

THE DUTCH AUDIOVISUAL LANDSCAPE: An Interesting European Case
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Early history

Radio broadcasting started as an amateur movement in the early twenties in the United States and in Europe. Amateurs built their own crystal transmitters and took free rides through the 'aether' waves like Internet 'surfers' nowadays cross the worldwide telecommunications infrastructure without apparent aim or purpose. In The Netherlands the first radio programme was broadcasted as early as 1919 by a man called Hanso Steringa Idzerda who owned a company named Netherlands Radio Industry which manufactured wireless transmitters. This kicked off a series of music programmes that acquired some renown in the UK as the 'Dutch Concerts', later to be followed by a station which broadcasted stock exchange news. Radio reached the general public when in 1923 the *Nederlandse Seintoestellen Fabriek* (The Dutch Transmitting Equipment Factory) started broadcasting popular music programmes from the small town of Hilversum (still the seat of the Broadcasting Organizations). This was a commercial station, sponsored by large Dutch companies such as Philips (one of the major sponsors providing free of charge the costly transmitters with nation wide reach; Philips would also play an important role later on when television was introduced in The Netherlands in order to promote the sale of tv sets).

In most European countries broadcasting was institutionalized in the twenties by means of independent public service organizations or entities fully controlled by the State. This institutionalization process placed broadcasting in Europe in a political non-commercial environment. In this period the license fee was invented: each member of the public who became the owner of a receiver set paid an annual fee in exchange of which he was entitled to listen to the programmes broadcasted by the national broadcasters. In The Netherlands the institutionalization process took a different turn. The Netherlands were at the time an ideologically divided country. The political and religious differences did, however, not lead to open confrontations because of the rigorous segmentation of society into protestant-calvinistic, catholic, conservative and socialist organizations for each and every part of social and cultural life. This so-called *pillar* system was kept together by the ingenious balance mechanism of the *pacification*: ideological disputes were settled at the top between the spiritual leaders at their regular meetings and written down in political compromises. The pacified pillar system was also used in broadcasting. The new phenomenon of broadcasting was contemplated in religious circles with moral abhorrence and caused a general reaction that things should be kept under control (as today is the case with Internet). Each pillar reacted with the formation of its own non-commercial organization. In 1924 the Netherlands Christian Radio Association (NCRV) organized its first radio evening "in order to put the beautiful invention of radio at the service of the Lord". One year later the Catholic Radio Organization (KRO) sent its first prayer out in the air. This organization was a response to the socialist organization which in the same year under the name `Association for Workers Radio Amateurs (VARA) had brought together losely organized socialist radio amateurs. In 1927 the organization was formally linked tot the Dutch Labour Party. The groups around the first commercial initiatives had created in 1927 their own organization, 'The General Radio Association (AVRO)', which proclaimed to be the sole

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national broadcaster, a claim rejected by NCRV, KRO and VARA. The controversy about who was entitled to be the national public broadcaster was to remain a striking feature of the Dutch system.

In 1930 the system was 'pacified' by the Radio Decree of 1930 assigning to the large organizations an equal amount of air time. VARA, KRO, NCRV and AVRO (which was to become the liberal pillar in this cloud) were the large concessionaries. A smaller liberal protestant organization (the Free Protestant Broadcasting Organization, VPRO) was admitted with less air time. Each organization issued its own Radio Guide which, apart from offering the programme listings of all organizations, was meant to establish a bond between the members and the organization. The number of subscriber-members of the association provided a yard stick for the amount of airtime to be assigned to an organization. The system was financed by contributions of the members (it was not until 1941, during the German occupation, that the license fee was introduced in the Netherlands). Each organization represented one of the ideological main streams of society, the collectivity of the organizations formed the national broadcasting organization: together they had to offer a public service to the public at large.

The pacification of 1930 laid down the main characteristics of the system which remains more or less intact even up to our times.

What are the advantages and disadvantages of the system compared to other European systems? Let me look at the advantages first.

The system has a high democratic quality because of what we call its *external pluralism*. The management of the organization is appointed by the associations, independent of the ruling majorities in Parliament. The threat of central control is one of the recurring issues in the debate about the proper charter for public broadcasting organizations. For the same reason the different political views in society are expressed more clearly in an external pluralistic system, because each subjective vision is automatically counterbalanced by another vision at the same time on a different channel or at a different time on the same channel. This often works out better than the self imposed objectivity of a centralized public broadcasting which, in one single organization, has to reflect and express all the existing pluralistic forces of society.

In the beginning of radio (and later television) the supply structure of the market was monopolistic, leaving the public not much choice. The external pluralistic system created competition from the outset. The public could choose its own organization and programmes. Broadcasting in The Netherlands was in the beginning a sort of *club good*. The broadcasters made programmes for the members of the club who were willing to contribute financially to *their* organizations. This competition for audiences within a monopolistic public framework certainly helped to improve the quality of the programmes.

The disadvantages originate from the pluralistic structure. External pluralism works for political viewpoints, less for culture and education, and not for entertainment. Radio, and even more so television developed into a massmedium. What was the use of having several organizations producing entertainment programmes for the general public? What was worse: the system became inefficient. In the sixties attempts were made to create an umbrella organization that would produce programmes of common and national interest (news, sports, arts, etc.), the so called Netherlands Broadcasting Organization (NOS). But the NOS was confronted with the pretensions of the broadcasting organizations which claimed that in fact *they together* were the public broadcasters. The Board of the NOS was composed in part of members appointed by the Crown, but also (and in majority) of representatives of the broadcasting organizations. That made the NOS an instrument in the hands of the broadcasting organizations, which prevented its development into a real national institution like the BBC or the ARD.

The fatal flaw in the system, however, is its diminishing grip on the public as members of clubs.

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The audience of the society in the time of 'the end of ideology' has become a general audience zapping its way through an ever increasing supply of entertainment programmes and no longer interested in the identification with a certain organization but only in the 'branding' of channels. A system of channel sharing on the basis of the identity of the organization cannot produce a programme output based on the brand of a channel. This has two major consequences: Firstly, public broadcasters competing with each other cannot compete with the market and secondly, and more important, the yard stick to measure the amount of airtime a broadcaster is entitled to became entirely fictitious. Members were subscribers to programme guides and nothing more. Can one find a system of external pluralism on a fiction? The answer is 'no' and it explains why since the eighties the system finds itself in an awkward position.²

The confrontation of the market model and the political model

One of the fascinating themes of the history of European broadcasting is the fact that at a certain moment it became embedded in the political structure keeping market forces out as much as possible. The Netherlands form an interesting case in point. In the early sixties Parliament debated the possibility of allowing commercial organizations, such as the press, to start commercial broadcasting along with the public broadcasters. However, the still existing power structure of the pillars still worked. The result of the debate was that the system remained more or less the same, but that commercial elements were introduced by allowing commercial advertising. The time available for advertising was fixed by the government and assigned to an organization called the Foundation for Aether Advertising (STER) which exploited the advertisements on behalf of all the public organizations. Since then, the funding system became a mixed one: partly out of the license fees, partly out of the income of advertising. This commercial force built into the system became stronger and stronger, because it resulted in a way of programming similar to commercial broadcasters who aim at selling large audiences to advertisers.

The strict policies of The Netherlands in respect of advertising induced increasing dissatisfactions of a new generation of young radio makers who felt affinity for the new Pop Culture. They looked for ways to start Pop radio stations entirely funded by advertising. The booming market, new transmitting technologies and the reluctance of the government to offer alternatives for commercial organizations, created a climate for initiatives that sought to circumvent the national authorities. It was the time of the radio pirates who anchored ships in the North Sea with strong radio transmitters aboard which covered the entire national territory. One of the most famous was Radio Veronica. It created an entire new format of programming and formed a generation of discjockeys who are still active in commercial broadcasting these days. The ratification and implementation of the Treaty of the Council of Europe for the Prevention of Broadcasting by Stations outside National Territory in 1969 brought this wild era to an end. Radio Veronica was literally forced to come ashore.

Veronica took advantage of the open system of external pluralism. It created in a short time a broadcasting organization which won wide support amongst the young Pop generation. Its famous slogan was 'You are Young and you want Something!' Veronica also profited from its underdog image as a popular radio station that had been taken away from the public by the

² Cfr. E.J. Dommering, 'La Représentation des tendances philosophiques à la Nos et la crise du système Néerlandais', in: *F. Jongen (ed.) Médias et Service Public* (Brussels 1992), 165-175.

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police force of the State. So it was 'legalized' and became one of the broadcasting organizations funded by the government on the same footing as the other organizations and obtaining the same amount of airtime. Earlier, a similar initiative taken by a different organization, called the TROS, had had succes. Like Veronica, the TROS had no particular ideological roots in Dutch society. In hindsight it can be observed that the openness of the system enabled the 'internalization' of new societal trends into the old pillar structure. At the same time, by doing so, it incorporated new antagonistic forces in the system. In essence, Veronica and TROS were in favour of a more entertaining sort of programming in the way the American commercial broadcasters had already done for years. Their attitude added new commercial elements to the already commercializing public service.

Technology and the market take command: the EC Treaty embraces broadcasting as a transfrontier service.

In the seventies the Dutch developed a feature of their broadcasting system which put it ahead of other European countries. Earlier than in other countries cable reached a high penetration grade. At the beginning of the eighties nearly 80 % of the households were connected to a local cable system, in nearly all of the cases owned by the municipalities. This advance in cable technology made the Dutch system an interesting testcase for the application of European law.

The cable introduced a new form of competition in the landscape. The first generation of cable systems had a capacity to carry 6-12 programmes. Cable could be used for the production of local programmes and the carrying of broadcasts over the air. The government feared that this new infrastructure could be used for the development of services competing with the public broadcasters. Therefore it regulated cable to the effect that only licensed new services would be allowed access. The broadcasts transmitted by air and received and distributed by cable were less regulated, because supply was still confined to the national and foreign broadcasts. The Media Act created a 'must carry' rule in respect of the national public broadcasters and left it to the discretion of the cable operators which foreign broadcasts they would choose to distribute. In practice this meant the carrying of the public broadcasters from the UK, Belgium and Germany.

The picture changed dramatically when private satellite organizations like SES started to operate medium power satellites for broadcasting services. These new infrastructure attracted commercial broadcasters who were interested to offer pan-European services, such as CLT, Eurosport, BSkyB, Discovery, MTV, etcetera. Faced with this new competition the Dutch government decided that services that would compete for Dutch advertising on the Dutch market would not be allowed access to the cable. These measures led to a couple of court cases in which European Law played a major role.

The first case became the later well known decision of the European Court of Justice in the case of *Bond van Adverteerders* (League of Advertisers).³ The government had prohibited to carry on cable broadcasting programmes from abroad aimed at the Dutch audience, which was presumed to be the case if the programmes had Dutch subtitles or were spoken in Dutch. The Court first established which were the relevant facts to qualify a service as a transborder service. It distinguished ('at least') two intertwined transborder services: the carrying service of the cable operator offered to the satellite operator and the programme provider, and the advertising

³ Case 352/85 ECJ 26 April 1988 ECR 1988, 2124.

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service offered by the programme provider to the Dutch advertisers. The measure itself was turned down on the ground that it was discriminatory because the Dutch broadcasters were allowed to sell commercial airtime through the intermediary of the STER. One could not prevent a European broadcaster from doing the same.

The second case was not brought before the European Court but decided on the national level. It had, however, strong European connotations. The Luxembourg based CLT started with the cooperation of Dutch producers a broadcasting service aimed solely at the Dutch audience, like it had done earlier in Germany with RTL-Plus. The national broadcasters contended that this was not a 'real' Luxembourg service but a U-turn operation by the Dutch producers in order to circumvent Dutch legislation which prohibited commercial broadcasting. The Council of State (acting in its capacity as a High Administrative Court) held that the most important criterium to locate the seat of a broadcaster was the jurisdiction of the State where the programme was made available to the general public. Taking into account that the broadcaster worked under the license of CLT (the broadcaster of RTL programmes in Germany, France and Belgium) and given the fact that CLT had to account for the content of the programme towards the Luxembourg media authorities, the broadcasting service was, in the opinion of the court, a real transborder service. The case was a forebode of the discussions that took place afterwards about jurisdictional issues, culminating in the Court decisions in 1996 that laid down criteria to establish national jurisdiction over broadcasters.⁴ The case had a strange aftermath in what has become known as the case Veronique. The Veronica broadcasting organization assisted financially and otherwise with respect to the foundation of the Luxembourg television station which in the beginning even used the name *Veronique*. The Commissioner for the Media contended that by doing so it had breached its obligations as a public broadcaster and the Commissioner imposed a heavy fine. Veronica argued that it was free to invest its money in a commercial station and in that respect invoked the freedom of capital movement. The European Court, however, ruled that the restrictions imposed on Veronica as a public broadcaster were justified in the light of the Treaty.⁵

The fourth case pended before the European Court when the second took place at the national level. The issues were similar to the ones in the first case. It concerned a new obstacle the government had thought out after the first one did not hold. Now the foreign broadcaster was allowed to advertise on the Dutch market, provided its organization of the exploitation was analogous to the centralized construction of the STER used in The Netherlands. In fact, the new legislation imposed national license obligations on the broadcaster who had already obtained a license in a member State, which is contrary to the principle of *home control*. The Dutch government justified this impediment of the free circulation of services in the light of the general interests involved in national media and culture policies: the institutional requirements in the field of advertising were necessary to maintain the pluralistic non commercial character of the system. The European Court of Justice accepted in theory the justification defended by the Dutch government, referring to the case law of the European Court of Human Rights in Strasbourg as part of the body of European law that formed the framework for the Court of Justice within which it had to apply the Treaty of the Union. 'In theory', because in fact it considered the measure disproportionate to the aim pursued.⁶

⁴ Cases 222/94 and 11/95, ECJ 10 September 1996, not yet reported.

⁵ Case C 148/91 ECR 1993, I-4097.

⁶ Cases 288/89 and 353/89, 25 July 1991, ECR I 1991, 4088.

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The Dutch system used to be open on a national level to any party who complied with the rules of external pluralism and who was able to obtain sufficient support of the public. When it was confronted with influences from abroad it reacted smoothly as long as the competitors were public broadcasters and spoke foreign languages. That changed when commercial competition on the Dutch market could no longer be prevented. The strong defensive reactions to this threat were tested against principles of freedom of services. The confrontation between the politics and the market, which was so victorious for the first on the national battle field, ended in a defeat on the European level.

The present situation

Competition in the cable market

After CLT had successfully started a RTL programme in the Netherlands by means of satellite and cable services, the Dutch government could no longer prevent commercial broadcasting in the country itself. Shortly afterwards the law was changed and a flexible license regime was introduced, allowing Dutch commercial broadcasters entry without limitation to the cable (in 1996 with a coverage of about 90 percent), first on the national level, and, since 1996, on the regional level as well. Today (in 1996) approximately seven national Dutch speaking commercial tv channels and three public channels compete on cable for audiences. And competition is tough. The public broadcasters fell back to a share of about 40 percent of the audience (over the last five years it used to be more than fifty percent). RTL, still market leader among the commercial broadcasters, for the first time saw its share decrease. In addition there is an increasing market for satellite dishes.

The football rights

The year of 1996 brought a more dramatic show down between the public broadcasters and the commercial broadcasters when the contract about the transmissions rights between the public broadcasters and the National Football League expired. The League organized a beauty contest between the public and private broadcasters and sold the rights to a new station Sport 7, a consortium formed by the national Telecom operator, Philips, one of the major national banks (ING), the largest tv producers (ENDEMOL, also active in Spain) and a national newspaper. The rights were sold for seven years (a time period which is at the moment of the writing of this paper is still under review by DG IV, because of possible anti-competitive effects) for the price of more than one billion Dutch guilders (one of the highest in Europe), a price the public broadcasters could not afford. This made a cruel end to the quiet life of the duopoly of the national broadcasters and the national League. In this fight about the sportrights The Netherlands followed the trend of what took place in the UK, Germany, Italy and Spain. As has been the case in those countries legal questions have been raised about the status of exclusive transmission rights of football games: who owns them (the clubs or the League) and what is the scope of competition law in this field (can the League trade them collectively)?⁷ What every-

⁷ Cfr. Decisions of the Commission, 93/403/EC, 11 June 1993 (ERU/Eurovision), OJ 22.7.1993, L 179/23; 91/130/EC, 19 February 1991 (Screensport/EBU), OJ 9.3.1991, L 63/32.

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body took for granted in the time of the quiet life of the duopoly becomes subject of legal debate once big money is at stake. At the time of the writing of this paper three procedures were pending in Court, and two complaints were brought to the attention of the Competition Authorities in Brussels and The Netherlands.

New issues of access

In the political model legal doctrine concentrated on public broadcasting as the only way to obtain access to the public at large. The only telecommunications infrastructure available for broadcasting was the aether. This has changed fundamentally.

In The Netherlands we observe a shift in emphasis from the traditional 'gate' kept by the public broadcasters to the new entrance gates: the combination of satellite and cable, especially the cable. Cable systems used to be in the hands of the municipalities that developed a sort of local and regional media policy with respect to issues of access. Recently a wave of privatization rolled through the country.⁸ Cable operators became private enterprises, in stead of public utilities offering carrying services to the public broadcasters like electricity, gas and water, but entrepreneurs offering selective priced attractive packages of programmes to a consumer public that makes its own choice. Here again we see a conflict between the traditional political model and the market model. Should we apply political or economic criteria to make a choice between the available programme providers? Is it the Competition Authority or the Commissioner of the Media that should monitor the use and abuse of the local dominant position of the (private) cable operators? The first Authority has a set of references based on the economics of the market, the second one has a political background.⁹

The democratic-political criteria to select possible candidates for the use of the aether are no longer valid in a competitive market, at least need an adjustment with economic criteria. This became especially apparent in the market of radio broadcasters. The Dutch government was forced by the National Court on the basis of European law to allow access to the aether to commercial radio broadcasters. The first beauty contest between the commercial candidates was turned down by the Court because the government did not clarify sufficiently why the government applied cultural rather than economical criteria. The clash between the political and commercial model manifested itself in this case on the threshold of a gate traditionally held by the public broadcasters. The government changed its policy after the Court decision. At the time of the writing of this paper the government proposed to Parliament to auction the aether, that is to say: to auction part of it for commercial broadcasting purposes. This introduces an entirely new element in the thinking about broadcasting.

Why public funding of the public broadcasters and, if so, how?

Why do we pay public broadcasters out of public funds? This is the overriding question all over Europe. The general public is not as dedicated any more to public broadcasters as it used to be in a more monopolistic environment. It seeks entertainment, sports and news, and it can find its

⁸ See also the contribution of Dr Nico van Eijk in this book.

⁹ See also the contribution of Dr Wouter Hins in this book.

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choice everywhere in commercial programmes. This reopens the debate on the justification of the funding of the public broadcasters. Is it still a 'basic service' ('Grundversorgung' as they call it in Germany)? But how could it be so if the majority of the audience fulfills its 'basic needs' with commercial programmes. Are they fulfilling the wrong needs and does a paternalistic government come to rescue them? This 'basic service' idea seems rather out of the way. In my view, there is still a justification for a public service as a vehicle and stimulator of the democratic debate in an open society. Government could also use the public service as an instrument in its cultural politics. This puts the public service in a more modest position. It requires also that the public service will be stripped of all commercial elements.

Public broadcasters have been funded by the license fee all over Europe. The arguments for creating this system have been lost in history and new ones were invented. Historically this way of funding has to do with the scarcity of receiver sets. Only those who could afford a receiver set had to pay for the service. This argument is out dated because nowadays everybody owns a receiver. A more sophisticated argument draws from economic theory. In this view broadcasting is considered to be a public good, because once a programme has been broadcasted its use by one person does not exclude the use by others.¹⁰ We need, therefore, a fiscal instrument to avoid the 'free rider' who takes advantage of a facility he does not has to pay for. It is questionable whether the argument is still valid, because by the present state of the art the use of a programme by one can be excluded from the use by another. This can be achieved by encryption and decoder techniques. Another refutation of this public good argument is the fact that the broadcasts can be produced out of the income of advertising, a resource also available to the public broadcasters. A last argument often used in favour of the license fee is that it is a safeguard for more independency of the broadcasters, because they are not dependent on the whims of day to day politics. The license fee fund is a permanent resource of the public broadcasters. The argument is not convincing anymore because all cultural institutions that are subsidized by the state find the protection of their independency in the constitutional framework of the democratic society, rather than in a seperate public fund.

These issues are raised everywhere in Europe, but also on Community level several complaints against the license fee have been brought to the attention of the Commision, and also to the Court of First Instance.¹¹

¹⁰ Cfr. Ejan Mackaay, An Economic View of Information Law, in: Willem F. Korthals Altes and others (eds.) *Information Law Towards the 21st Century* (Deventer/Boston 1992), at 48.

¹¹ Court of First Instance, cases T-17/96 (Télévision Française) and T-95/96 (Gestevision Telecinco SA).

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Regulating a dual system

The regulation of broadcasting has entered a new era. The EC Directive on Transfrontier Television leaves it to the discretion of the Member States to lay down stricter rules for national broadcasters than those in the Directive. Although it sounds logical that public broadcasters should obey stricter rules for advertising and sponsoring, the every day practice of regulating is that there is a tendency to apply the same rules to both the public broadcasters and the market. This at least is the case in The Netherlands. In fact the dynamic forces of the market create an environment in which the public and commercial broadcasters are approaching each other. Commercial broadcasters in the Netherlands, however, are not satisfied with the situation. It is not unlikely that this will cause new tensions in the near future.

The Dutch case revisited

As I have briefly sketched in the foregoing the Dutch system was 'broken up' from the outside and had to introduce commercial broadcasting on the national level afterwards. Subsequently, all old paradigms of broadcasting law had to be abandoned. But what happened with the public broadcasters themselves?

The present socialist-liberal coalition put the broadcasting issue again on the agenda. The target was to reform the highly inefficient public broadcasters, consisting of many organizations divided within themselves, losing audience every year. But the problem remained the same. Who is the successor in title of the public service? Is this the umbrella organization (the NOS) or are these the old associations minus Veronica which in the mean time joined forces with the 'enemy' and became one of the Dutch channels of the RTL group (adding a third channel to this group, called Holland Media Group, existing of CLT, a large Dutch publisher, VNU and Veronica, and thus creating a dominant position on the advertising market)?¹² The former pillars still have an important stake in the market of programme guides, but that does not mean that the subscribers are still part of the 'club'. Uptil the moment of the writing of this paper the government did not propose to disregard them all together. It proposed to create one new organization, not unlike the BBC, but to preserve at the same time the rudiments of the external pluralism by giving the old broadcasting organizations a privileged position as producers of a guaranteed amount of the programmes. The privileged position should be justified, like in the past, by the support the organizations still receive from the members. The support could be periodically measured.

No observer (like myself) believes that this new compromise will work. Of course the old broadcasting organizations are fiercely opposed. They use in the debate invectives like 'expropriation' and 'state television'. In a more balanced way one could describe the compromise as an attempt to finish a retarded process of institutionalization of the public service that has taken place so much earlier in Europe.

The Netherlands has to make two transformations in one strike. It has to transform its system of external pluralism into one of internal pluralism and it has to redefine the role of the public service in a new technological, societal and economical environment. The latter transformation is the European issue.

¹² See Decision of the Commission in the case of the Holland Media Group, case IV/M 553-RTL/Veronica/Endemol, OJ 19.11.1996, L 294/14.

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The 'double' transformation is a complicated process and will certainly be on the agenda of the next government (1998). In fact, broadcasting has never been off the political agenda since it was invented.