues regarding data protection.

## G. Rechtliche Rahmenbedingungen für Mediaagenturen in den USA

### I. General Overview

- 307 As in many countries, the rapidly changing media landscape in the United States has challenged all companies in the content ecosystem, from content-providers to advertisers to media agencies to the distributors themselves. Indeed, the notion of “media” – of a mass distribution medium received by a significant percentage of the public – is under significant stress with the continued development of Internet platforms and the increasing personalization of content and distribution. “Today’s consumers are exposed to an expanding, fragmented array of marketing touch points across media and sales channels.”<sup>206</sup>

<sup>206</sup> Wes Nichols, Advertising Analytics 2.0, Harvard Business Review, March 2013.