

TELECOMMUNICATIONS LAWS OF THE WORLD

Netherlands



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OVERVIEW OF LEGAL LANDSCAPE

Subject to certain exemptions (mostly concerning the use of the radio spectrum and frequencies), communication providers have general authorisation to operate in the Netherlands and do not require a licence, permit, consent etc. There is, however, an obligation to register with the Dutch telecoms regulator; the *Autoriteit Consument & Markt* (ACM). Details of this obligation to register are provided under Registration/Licencing.

The concept of general authorisation is derived from the European Authorisation Directive which has been implemented in EU Member States.

The roles and responsibilities of ACM, as well as the obligations of communication providers that operate in the Netherlands are codified in the primary telecoms legislation in the Netherlands, known as the *Telecommunicatiewet* (the 'Dutch Telecommunications Act').

KEY TELECOMMUNICATIONS LAWS, REGULATIONS AND POLICIES

The primary legislation governing the telecommunications sector in the Netherlands is the Dutch Telecommunications Act which came into force on 19 October 1998. The Dutch Telecommunications Act has been amended over time in order to implement (successive amendments of) the following European Directives:

- Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services
- Directive 2002/20/EC on the authorisation of electronic communications networks and services
- Directive 2002/19/EC on access to and interconnection of electronic networks and associated facilities
- Directive 2002/22/EC on universal service and user rights
- Directive 2014/61/EU on measures to reduce the cost of deploying high-speed electronic communications networks
- Directive 2018/1972 establishing the European Electronic Communications Code

In addition to the Dutch Telecommunications Act the following legislation may also impact the provision of communication services and the operation of communication networks in the Netherlands:

- Competition Law (both the Dutch Competition Act (*Mededingingswet*) and EU Competition Law)

- Data Protection Law (primarily the Dutch Personal Data Protection Act (*Wet Bescherming Persoonsgegevens*)) which governs the processing of personal data
- Universal Service Decree of 13 June 2014 (*Regeling Universele Dienstverlening en Eindgebruikersbelangen*)

The key features of the Dutch Telecommunications Act are:

- The obligation for communication providers to register with ACM (paragraph 2)
- A regulatory framework for use and leasing of radio spectrum (paragraph 3)
- The regulation and allocation of telephone numbers and the regulation of number retention (paragraph 4)
- A regulatory framework for laying network cables in public grounds (paragraph 5)
- A regulatory framework for access to physical infrastructure (paragraph 5a)
- An obligation for communication providers who control the connectivity to end users to negotiate in good faith with other communication providers (i.e. the principle of interoperability, paragraph 6)
- The power of ACM to set specific conditions relating to interoperability, interconnectivity, universal services, access, privileged suppliers and - most notably - 'significant market power' (SMP). In accordance with the EU directives mentioned above, ACM has a duty to periodically review the telecoms markets recommended for review by the European Commission and where it finds that one or more of the operators have SMP it must impose such a condition on the SMP operator(s) (paragraphs 6a and 6b)
- An obligation to provide end users with clear information on the nature of the services, the most advantageous prices and clear contractual terms as well as several mandatory provisions in relation to consumers such as the right to compensation in case of an outage and the right to terminate a contract after the initial term with a maximum notice period of one month (paragraph 7)
- The principle of universal service; that affordable basic telephony services should be available to everyone (paragraph 9)
- Rules on protecting the end user's privacy and personal data (paragraph 11)
- The ACM's power to hear disputes between communication providers (although referral to ACM does not preclude the bringing of court proceedings), and the access for consumers to a dispute resolution committee (paragraph 12)
- The obligation for communication providers to ensure that the telecommunications services that are offered to end users can be intercepted upon request by the competent authority (paragraph 13)
- The obligation to notify an acquisition of predominant control in a Dutch telecommunications provider which gives rise to relevant influence in the telecommunications sector to the Minister of Economic Affairs and Climate (paragraph 14a)

REGULATORY BODIES OR AUTHORITIES

ACM

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TYPES OF TELECOMMUNICATIONS ACTIVITIES AND/OR PERSONS WHICH ARE SUBJECT TO LEGAL AND REGULATORY REQUIREMENTS

There are two main categories of communication providers for the purposes of the Dutch Telecommunication Act; providers of electronic communication networks (ECNs) and providers of electronic communication services (ECS). The categories are then further sub-divided into public and private providers.

The definitions of electronic communications network and electronic communications service in the Dutch Telecommunications Act are fully in line with the EU Framework Directive (2002/21/EC):

- Electronic communications network: transmission systems and, where applicable, switching or routing equipment and other resources which permits the conveyance of signals by wire, by radio, by optical or by other electromagnetic means, including satellite networks, fixed and mobile terrestrial networks, electricity cable systems, to the extent that they are used for the purpose of transmitting signals, and networks used for radio and television broadcasting, and cable television networks, irrespective of the type of information conveyed
- Electronic communications service: a service normally provided for remuneration which consists wholly or mainly in the conveyance of signals on electronic communications networks, including telecommunications services, interpersonal communications services (e.g. applications like Gmail, Skype and Whatsapp)¹ and transmission services in networks used for broadcasting, but exclude services providing, or exercising editorial control over, content transmitted using electronic communications networks and services; it does not include information society services, as defined in article 1 of the Notification Directive which do not consist wholly or mainly in the conveyance of signals on electronic communications networks

In relation to qualification of a service as an ECS, one of the decisive elements is whether the provider's (contractual) responsibility towards the user is mainly to bring about the transmission of a signal. Merely providing a connection to an ECS in itself is insufficient when the responsibility for bringing about the actual transmission is not a main element of the service for which the provider is contractually responsible towards the user. In this respect, Dutch practice seems to be in line with the European Court of Justice's judgements in cases C-142/18 (Skype/IBPT) and C-193/18 (Google/Germany).

The Telecommunications Act's provisions relating to use of the radio spectrum and frequencies in principle apply to all ECN and ECS providers, but most other provisions only apply to providers of public ECNs or ECS. An ECS is 'public' when the services provided are available to the public, while an ECN is 'public' when it is only or mostly used for providing public electronic communications services.

Note 1: Services which enable interpersonal and interactive communication merely as a minor ancillary feature being intrinsically linked to another service shall not qualify as an Interpersonal Communication Service in terms of the Telecommunications Act (e.g. a chat function in an application for the lease of cars).

OVERVIEW OF CONSENTS, LICENCES AND AUTHORISATIONS REQUIRED PRIOR TO THE COMMENCEMENT OF TELECOMMUNICATIONS ACTIVITIES

Communication providers have general authorisation to operate in the Netherlands and do not require a licence, permit, consent etc. In the Netherlands, all providers of public electronic communications services and all operators of public electronic communications networks must register with the regulatory authority (ACM) prior to the start of their operations in the Netherlands. In order to register, information must be provided on the provider's corporate structure, its turnover and the services provided in the Netherlands.

Once the registration is effective, the provider will be listed in the public register of communication companies and will receive a registration number. In case of a subsequent change of activities, the registration must be updated by notifying the change to ACM. All registered communication companies must annually report the turnover they achieved by providing communication services in the Netherlands to ACM. On this basis, ACM levies an annual fee (called 'contribution in the costs of regulation'), the amount of which depends on the turnover achieved. No fee is due if the turnover amounts to EUR 2 million or less.

Mobile operators (and other users of spectrum) do require a licence in order to install or operate certain mobile network equipment.

DOMICILE RESTRICTIONS PREVENTING THE OPERATION OF CERTAIN TELECOMMUNICATIONS ACTIVITIES BY NON-DOMICILED ENTITIES

From a telecoms regulatory perspective, there are no requirements for a communications provider to be domiciled in the Netherlands prior to or during the provision of services. Advice should however be sought from a tax perspective.

From a foreign direct investment perspective, there is a requirement for investors that intent to acquire predominant control in a Dutch telecommunications provider which gives rise to relevant influence in the telecommunications sector to notify the Ministry of Economic Affairs.

EXISTENCE OF RELEVANT INTERCONNECTION/ROAMING REGULATIONS

ACM has certain powers with regards to ex-ante regulations on interconnection and roaming.

Providers of a public ECN or public ECS are under a general obligation to enter into negotiations with other providers in relation to access to end users. Whilst the underlying principle of these negotiations is freedom of contract, the outcome of these negotiations should be aimed at an agreement regarding end-to-end connectivity. Such negotiations are to be conducted objectively, transparently, proportionally, and non-discriminatorily, with a view to reaching agreement on the technical aspects of the connection of the network(s), tariffs, quality of the services, and other relevant conditions. Providers are to enter into these negotiations 'proactively'.

The obligation to enter into negotiations concerns an obligation to achieve a result. When the desired result is not reached, ACM may be requested to make the provider install the requested end-to-end connectivity on conditions set forth by ACM. These conditions may even relate to subjects such as what tariffs are considered 'reasonable'. ACM may also act on its own discretion, if no request is filed.

TELECOMMUNICATION LAWS AND REGULATIONS AFFECTING CONSUMERS

Specific obligations relating to consumers include:

- The requirement to include certain minimum terms in consumer contracts
- Conditions relating to maximum contract duration and maximum notice periods for contract termination

- The requirement to make certain information available to the customer such as a description of the services offered and the standard and the most advantageous tariffs
- Availability of number portability

In addition to specific telecoms regulations, provisions of general consumer law also apply, such as rules concerning unfair contract terms.

REGULATORY TAXES AND FEES

Registration with ACM itself is free of charge. Once registered, however, all providers that achieve a turnover in excess of EUR 2,000,000 in the Netherlands with the provision of a public ECN or public ECS must pay an annual fee to the regulator as a contribution to the costs of regulation. The fee is annually set at a percentage of the relevant turnover. For 2022, the fee is set at 0.03672% of the relevant turnover achieved in 2020.

KEY SANCTIONS AND PENALTIES IN THE CASE OF CONTRAVENTION OF TELECOMMUNICATIONS LAWS AND REGULATIONS

Certain provisions of the Dutch Telecommunications Act, including those relating to use of frequencies (Chapter 3) and interception (Chapter 13), are subject to criminal prosecution by the Department of Justice on the basis of the Economic Offences Act. Depending on whether the violation was intentional or non-intentional, providers may be sentenced with a maximum fine of EUR 20,750 or EUR 83,000, respectively. If the infringement resulted in profits exceeding 25% of these amounts, however, the maximum fines are increased to EUR 83,000 or EUR 830,000 respectively. Individuals can receive a jail sentence of up to one year and six years, respectively.

Other violations of the Dutch Telecommunications Act are subject to administrative prosecution by either the Telecoms Department (*Agentschap Telecom*) of the Ministry of Economic Affairs or by ACM, depending on the subject-matter of the violation. Both authorities have a broad degree of discretion when deciding the measure to be imposed. The maximum penalties are generally set at a percentage of annual turnover, ranging between 1% and 40% depending on the nature, duration and the severity of the infringement.

The Ministry of Economic Affairs can prohibit a transaction if it considers it a threat to the public interest. This is the case if abuse or deliberate failure of the telecommunications party over which “predominant control” is obtained or held can lead to a threat to national security or public order (Chapter 14a).

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