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## PLURALITY OF POLITICAL OPINIONS AND THE CONCENTRATION OF MEDIA

*A.W. Hins*

### Introduction

On 30 November 2009, a standing committee of the Dutch Parliament had an interesting discussion with the government on the 'Temporary Act on Media Concentrations', which is in force since 2007.<sup>1</sup> The act contains specific rules, complementary to general competition law, for the markets in radio, television and newspapers. The act would expire on 1 January 2010, but this date could be postponed by royal decree. The key question was whether a postponement was desirable. Constitutionally, a royal decree is made by the government alone. However, it is customary for the government to consult parliament on sensitive matters. In the Dutch political system, governments are based on a majority in parliament (in 2009: Christian-democrats, Labour and the small Christian Union). It is important to keep all partners of the coalition happy. If one of them loses confidence in the government, the ministers are under a duty to resign.

The chance that the debate of 30 November 2009 would cause such a crisis was very small.<sup>2</sup> Compared to other political issues of that time – the war in Afghanistan, the budget deficit and the future of retirement pensions – the Temporary Act on Media Concentrations was a minor subject. Nevertheless, the debate showed fundamental differences of opinion, even within the governing coalition. Speaking on behalf of the government, Minister Ronald Plasterk (Labour) said that he wanted to extend the temporary act with an additional two years. In his view, a specific legal instrument was needed to prevent a situation where one company has too much power over public opinion. General competition law would not suffice. A majority of parliament disagreed. The liberal opposition alleged that the Temporary Act on Media Concentrations had been an unnecessary hindrance for innovation. At least, the limitations on media concentrations should be diminished. The Liberal Party introduced a motion to that effect, which was

<sup>1</sup> Act of Parliament of 16 May 2007, *Staatsblad* 2007, 204.

<sup>2</sup> The minutes of the meeting are published in *Kamerstukken II 2009/10*, 32123 VIII, No. 93.

adopted on 8 December 2009.<sup>3</sup> The Christian Democrats voted with the opposition. A few days later, the government decided to prolong the act anyway.<sup>4</sup>

This short introduction illustrates that the role of the State towards concentration in the media is a topic of present interest in the Netherlands. In the next paragraphs we shall discuss how plurality is promoted by media law on the one hand and competition law on the other. It is important to note beforehand that the Netherlands have a strong public broadcasting sector, which is now extending its scope to new audiovisual services, in particular services on demand. Private undertakings complain that State aid for these services is distorting competition. The objections against anti-concentration measures should be seen in this context. European Union law plays a significant role here. Moreover, we shall see that restrictions on media ownership are not the only way of promoting pluralism. Finally, attention shall be paid to factual developments and prospects for the future.

## 1. General Considerations

### 1.1. Definitions

In this report, the word 'media' is used in a narrow sense. We shall focus on radio, television and newspapers. It is generally thought that these media have the greatest impact on public opinion. Consequently, the Dutch Media Act only regulates audiovisual services and State aid for the printed press.<sup>5</sup> Booksellers, libraries and cinemas are not affected. A more difficult question is what the words 'radio' and 'television' mean. Are they restricted to classic broadcasting services, meant for simultaneous viewing by the public on the basis of a programme schedule? The EU Directive on Audiovisual Media Services (AMS-Directive) obliges EU Member States, such as the Netherlands, to set rules for 'linear' as well as 'non-linear' television.<sup>6</sup> The Media Act, therefore, contains several provisions regarding non-linear services. However, unlike the AMS-Directive, the Media Act does not use the word 'programme' for video on demand. It sounds like a technical detail, but there are important consequences for the scope of the Temporary Act on Media Concentrations. This Act concerns the markets for radio programmes, television programmes and newspapers. Due to the definition of 'programme' in the Media Act, the market for internet services falls outside

<sup>3</sup> *Kamerstukken II 2009/10, 32123 VIII, No. 74.*

<sup>4</sup> Royal Decree of 21 December 2009, *Staatsblad* 2009, 603.

<sup>5</sup> Act of Parliament of 29 December 2008, *Staatsblad* 2008, 583. The Act has been amended by Acts of Parliament of 2 July 2009, *Staatsblad* 2009, 300 and 10 December 2009, *Staatsblad* 2009, 552, respectively.

<sup>6</sup> Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007, amending Council Directive 89/552/EEC, *OJ* 2007, L 332/27.

the scope of the Act. Nevertheless, we shall pay attention to non linear services also.

### 1.2. *History*

Newspapers in the Netherlands have a history that is very different from radio and television. The first newspapers appeared in the 17<sup>th</sup> century, in the time of the Dutch Republic.<sup>7</sup> In the absence of a king and a central bureaucracy, private entrepreneurs enjoyed more liberty than elsewhere in Europe. Famous were the papers written in French, providing news about current affairs abroad. As they were read by an international audience, one could compare the Dutch newspapers between 1618 and 1795 with the Luxemburg-based broadcasting stations between 1931 and now. Capital and creativity often came from outside, in particular from French refugees. A reluctance to intervene has been characteristic for the regulation of newspapers ever since. 'The best press law is no press law', one used to say. Around 1970, however, there was a growing concern that many newspapers would not survive the competition with television. After several titles had gone down, the government introduced limited financial support for newspapers. In order to prevent political interference in editorial matters, the power to subsidize was attributed to an independent authority. Introducing a specific merger regime took more time. It was only in 2007 that the Temporary Act on Media Concentrations was adopted.

Radio and television have always been under more government control. The first radio broadcasts were transmitted as early as 1919, television broadcasts followed in 1951. Government interference was considered as normal, because frequencies were scarce and radio and television were suspected of threatening public morals. However, there was a difference with other countries. In the Netherlands, a national monopolist has never been established. Public broadcasting has always been an activity for private associations, each representing a religious or political current in society. Although advertising was strictly prohibited, the associations cherished their autonomy. The word 'public broadcasting' was not known before 1991, when commercial radio and television were introduced. From that moment the associations became ready to cooperate and stress their common remit. Minding the public remit is no luxury, because the European Commission carefully watches that funding broadcasting services is not distorting the market.<sup>8</sup>

As a consequence, the present Media Act reflects two opposing philosophies. On the one hand, there is a public media service. It must provide high quality programmes, in traditional broadcasting as well as new

<sup>7</sup> Schneider & Hemels 1979 and Baschwitz 1949.

<sup>8</sup> Communication from the Commission on the application of State aid rules to public service broadcasting, published 27 October 2009, *OJ* 2009, C 257, p. 1-14.

electronic services. For historic reasons, private organizations still play an important role. Three television networks and seven national radio networks have been allocated to the public media service. The participants are licensed by the government, receive financial support and their activities are strictly regulated. For example, they may not enter the newspaper market. Private media are in a different situation. In relation to them, the philosophy is that free market principles should be respected. The Media Act implements the EU Directive on Audiovisual Media Services, but there is little other regulation as to private electronic media. Newspapers are regulated even less. A policy of non-intervention was felt to be justified, because a broad range of high quality programmes is already offered by the public media service. However, there are disputed territories. On the internet, for example, the public media service provides video channels, supported by public money. Private broadcasters and publishers see this as a distortion of competition.

### 1.3. *Freedom of Speech*

Article 7 of the Constitution deals with the fundamental right to freedom of speech. The provision makes a distinction between the printed press on the one hand and radio and television on the other. A licensing system is prohibited as far as books, newspapers and magazines are concerned. For radio and television a licensing system is allowed, unless it amounts to 'censorship'. In principle, Article 7 of the Constitution is negative right. It protects against government interference, even if such interference is based on the wish to protect consumers, culture or democracy. For example, in 1958 the Government introduced a licensing system for book shops in order to protect high quality book shops against cherry-picking by supermarkets, tobacconists etc. The new regulation required a professional diploma for selling books to the public. In 1960, the Supreme Court decided that the regulation was an infringement of Article 7. The argument that plurality in the book market would benefit from a licensing system did not convince the Court. Similar judgments were made by the Supreme Court in relation to libraries and printing companies.<sup>9</sup>

The primarily negative obligations, implied in Article 7, are a major obstacle for specific legislation against press concentrations. If no license may be required for publishing a newspaper, it would be strange to require a license for the merger of newspapers. The constitutional objections become evident when the criterion is to be how much harm will be done to the plurality of the press. Such a test cannot be performed without establishing how useful a particular newspaper is. This runs counter to the very essence

<sup>9</sup> Hoge Raad 22 March 1960, *NJ* 1960, 274 (*Book sellers*). See also Hoge Raad 22 November 1960, *NJ* 1961, 206 (*Libraries*) and Hoge Raad 23 May 1961, *NJ* 1961, 427 (*Printing shops*).

of Article 7 of the Constitution. The question which newspapers must survive and which may disappear should be decided by the market, not a licensing authority. A similar interpretation of Article 7 was given by the Trade and Industry Appeals Tribunal – the highest court in competition matters – in 2001. The national competition authority had allowed the transfer of a newspaper to another company only after a commitment that the newspaper would remain focused on a particular geographical area. This condition was considered illegitimate, because it refers to the content of the paper.<sup>10</sup>

#### 1.4. *Positive Obligations*

The text of Article 7 of the Constitution says nothing about positive obligations for the State to protect plurality of the media. Nevertheless, it is commonly accepted that it is a general principle of law that the government should prevent excessive press concentrations. This principle was explicitly mentioned by the former European Commission of Human Rights in a case against the Netherlands in 1976.<sup>11</sup> In 1993, the European Court of Human Rights considered in case about Article 10 ECHR:

‘The Court has frequently stressed the fundamental role of freedom of expression in a democratic society, in particular where, through the press, it serves to impart information and ideas of general interest, which the public is moreover entitled to receive (see, for example, *mutatis mutandis*, the *Observer and Guardian v. the United Kingdom* judgment of 26 November 1991, Series A no. 216, pp. 29-30). Such an undertaking cannot be successfully accomplished unless it is grounded in the principle of pluralism, of which the State is the ultimate guarantor. This observation is especially valid in relation to audio-visual media, whose programmes are often broadcast very widely’.

The principle of pluralism is also embedded in Article 11, paragraph 2, of the Charter of Fundamental Rights of the European Union.<sup>12</sup>

In the context of freedom of speech, the concept of ‘plurality’ primarily refers to information and ideas on matters of public interest. Citizens must be able to inform themselves from several sources with different political perspectives. This is an essential condition for democracy. However, there are also cultural and linguistic reasons why a government should respect, protect and promote plurality in the media.<sup>13</sup> For example, Article 22 of the

<sup>10</sup> College van Beroep voor het bedrijfsleven 5 December 2001, *Wegener v. NMa*, <[www.rechtspraak.nl](http://www.rechtspraak.nl)>, LJN: AD6693, *Mediaforum* 2002-4, No. 15, commented by F.J. Leeftang and K.J.M. Mortelmans.

<sup>11</sup> European Commission of Human Rights 6 July 1976, *NJ* 1978, 237, *Geïllustreerde Pers v. The Netherlands*.

<sup>12</sup> *OJ* 2007 C303/1. Article 11-2 reads: ‘The freedom and pluralism of the media shall be respected’.

<sup>13</sup> See Recommendation CM/Rec(2007)2 on media pluralism and diversity of media content. It was adopted by the Committee of Ministers of the Council of Europe on 31 January 2007.

Dutch Constitution instructs the government to foster cultural development and innovation. Also relevant is the Convention on the protection and promotion of the diversity of cultural expressions, which was adopted by the General Conference of the Unesco in Paris on 20 October 2005.<sup>14</sup> As for linguistic diversity mention should be made of the Framework Convention for the protection of national minorities, adopted by the Member States of the Council of Europe and others in Strasbourg on 1 February 1995.<sup>15</sup>

It is important to keep in mind that the obligation to refrain from interference in freedom of speech is a hard rule, whereas the positive obligation to foster plurality of information is a legal principle. There is only one way in which a government can comply with the obligation not to interfere, that is: keeping their hands off. Legal principles can be fulfilled in several ways. A politician who strongly believes in the free market will choose other means than a supporter of the Welfare State. Consequently, judges will tread carefully. If the government violates freedom of speech by arbitrary interferences, a judge will not hesitate to declare this policy illegal. But he will find it more difficult to decide that a government should take measures to prevent media concentrations. Political discussions are better placed in parliament than in a court room. This does not mean that positive obligations can never be enforced. In particular, authorities may not sit still when people suffer from private wrongdoings. However, the legal principle that plurality must be protected cannot be used as an excuse for censorship. When confronted with media concentrations competition authorities must, therefore, be mindful of the limits set by Article 7 of the Dutch Constitution and Article 10 of the ECHR.

## **2. Media Rules against Concentrations**

### **2.1. Temporary Act on Media Concentrations**

On 1 July 2007, the Temporary Act on Media Concentrations entered into force. The Act has the following characteristics:

- a. First, it has abolished former cross ownership limitations. Between 1991 and 2007 there had been a law prohibiting private broadcasters from having a dominant position in the market for newspapers and prohibiting newspapers with a dominant position from having substantial influence over a private broadcaster. 'Dominance' was defined as a market share of 25%. 'Substantial influence' was defined as having one

<sup>14</sup> The Convention was ratified by the Netherlands on 9 October 2009 and entered into force for the Netherlands on 9 January 2010.

<sup>15</sup> The Framework Convention was ratified by the Netherlands on 16 February 2005 and entered into force for the Netherlands on 1 June 2005. The Media Act has implemented the convention by providing for broadcasts in the Frisian language.

third of the votes in the shareholders meeting or control over one third of the Executive Board or Supervisory Board. This specific rule against multimedia activities was felt to be obsolete in 2007.

- b. Today, media concentrations are prohibited that presumably endanger plurality of opinion. In particular, a newspaper may not acquire a market share over 35% in the user market for newspapers. Also, a media conglomerate may not acquire a market share over 90% in the combined user markets (300%) for newspapers, radio and television. In both cases the prohibition is limited to mergers and acquisitions. If a company transgresses a maximum through market success or failure of its competitors, there is no violation.
- c. The market share of a newspaper is calculated on the basis of circulation. Market shares for radio and television are determined by measuring the listening time and the viewing time. The general competition authority, the *Nederlandse Mededingingsautoriteit* (NMa), must prevent media concentrations that violate the law. However, it is for the specialized media watchdog *Commissariaat voor de Media* (CvdM) to gather the necessary data and give advice to the NMa.
- d. Finally, the CvdM is charged with the task to monitor developments in the national and international media markets and their consequences for plurality and independence. The findings are to be published in a yearly report, called the 'Media Monitor'. There is no need for the CvdM to limit its monitoring to newspapers, radio and television. It may also look at other media institutions, such as press agencies, search engines or social network services.

Originally, the Temporary Act was meant to expire on 1 January 2010. However, Article 15 states that the government can appoint a later date. On 21 December 2009 a royal decree was made in order to extend the validity of the Act. According to this decree, the Act will expire on 1 January 2012.

The introduction of the Temporary Act in 2007 was a compromise. In the past, some parties had submitted that the absence of a specific merger control system for the press was a serious danger for plurality of opinion. In their view, the government should take active measures against the continuing press concentrations. The disappearance of traditional newspapers with a diversity of political opinions worried them. Competition law was not enough to counter this development, so they said. Their plea was that press mergers should be forbidden, unless the companies could show that the existing plurality of opinion was guaranteed. Others objected that such a law would be ineffective and unconstitutional. Ineffective, because legislation cannot save independent newspapers when economic circumstances are bad. Sometimes a merger is the only way to keep at least one newspaper alive. Secondly, a specific law against press mergers would

be against Article 7 of the Constitution, that prohibits prior control over the printed press.<sup>16</sup>

Choosing a middle course, the Temporary Act tries to accommodate both sides. On the one hand, specific rules have been set for media markets in order to protect plurality of opinion. On the other, the Temporary Act is only an addition to the Competition Act. Under this Act the *Nederlandse Mededingingsautoriteit* (NMa) supervises markets in general. In principle, the NMa does not judge the quality of products, because that is for the consumers to decide. What the Temporary Act does, is specifying the maximum market shares that are acceptable for media concentrations. Exceptions cannot be allowed. However, the media watchdog *Commissariaat voor de Media* (CvdM) plays a role too. First, the NMa must ask its advise when a media concentration has been notified. Second, the CvdM can express its long term views in the yearly Media Monitor. The final decisions about media concentrations, however, are taken by the NMa.

## 2.2. *Scope of the Temporary Act*

The scope of the Temporary Act is limited to newspapers, radio and television. The definition of 'newspapers' includes free papers that are distributed on weekdays in railway stations, supermarkets etc. Article 1 of the Temporary Act states that a newspaper must be printed on paper and appear at least five days a week. There is no obligation that the consumer must pay. In this respect, there is a difference with the press subsidy rules under the Media Act 2008. Subsidies can be granted by an independent authority, the *Stimuleringsfonds voor de Pers*, to newspapers and magazines that appear at least once a month. Under Article 8.10 of the Media Act, one of the conditions is that the periodical is not free of charge. Readers must either take a subscription or buy single issues. Responding to written questions of Parliament, the government explained in 2007 why it was necessary to take account of free newspapers when calculating market shares. For a significant part of the population, so the government said, free papers have the same function as traditional newspapers.<sup>17</sup> As a consequence, the total user market is defined in a broad way and the ceiling of 35% will not be reached easily.

There is a second difference between the subsidy rules of the Media Act and the anti-concentration rules of the Temporary Act. Under the Media Act, subsidies can only be granted to periodicals 'providing a substantial amount of news, analysis, comments and background information about current events in society, thus contributing to political opinion building'.<sup>18</sup> It is not necessary to deal with all categories of 'news', but a periodical must at least discuss a diverse segment of contemporary society. A hobby magazine or a

<sup>16</sup> Nieuwenhuis 1991.

<sup>17</sup> *Aanhangsel II* 2006/07, No. 1745.

<sup>18</sup> Art. 8.10, para. 2 sub b, of the Media Act 2008.

periodical that only aims at amusement does not qualify for press subsidies. The Temporary Act, on the other hand, makes no reference to the content of newspapers. If a paper appears at least five days a week, it automatically belongs to the user market for newspapers. The drafters of the Act aimed at transparency and simplicity. Making a distinction between papers that contribute to political opinion and papers that do not, would have demanded a more complicated administration. Furthermore, the Temporary Act makes no distinction between national and local markets.

In paragraph I, we have seen that the concepts of 'radio' and 'television' have a restricted meaning in the Temporary Act. The words do not include non linear services, such as video on demand. In the Explanatory Memorandum to the bill of 2006, the government admitted that internet has become an important tool for gathering information on matters of public interest, but it decided not to regulate internet services. Two reasons were submitted for this. First, the government held that it is practically impossible to ascertain which websites on the world wide web have a considerable influence on public opinion in the Netherlands and should, therefore, be counted as relevant market players. Second, the internet by itself prevents that a limited number of participants will determine the news and the public debate. One possible problem was touched upon briefly, namely the power of search engines. Indeed, there is a risk that the operator of a search engine can restrict access to sources of information for reasons that are not in the public interest. However, the government concluded that the Temporary Act on Media Concentrations was not the right instrument to regulate search engines.<sup>19</sup>

Radio and television programmes are supplied by public and private media. It must be remembered that public broadcasting in the Netherlands is provided for by private associations, but there is a clear difference with private broadcasting. The associations have privileges, such as state funding, must carry rights and access to radio frequencies, but these privileges correspond with the obligation to provide high-quality programmes and programmes for minority groups. Private broadcasters neither have the privileges, nor the obligations. They can make a profit with simple programmes that generate a lot of advertising revenue. In calculating market shares under the Temporary Act, both categories of broadcasting are counted. As there is no maximum market share for television and radio, the viewing and listening time spent on public programmes is only relevant for the rule that no conglomerate should acquire a market share of more than 90% of the combined markets for radio, television and newspapers (300%). Public broadcasters can reach this maximum only in theory, because the Media Act prohibits them from publishing a newspaper. It is fair to say that a strong public broadcasting system makes it easier for a newspaper company

<sup>19</sup> *Kamerstukken II 2006/07, 30921, No. 3, p. 3.*

to acquire private radio and television stations without exceeding the maximum of 90% market share.<sup>20</sup>

### 2.3. *Implementation of the Temporary Act*

The Temporary Act on Media Concentrations is an addition to the Competition Act. Later, we shall discuss the Competition Act in more detail. Now, it suffices that all concentrations of importance must be notified with the *Nederlandse Mededingingsautoriteit* (NMa). Under Article 34 of the Competition Act it is forbidden to establish a concentration without prior notification and before four weeks have elapsed. Article 3 of the Temporary Act states that the NMa must decide within four weeks whether or not the concentration will lead to market shares prohibited by this Act. The decision can be challenged before the Court of Rotterdam, which is specialized in competition matters.<sup>21</sup> Appeal is possible with the *College van Beroep voor het bedrijfsleven* (Trade and Industry Appeals Tribunal), whose judgment is final.<sup>22</sup> Finally, Articles 5 and 6 of the Temporary Act deal with inspections and sanctions. These articles refer to the Competition Act, which means that the NMa can impose fines up to € 450,000 or – if this is more – 10% of the turnover of the previous year. The NMa can also take coercive measures.

## 3. **Media Rules Promoting Plurality of Information**

### 3.1. *Public Service Media*

A principle aim of the Media Act 2008 is promoting plurality of information. In this respect, there is little difference with its predecessors. The establishment of a public media service is a central element in the Act. Before 2008, the focus was on public broadcasting. Today, the public service remit has been expanded to interactive electronic media. This is in line with a Recommendation of the Committee of Ministers of the Council of Europe, encouraging member states 'to guarantee the fundamental role of the public service media in the new digital environment'. According to this Recommendation, public service media should offer:

<sup>20</sup> The market shares of public broadcasting in 2008 were about 35% for television and about 30% for radio. See <[www.mediamonitor.nl](http://www.mediamonitor.nl)>.

<sup>21</sup> Art. 7 Temporary Act in connection with Art. 93 Competition Act. The Explanatory Memorandum suggests that it is not necessary to file an administrative appeal with the NMa first (*Kamerstukken II 2006/07, 30921, No. 3, p. 13*). The government probably thought that a decision based on Art. 3 Temporary Act is comparable to a licensing decision based on Art. 44 of the Competition Act and that, therefore, Art. 93, subsection 2, Competition Act is applicable. However, the law itself is not clear on this.

<sup>22</sup> Art. 20 of the *Wet bestuursrechtspraak bedrijfsorganisatie* (Act on administrative jurisdiction in regulated markets) in connection with the Annex to this Act.

- 'a) a reference point for all members of the public, offering universal access;
- b) a factor for social cohesion and integration of all individuals, groups and communities;
- c) a source of impartial and independent information and comment, and of innovatory and varied content which complies with high ethical and quality standards;
- d) a forum for pluralistic public discussion and a means of promoting broader democratic participation of individuals;
- e) an active contributor to audiovisual creation and production and greater appreciation and dissemination of the diversity of national and European cultural heritage'.<sup>23</sup>

As to point d, the Recommendation specifies:

'14. Public service media should play an important role in promoting broader democratic debate and participation, with the assistance, among other things, of new interactive technologies, offering the public greater involvement in the democratic process. Public service media should fulfil a vital role in educating active and responsible citizens, providing not only quality content but also a forum for public debate, open to diverse ideas and convictions in society, and a platform for disseminating democratic values.

15. Public service media should provide adequate information about the democratic system and democratic procedures, and should encourage participation not only in elections but also in decision-making processes and public life in general. Accordingly, one of the public service media's roles should be to foster citizens' interest in public affairs and encourage them to play a more active part.

16. Public service media should also actively promote a culture of tolerance and mutual understanding by using new digital and online technologies.

17. Public service media should play a leading role in public scrutiny of national governments and international governmental organizations, enhancing their transparency, accountability to the public and legitimacy, helping eliminate any democratic deficit, and contributing to the development of a European public sphere.

18. Public service media should enhance their dialogue with, and accountability to, the general public, also with the help of new interactive services'.

As mentioned before, the public media service in the Netherlands is provided for by private media associations. They are coordinated by a body called *Nederlandse Publieke Omroep* (NPO), which means Netherlands Public Broadcasting. The name is a bit old-fashioned, since the public service remit is not limited to broadcasting anymore. The reason for not changing the name is that it has become a strong trademark. In the last fifteen years, the powers of NPO have grown. For example, NPO distributes government funds among the associations and makes the programme schedules for public radio and television. Furthermore, NPO represents the common

<sup>23</sup> Recommendation Rec(2007)3 of the Committee of Ministers to member states on the remit of public service media in the information society, adopted on 31 January 2007.

interests of the associations. Acting on behalf of them, NPO concludes collective contracts with trade unions, copyright organizations, foreign broadcasters etc. Nevertheless, the associations have editorial responsibility. Under the Media Act they are entitled to certain amounts of time on the national networks. Each association has its own political, religious or cultural identity. Therefore, plurality of ideas in the public media service is mainly guaranteed by them.

Media associations obtain a licence from the government for a period of five years. In order to get a full status, 150,000 members are necessary. Members must be over 16 years, live in the Netherlands and pay a minimum subscription fee.<sup>24</sup> New organizations only need 50,000 members for a preliminary status.<sup>25</sup> They get a limited amount of transmitting time, which enables them to present themselves and appeal to a broader audience. If they succeed in attracting 150,000 members before the next cycle of five years begins, they can stay. If not, they are out. It is not possible to obtain a preliminary status for a second time. Established media organizations that have dropped below the 150,000 mark, must leave too. The amount of transmitting time for an association depends on the number of its members. Today, there are only two categories: those under 300,000 members and those above 300,000 members. This situation will change, starting from 1 September 2010. From then, each extra member above 150,000 will lead to extra broadcasting time until a maximum of 400,000 members.<sup>26</sup>

Interestingly, the Media Act tries to promote plurality of opinion by stating that a newcomer must not merely duplicate what other associations are doing. A candidate applying for a preliminary status must promise that its programmes will significantly differ from existing programmes, in view of their 'tendency, content or target groups'.<sup>27</sup> The combination of quantitative and qualitative criteria tries to respond to changing preferences of the public. In September 2010, two new associations will enter with a preliminary status. They find themselves on the right side of the political spectre. A left-wing ecologist association that had a preliminary status between 2005 and 2010 must stop, because the government decided its programmes had resembled the others too much. Roughly speaking, the public media system as a whole will get a more conservative appearance from 2010. This might be a reaction to accusations that the programmes have been too 'leftish'. Finally, the Media Act makes allowance for minorities that are not represented by a media association. One might think of immigrants, who cannot find their way into the complicated system. For such groups, the Media Act has created an organization without members, the *Nederlandse Programma Stichting* (NPS).

<sup>24</sup> Art. 2.25 and 2.27 Media Act.

<sup>25</sup> Art. 2.26 and 2.27 Media Act.

<sup>26</sup> Art. I sub HH of the Act of 2 July 2009, *Staatblad* 2009, 300, in connection with the Royal Decree of 3 December 2009, *Staatblad* 2009, 528.

<sup>27</sup> Art. 2.26, sub d, of the Media Act.

Its task is to provide programmes that are complementary to those of the associations.

### 3.2. *Other Ways of Guaranteeing Plurality*

As to private media, the Media Act has only a few provisions aiming at plurality of information. One example is the obligation for media companies to establish a covenant with their employees, defining what the organization stands for. The obligation is created by Article 3.5 and 3.29d of the Media Act in relation to private broadcasting companies and providers of video on demand, respectively. As to newspapers and magazines, Article 8.10 of the Media Act contains a similar requirement if they receive a subsidy from the *Stimuleringsfonds voor de Pers*. This Article explicitly states that the editorial staff must work 'independently' of the owners. However, one should not overestimate the practical usefulness of these obligations. If employees content themselves with a very vague covenant, there is little public authorities can do. Moreover, a covenant offers no protection against economically hard times. If an employer can show that the only way to survive is to deviate from ideological principles, many journalists will conclude that keeping their jobs takes priority.

Other provisions focus on the technical infrastructure, such as terrestrial transmitters or cable networks. Before allocating radio frequencies to private broadcasters, the government can decide what kind of programmes must be transmitted over these frequencies. For example, some frequencies will be earmarked for news and current events, others for classical music or jazz. In the following auction or beauty contest, candidates can choose which category fits them best. The result is a mixed 'bouquet' of programming formats. However, the government has no authority to determine the political colour of the stations. Next, Article 6.24 of the Media Act states that private radio broadcasters cannot use more than one FM frequency network. A Royal Decree, implementing this Article, specifies when two related companies must be treated as if they were one. The definition closely resembles the definition of a 'concentration' in the Competition Act. Furthermore, the Royal Decree allows the minister of Cultural Affairs to make exceptions.

As far as cable networks are concerned, the Media Act contains a few must carry obligations. They will apply as long as cable is the most important instrument for receiving programming material by a significant part of the population in the Netherlands.<sup>28</sup> Public service programmes must be carried, because they are paid for by the taxpayers. Due to a treaty with Belgium, the same is true for Belgian public service programmes in Dutch (with a maximum of two radio and two television networks). Apart from that, local governments must establish programming councils. Such a council must give

<sup>28</sup> Art. 6.12 Media Act.

guidelines to the local cable operator on the programming of 15 television channels and 25 radio channels. If the guidelines are unreasonable, the cable operator may ignore them. However, the *Commissariaat voor de Media* can impose a fine if a guideline is ignored without good reason. The programming council is supposed to represent the interests of the consumers and their activities should aim at 'pluralism' in the selected programmes (Art. 6.21 of the Media Act). The latter obligation is rather toothless. In general, there is little enthusiasm about the role of programming councils. Recently, the minister of Cultural Affairs wrote to parliament that the European Commission is not happy either. A bill amending the Media Act is expected soon.<sup>29</sup>

#### 4. Competition Law

##### 4.1. *The Competition Act*

The Competition Act 1997 entered into force on 1 January 1998. It regulates anti-competitive behaviour as well as merger control. The Act is strongly inspired by competition law of the European Union and uses familiar concepts. In the Explanatory Memorandum, the government stated that the provisions must be interpreted in the light of EU practice and EU case law.<sup>30</sup> If necessary, a national court can request a preliminary ruling of the European Court of Justice. The fact that a case is governed by national law only does not preclude the procedure of Article 267 TFEU. This is shown by the landmark judgment *Leur-Bloem*. Dealing with Article 177 EC, a predecessor of Article 267 TFEU, the ECJ held:

'The Court of Justice has jurisdiction under Article 177 of the EC Treaty to interpret Community law where the situation in question is not governed directly by Community law but the national legislature, in transposing the provisions of a directive into domestic law, has chosen to apply the same treatment to purely internal situations and to those governed by the directive, so that it has aligned its domestic legislation to Community law'.<sup>31</sup>

Before 1998, there was a much softer law on competition. In fact, there was no national merger control. Only the European Commission had powers under the EC Merger Regulation, regarding very large concentrations.<sup>32</sup> However, the government could use the exception of Article 22 of the Regulation. Under this provision, a Member State may request the

<sup>29</sup> Letter of 15 October 2009; *Kamerstukken II* 2009/10, 32123 VIII, No. 14.

<sup>30</sup> *Kamerstukken II* 1995/96, 24707, No. 3, p. 10.

<sup>31</sup> ECJ 17 July 1997, C-28/95, *Leur-Bloem*.

<sup>32</sup> Council Regulation (EC) No. 139/2004 of 20 January 2004, *OJ* 2004, L 24, p. 1-22. The RTL/Veronica/Endemol decision was taken under its predecessor: Council Regulation (EEC) No. 4064/89 of 21 December 1989 on the control of concentrations between undertakings, *OJ* 1989, L 395, p. 1-12.

Commission to examine a concentration although it has no 'Community dimension'. This was the background of the famous case *RTL/Veronica/Endemol* in 1995. The three parties – two broadcasters and a production company – had created a joint company, 'Holland Media Groep', that would supply radio and television programmes to the Netherlands and Luxembourg. Because the Competition Act was not yet in force, the national authorities could not examine the concentration themselves. So, the government went to the European Commission for help. The Commission concluded that the concentration would lead to the creation of a dominant position on the Dutch market for television advertising and to the strengthening of an already existing dominant position of Endemol in the market for independent television production.<sup>33</sup>

The Competition Act introduced a national merger control. Executive powers are entrusted to the *Nederlandse Mededingingsautoriteit* (NMa). In the beginning, this authority was a government agency for which the minister of Economic Affairs was fully responsible. Parliament hesitated to create an independent body, for as long as a minister is responsible, parliament has more influence. Seven years later, the situation changed. A bill amending the Competition Act was adopted in 2004 and entered into force on 1 July 2005.<sup>34</sup> It has given the NMa more independency. However, some political control still exists. For example, the minister of Economic Affairs can give 'guidelines' to the NMa (Article 5d of the Competition Act). If the board of the NMa seriously fails in its duties, the minister can take all 'necessary measures' (Article 5f). Finally, the minister can allow a concentration, for reasons of public interest, against a prior decision of the NMa (Article 47). However, Article 47 is not applicable in cases regulated under the Temporary Act on Media Concentrations.

#### 4.2. *Competition and the Media*

The tasks of the NMa can be summarized as follows:

- promoting and safeguarding free competition;
- taking action against parties that participate in cartels, for example, by fixing prices;
- taking action against parties that abuse a dominant position;
- reviewing mergers and acquisitions;
- regulating the energy markets and transport markets in detail.

<sup>33</sup> Commission Decision 96/346/EC of 20 September 1995, *OJ* 1996, L 134, p. 32-52, followed by Commission Decision 96/649/EC of 17 July 1996, *OJ* 1996, L 294, p. 14-17.

<sup>34</sup> Act of 9 December 2004, *Staatsblad* 2005, No. 172.

Radio, television, the press and internet are not excluded from its competences. Indeed, the NMa has taken several decisions concerning media markets. It has examined the refusal to sell programming data, access to cable networks, advertising facilities, television rights of football matches, concentrations of cable operators, newspapers etc. Details can be found on the website of the NMa, which is also available in English.<sup>35</sup>

Sometimes, the general competences of the NMa overlap with specific competences of other regulatory bodies. If the provider of a public communications network arbitrarily refuses its services to a programming company, the independent telecommunications authority OPTA can intervene.<sup>36</sup> More often than not, OPTA will have to interpret concepts which have their origin in competition law. Article 18.3 of the Telecommunications Act guarantees that OPTA and NMa operate in a coordinated way. A covenant between the two authorities lays down the procedures. A comparable situation exists between the *Commissariaat voor de Media* and the NMa. Under the Media Act, the CvdM can authorize non-broadcasting activities of public broadcasters only on condition that these activities do not violate the principle of market-conformity.<sup>37</sup> In cases of doubt, the CvdM consults the NMa in order to avoid diverging interpretations of competition law. However, under the Temporary Act on Media Concentrations this risk does not exist. It is the NMa that decides on a planned media concentration. The CvdM only tenders an advice. Again, the procedural details are laid down in a covenant.<sup>38</sup>

#### 4.3. *Merger Control*

Under Chapter 5 of the Competition Act, the NMa has prior control over concentrations. The term involves mergers, acquisitions and joint ventures. The definition in Article 27 states:

1. 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.

<sup>35</sup> See the website <[www.nmanet.nl](http://www.nmanet.nl)>.

<sup>36</sup> OPTA means 'Onafhankelijke Post- en Telecommunicatieautoriteit'. The relevant provisions are Arts. 6a.6 and 8.7 of the Telecommunications Act.

<sup>37</sup> Art. 2.132 Media Act.

<sup>38</sup> *Staatscourant* 24 June 2008, No. 119, p. 35.

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 subsection (1)(b).

Only large concentrations are concerned.<sup>39</sup> A 'large' concentration exists if the following conditions are met:

1. the joint annual turnover of the undertakings worldwide amounts to more than € 113,450,000 and
2. at least two of them have an annual turnover in the Netherlands of at least € 30 million each.

The procedure of prior control by the NMa consists of two phases: the notification phase and the licensing phase. Undertakings that wish to bring about a large concentration, must first notify the NMa of their intention to do so.<sup>40</sup> The NMa investigates whether there is reason to believe that competition on the Dutch market will be significantly restrained, in particular because the concentration will result in the emergence or strengthening of a dominant position. Within four weeks of receiving the notification, the NMa will inform the applicant whether or not a licence is required. If this term lapses without a decision, a licence is not required. During the period in which the notification is assessed, it is prohibited to bring about the concentration.

If the NMa has decided so, the parties have to apply for a licence next.<sup>41</sup> The NMa investigates whether the proposed concentration will indeed result in a significant obstruction of competition. In order to reach a decision, NMa defines the relevant market and determines the market shares of the undertakings involved in the concentration and the market shares of competitors. It also investigates, for instance, what opportunities are available to third parties to enter the market and the extent to which buyers and suppliers will be dependent on the new company that is to be created. A decision on the application for a licence must be taken within 13 weeks. During the period in which the application is assessed, the concentration is prohibited. If the period of 13 weeks lapses, without a decision having been taken, the licence is deemed to have been granted.

#### **4.4. Remedies**

A licence may be issued subject to limitations and instructions.<sup>42</sup> Since 2007, the NMa can do the same when it decides that no license is required for a

<sup>39</sup> Art. 29 Competition Act.

<sup>40</sup> Arts. 34-40 Competition Act.

<sup>41</sup> Arts. 41-49 Competition Act.

<sup>42</sup> Art. 41, subsection 4, Competition Act.

particular concentration.<sup>43</sup> These measures, also known as ‘remedies’, aim at removing the potential harm a concentration can cause to competition. Guidelines of the NMa explain its policy.<sup>44</sup> As a rule, limitations and instructions are imposed only after they have been offered by the parties themselves. The guidelines enable parties to foresee which commitments the NMa will find satisfactory.

In principle, there are two sorts of remedies: structural and behavioural ones. Structural remedies require a structural change, for example the selling of a part of a company or the withdrawal from a joint venture. A behavioural remedy obliges an undertaking to behave in a certain way in the future. The NMa prefers structural remedies, because behavioural obligations need permanent supervision. This is an administrative burden in the long run. Moreover, the latter obligations can leave room for different interpretations and, therefore, lead to a series of conflicts. Nevertheless, sometimes the NMa chooses for a behavioural remedy. For example, when a party acquires essential facilities through a vertical concentration, the NMa can impose an obligation to give equal access to competitors.

Failure to notify a contemplated merger, like other violations of the Competition Act, can be punished by the NMa. It can impose heavy fines in combination with coercive measures. The affected party has the right of administrative appeal to the NMa. If this appeal does not succeed, it is possible to file a judicial appeal with the Court of Rotterdam. Further appeal is possible to the *College van Beroep voor het bedrijfsleven* (the Trade and Industry Appeals Tribunal) in The Hague. Decisions relating to a license – for example the decision that a license is needed – are different. Here, the interested parties can go to the Rotterdam Court directly without having tried an administrative appeal first.<sup>45</sup>

## 5. Relations between Media and Competition Law

### 5.1. Two Merger Regimes

The media-specific rules, embedded in the Temporary Act on Media Concentrations, and the general rules of the Competition Act are implemented concurrently. As we have seen in Section 2.1, the *Nederlandse Mededingingsautoriteit* (NMa) is competent under both laws. Parties, which are contemplating a large media concentration, have to notify their intention to the NMa by virtue of the Competition Act.<sup>46</sup> The NMa must check first whether or not the concentration will lead to a market share above the

<sup>43</sup> Art. 37, subsection 4, Competition Act.

<sup>44</sup> Richtsnoeren Remedies 2007, adopted by the board of the NMa on 21 September 2007 and published on the website <[www.nmanet.nl](http://www.nmanet.nl)>.

<sup>45</sup> Art. 93, subsection 2, Competition Act.

<sup>46</sup> Art. 34 Competition Act.

maxima specified in Article 2 of the Temporary Act (i.e. 35% market share in the user market for newspapers and 90% market share in the combined user markets for newspapers, radio and television).<sup>47</sup> The aim is that there will be at least three independent newspaper companies. For radio and television such a guarantee was felt to be superfluous on account of the public broadcasting system. The government explained that it is very unlikely that mergers and acquisitions will bring about a situation where only one private broadcaster remains. Such a development can be prevented by the NMa with its normal powers.<sup>48</sup>

Under the Competition Act, a merger control consists of two phases. First, the notification procedure. Second, when necessary, a licensing procedure. The Temporary Act on Media Concentrations creates a different system. Article 3 states that within four weeks of the notification, the NMa must decide about the market shares. The only question is whether or not the concentration transgresses the maxima, specified in Article 2. The answer is a simple yes or no. The NMa can make no exceptions, nor can it subject a positive decision to limitations and instructions. Finally, it should be remembered that Article 47 of the Competition Act is not applicable.<sup>49</sup> Under this provision, the minister of Economic Affairs can allow a concentration, for reasons of public interest, setting aside a prior decision of the NMa. Article 2 of the Temporary Act explicitly deviates from this. Therefore, the procedure is quick and simple. If there is a transgression, the concentration may not take place. In the unlikely event that parties would carry out the concentration anyway, they can be punished by the NMa. After a negative decision the only remedy is a judicial appeal.

However, the maximum market shares in the Temporary Act are not the only relevant provisions. As mentioned above, the Temporary Act is implemented concurrently with the Competition Act. When the NMa decides – after a notification – that the concentration is not against the Temporary Act, it simultaneously decides whether or not a licensing procedure must follow.<sup>50</sup> The concentration can still be prohibited. There can be specific reasons why competition in the user market is threatened, although there is no transgression of the maximum market shares. Furthermore, the NMa must look at other markets than the user markets alone. Also relevant are the markets for advertising and the production of television programmes, which are not mentioned in the Temporary Act.

Not every media concentration needs to be notified. It is possible that the joint annual turnover of the undertakings involved is less than € 113,450,000 or that less than two of the participants have an annual turnover in the Netherlands of more than € 30 million. Then, the concentration is not

<sup>47</sup> Art. 3, subsection 1, of the Temporary Act.

<sup>48</sup> Explanatory Memorandum to the Temporary Act on Media Concentrations, *Kamerstukken II 2006/07*, 30921, No. 3, p. 4.

<sup>49</sup> See 4.1 above.

<sup>50</sup> Art. 3, subsection 2, of the Temporary Act.

large enough according to Article 29 of the Competition Act. However, the Temporary Act remains relevant. For example, a big newspaper concern, that has grown autonomously to 35% of the user market, wants to buy a small local paper in order to extend its market share even further. The turnover of the local paper might be under € 30 million, so that a notification is not necessary. On the other hand, the concentration violates Article 2 of the Temporary Act, because the joint market share is over 35%. In this case the NMa can only intervene afterwards by imposing a fine or giving a coercive order. Before doing so, the NMa will consult the *Commissariaat voor de Media*, just like in prior control cases. According to the Explanatory Memorandum to the Temporary Act, competitors could also start a civil lawsuit against the offenders. Their claim would be that the illegal acquisition is damaging to their financial interests.<sup>51</sup>

## 5.2. Working with the European Commission

Media concentrations with a Community dimension – very large, multinational concentrations – must be notified to the European Commission by virtue of the EU Merger Regulation of 2004.<sup>52</sup> The Commission examines whether the concentration would significantly impede effective competition in the common market or in a substantial part of it (Article 2 Merger Regulation). Article 21 of the Regulation makes clear that the Commission has sole jurisdiction. No Member State shall apply its national legislation on competition to any concentration that has a Community dimension. However, Article 21, paragraph 4, of the Regulation adds:

4. Notwithstanding paragraphs 2 and 3, Member States may take appropriate measures to protect legitimate interests other than those taken into consideration by this Regulation and compatible with the general principles and other provisions of Community law.  
Public security, plurality of the media and prudential rules shall be regarded as legitimate interests within the meaning of the first subparagraph.  
(...)

The Temporary Act on Media Concentrations qualifies as an ‘appropriate measure to protect plurality of the media’. After consulting the media watchdog *Commissariaat voor de Media*, the NMa decides whether or not a concentration violates the Temporary Act. In order to prevent a situation in which the European Commission says yes and the NMa must say no, both authorities closely work together. One option is that the European Commission decides to refer a European notification in its entirety to the

<sup>51</sup> *Kamerstukken II 2006/07, 30921, No. 3, p. 5.*

<sup>52</sup> Council Regulation (EC) No. 139/2004 of 20 January 2004, *OJ 2004, L 24, p. 1-22.* See 4.1 above.

NMa. Such a referral is allowed by Article 9 of the Merger Regulation under certain conditions.

### 5.3. *Other Rules Promoting Plurality*

In many European countries, State aid for public broadcasting is a matter of heated discussions. On the one hand, public funding is good for plurality. It enables public broadcasters to transmit programmes that would have no chance in a commercial environment, because of their high costs or because they attract a small audience only. On the other, State aid can harm plurality as well. Newspapers and private broadcasters in the Netherlands have been complaining since ages that they suffer from unfair competition. The stumbling-stone is the combination of government subsidies and the right of public broadcasters to sell advertising time. The subsidies are allegedly too generous, because they are not limited to costly high-brow programmes or programmes for minorities, but are spent for football and amusement as well. In 2006, the European Commission decided that the Netherlands had violated EU law, because the financing failed to comply with the principle of proportionality.<sup>53</sup> The government and the public broadcasters have appealed to the Court of First Instance. These cases are still pending.<sup>54</sup>

Meanwhile, the Commission has updated its State aid policy regarding public broadcasting.<sup>55</sup> One of the issues the Commission has dealt with is the question whether public broadcasters may use public subsidies for interactive media services, such as video on demand. In the Netherlands, political parties disagree on this subject. An expert committee, advising the government on the future of the press, submitted in 2009 that newspapers must find new ways to earn money with internet services.<sup>56</sup> The problem is that public broadcasters make websites too. Consumers will not pay for news if they can get the same information elsewhere for free. A solution might be to allow newspapers to re-use video items that public broadcasters have published on the internet. This requires an amendment of the Media Act. Up to now, public broadcasters are forbidden to make joint ventures with commercial undertakings. However, one could argue that newspapers fulfil a public function, just like public broadcasters do. From this point of view, allowing joint ventures between public broadcasters and newspapers seems acceptable.

In November 2009, it became clear that private broadcasters do not like this idea at all. In their view, a new distortion of competition threatens. Private broadcasters also provide news and current events. So, why should only newspapers be given the privilege of getting video material from the

<sup>53</sup> Commission Decision 22 June 2006, *OJ* 2008, L 49, p. 1.

<sup>54</sup> Cases T-231/06 and T-237/06, *Kingdom of the Netherlands and NOS v. Commission*.

<sup>55</sup> Communication from the Commission on the application of State aid rules to public service broadcasting, published 27 October 2009, *OJ* 2009, C 257, p. 1-14.

<sup>56</sup> Tijdelijke Commissie Innovatie en Toekomst Pers 2009.

public broadcasters? Their lobby has succeeded in gaining support in parliament. A motion was introduced by the liberal party stating that is 'undesirable that cooperation between public broadcasters and the printed press causes an unlevel playing field for private broadcasters'. The motion contains an urgent request to the government to consult all relevant parties – including private broadcasters – and keep parliament informed.<sup>57</sup> Although the minister of Cultural Affairs advised against the motion, it was adopted on 8 December 2009.<sup>58</sup> In theory, the government could ignore the request, but that would harm its relations with parliament. Therefore, one expects the government to start consultations in 2010, which can take a while.

## 6. Practical Experiences

### 6.1. *The Case RTL/Veronica/Endemol*

RTL, Veronica and Endemol intended to create a joint company 'Holland Media Groep' in 1995. RTL was a Luxembourg-based private broadcaster. Veronica was a broadcaster in the Netherlands with a colourful history. First it had been a pirate radio station, transmitting from a ship in the North Sea. In 1976 – when the government policy against pirate stations tightened – Veronica had entered the public broadcasting system, but it never concealed its commercial ambitions. Endemol was a production company, specialized in glamorous television shows. The plan was that 'Holland Media Groep' would transmit radio and television programmes from Luxembourg to the Netherlands in particular. In 4.1, we have seen that the concentration was examined by the European Commission after a request by the Dutch government under Article 22 of the Merger Regulation.<sup>59</sup> The case reveals that there can be a tension between competition law and freedom of speech. After deciding in 1995 that the concentration could not be approved immediately, the Commission imposed a number of remedies in 1996. One of these included that one of three intended television stations – RTL5 – must be dedicated to 'news'.

Arguably, it is a restriction of freedom of speech to tell a person what kind of programmes he must or may not transmit. In this case, the restriction was not too serious. The commitment to make RTL5 a news-station was voluntarily agreed to by the parties concerned. However, the maxim *volenti non fit iniuria* should not be used too easily. If an adult person voluntarily participates in a boxing game and subsequently gets a punch on his nose, of course he cannot complain about maltreatment. That is all in the game. But

<sup>57</sup> *Kamerstukken II* 2009/10, 32123-VIII, No. 76.

<sup>58</sup> *Kamerstukken II* 2009/10, 32123-VIII, No. 93, p. 51. *Handelingen II* 8 December 2009, p. 3263.

<sup>59</sup> Commission Decision 96/346/EC of 20 September 1995, *OJ* 1996, L 134, p. 32-52, followed by Commission Decision 96/649/EC of 17 July 1996, *OJ* 1996, L 294, p. 14-17.

how about a prisoner agreeing to medical experiments on his body in exchange for a sentence reduction? In the Netherlands, that would be totally unacceptable. Such a prisoner is no real ‘volunteer’, because if he refuses he will have to stay in prison. This is not to say that media companies are comparable to prisoners and competition authorities to evil doctors, but freedom of choice depends on the context. Therefore, it is important to look at the precise content of the commitments. Prescribing a format of news and current events is acceptable, prescribing support for a political opinion is not.

## 6.2. *The Wegener Case*

In 1999, Wegener notified an intended take-over of VNU Dagbladen to the *Nederlandse mededingingautoriteit* (NMa). Wegener was the owner of 16 regional newspapers and 130 local magazines in the Netherlands. VNU Dagbladen owned 5 regional newspapers and 70 local magazines. The Temporary Act on Media Concentrations did not yet exist, so the only relevant legal background was the Competition Act of 1997. One element that worried the NMa, was that in the region Zeeuws-Vlaanderen competition would vanish. Before the take-over, there were two newspapers that covered Zeeuws-Vlaanderen: the Provinciale Zeeuwse Courant of Wegener and BN/De Stem of VNU Dagbladen. The NMa decided to allow the concentration on condition that both newspapers should remain separate and that they should keep covering the region of Zeeuws-Vlaanderen.

Wegener appealed against this condition, first to the Court of Rotterdam and subsequently to the College van Beroep voor het bedrijfsleven (Trade and Industry Appeals Tribunal). The key issue was whether the NMa had violated freedom of speech by interfering with editorial choices. In 2001, the College van Beroep voor het bedrijfsleven decided that there had indeed been a violation of Article 7 of the Constitution (freedom of speech).<sup>60</sup> However, the tribunal added that it would not have been against the Constitution to oblige Wegener to distribute both newspapers in Zeeuws-Vlaanderen. Determining where a newspaper has to be distributed is different from determining its content, so the tribunal considered. This reasoning shows little understanding for economic reality. It is easy to say that an obligation to distribute a newspaper somewhere does not touch upon its content. Economic reality, however, dictates that a regional newspaper cannot effectively be sold in a region that gets no editorial attention. Therefore, the obligation to distribute a newspaper in a particular region is practically the same as an obligation to cover this region from a journalistic perspective. On the other hand, it is clear that the core values of freedom of speech were not at stake in this case.

<sup>60</sup> See footnote 10 above.

### 6.3. *The Trauma of Apex*

In the Netherlands, there are 5 paid national newspapers: De Telegraaf, Volkskrant, NRC-Handelsblad, AD and Trouw. In addition, there are 3 free national papers, 5 special interest papers (including two for orthodox Christians) and more than 20 regional papers. In 2004, four of the five paid national newspapers were in one hand: PCM (Perscombinatie Meulenhoff) that also owned several regional papers and a book publishing-house. Only De Telegraaf had its own company. The shares of PCM were owned by non-profit organizations, whereas shares of De Telegraaf could be bought on the stock market, as they still can today. In the years before 2004, PCM found it increasingly difficult to lend money for necessary investments. That is why the non-profit owners of PCM decided to sell a majority of their shares to a British private equity fund, called 'Apex'. This proved to be a mistake. The costs of the take-over by Apex were transferred to PCM itself and three years later the financial situation was worse than before the operation took place. In 2007, one of the original share-holders bought back the shares of the impoverished PCM.

In 2008, the prospects of PCM deteriorated further, due to falling advertising income and the global credit crisis. The only solution was to sell 51% of the shares to a Belgian newspaper company, De Persgroep. The NMa agreed on condition that NRC-Handelsblad must be sold to a third party. This happened in December 2009. The new owners of NRC-Handelsblad are Dutch: a family investment fund (Egeria) and a small private broadcaster (Het Gesprek).<sup>61</sup> The Apex-period is considered as a traumatic experience. The general feeling is, that it is all right to sell newspapers to a foreign company, such as the Belgian Persgroep, but preferably not to private equity funds, aiming at short term profits, such as Apex.

## 7. **Prospects and Improvements**

'Prediction is very difficult, especially if it's about the future', Niels Bohr once said. However, a few observations can be made about the prospects for the Temporary Act on Media Concentrations.

First, the enthusiasm for specific anti-concentration measures in the media sector has diminished. The parliamentary debate on 30 November 2009, mentioned in the introduction, shows this. A maximum market share for newspapers of 35% in the user market was felt to be too restrictive. It is better to allow one media company to have a larger share, than forcing a sale of newspapers to a short-term investor. The memory of Apex still hurts. Furthermore, the 90% rule for the combined markets of radio, television and newspapers, seems to be superfluous. All multi-media concentrations since 2007 remained far away from this maximum. In all likelihood, the Temporary

<sup>61</sup> <[www.stdem.org/geschiedenis](http://www.stdem.org/geschiedenis)>.

Act on Media Concentrations will end on 1 January 2012. General competition law will suffice. Plurality of opinion can better be promoted in other ways. Requirements of internal plurality and financial support for public services seem more suitable. Only one element of the Temporary Act has proved to be valuable: the yearly Media Monitor of the Commissariaat voor de Media. This is a useful source of information for the general competition authority NMa.

Second, technology is changing rapidly. The phenomenon of papers printed with ink will lose ground. Today, publishers already offer the option that consumers do not receive tangible papers, but only a digital edition. The rise of mobile internet (through 'netbooks', 'I-pads' etc.) will accelerate this development. This makes it harder to define the relevant market. Maybe the criterion of circulation must be replaced by 'viewing time', which is the relevant criterion for television. However, the Commissariaat voor de Media already finds it difficult to determine which television programmes must be taken into account. Language is a starting point, but some television programmes in Dutch are specifically meant for Belgium and some programmes in another language are nevertheless meant for people in the Netherlands (Turkish, Arab or Frisian). The problems will increase when the borderlines between traditional television and video on demand fade away. If there is no real difference anymore, it is hard to justify why the Temporary Act should only regulate the user market for traditional television.

A final question is which role the European Union should play. Should there be European anti-concentration regulation instead of national rules? In a Resolution of 25 September 2008, the European Parliament was cautiously sympathetic towards this idea. The Resolution calls on the Commission 'to ascertain by means of consultative procedures whether minimal guidelines or sector-specific regulation are needed to safeguard media pluralism'.<sup>62</sup> However, Member States are inclined to stress that the protection of media pluralism is primarily a task for themselves. The Netherlands are no different. In particular, when the organization of public broadcasting is concerned, the Dutch are strongly attached to their own solutions.

<sup>62</sup> European Parliament resolution of 25 September 2008 on concentration and pluralism in the media in the European Union, *OJ* 2008, C 8E, p. 85-94.

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