

## Interview *Madeleine de Cock Buning* *Commissariaat voor de Media*

### ‘Diverging supervision’

Performing an increasingly divergent role in a converging media landscape.

#### **About the Media Authority**

The Dutch Media Authority, called “Commissariaat voor de Media”, is an independent governing authority which supervises compliance with the Dutch Media Act as well as the application of the fixed book pricing regulation. The Media Authority performs these tasks by executing tailor-made supervision of radio, television, video services on-demand and Dutch language book publications. In performing its designated tasks the Media Authority protects the independence, multiformity and accessibility of media products, which contributes to the freedom of information.

*The convergence of mass media and communications initially only referred to technological developments, whereas today it is mostly about content which is distributed and consumed through a variety of media platforms, as well as about different media companies joining forces or setting foot on each other’s territories. Chairman of the Dutch Media Authority and Professor of Law, Madeleine de Cock Buning, clarifies the role of the Media Authority in this converging media landscape. ‘In years past, our organisation restricted itself mainly to the execution of the Dutch Media Act. But in the converging media landscape that exists today we perform a more and more divergent role. In addition to the execution of the law, we perform meta-supervision and co-supervision, as well as advisory tasks and monitoring activities. We increasingly gear our policies to international organisations.’*

#### **Back to the core of media law**

Already in her inaugural lecture as professor of media law in 2006 Madeleine de Cock Buning drew attention to the convergence of the media landscape. De Cock Buning: “This was a process that had been going on for years, but had not yet been fully materialized. In my view this development brings along the necessity to return to the essence of media law, for instance accessibility, the protection of weaker consumers, such as children, and a clear distinction between journalism and commerce. Originally the foundation of media law was “scarcity and impact”. Yet, scarcity is hardly applicable to the broadcasting landscape today, since there is such a variety of broadcasting and other audio-visual channels. Although media still have great impact and are essential for exercising supervision over

democratic values, the variety of TV channels simultaneously curtails the impact of public broadcasting. Therefore, a new set of rules and regulations may be considered, which is of course the responsibility of the legislator. The Green Paper of the European Commission that was published in 2013 paves the way for new rules and regulations with regard to media that are irrespective of media type and truly focus on the fundamental aspects of content.’

#### **Executing media law and discretionary powers**

The primary task of the Media Authority is the execution of the law in an independent and apolitical manner. Still, within the scope for policymaking the Media Authority has discretionary powers as the world of politics more than



once passes on contentious issues to the implementation phase in which they operate. De Cock Buning: ‘Making these policies we refer to our European network of media authorities EPRA, ensuring that its policies have the harmonising effect as aimed for in the European arena.’

Take for instance the issue with regard to Commercial Media Services on Demand, which are under our supervision since the EU’s Audio-visual Media Services Directive (AVMSD ed.) took effect. The European and national political arenas could not come to an agreement on the exact demarcation of these commercial media services and moved the issue to the implementation phase. Subsequently, we made policies on which type of internet service can be regarded as a commercial media service on demand in close contact with EPRA.’

This discussion also applies to the newspaper business, since most newspaper websites offer audio-visual material. Formerly, only public broadcasting was heavily regulated in the Netherlands and the newspaper

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business was beyond the scope of media law. De Cock Buning: ‘Due to European legislation, when newspapers started to publish video content on their websites, this content, as far as it can be regarded as commercial media services on demand, made the media law also applicable to newspaper companies. We discussed the issue with the newspaper publishing sector, because we don’t wish to hamper

innovations in the newspaper business when it comes to our supervisory tasks. To make sure there is a level playing field of media companies that publish video content in a similar manner, they all have to comply with a similar set of rules.’

#### ***Level playing field***

As the matter of audio-visual material on the internet already shows, the existing rules and regulations do not yet apply irrespective of the media platform in question. Especially in connection with the distinction between linear and non-linear content, for which different levels of enforcement apply. De Cock Buning: ‘The converging trend in the media sector is regulated by rules and regulations that have not yet converged correspondingly. Yet, the recent Green Paper shows that the European Commission doubts if the distinction between passively watching TV or actively retrieving information on the internet is still relevant and justifiable. But, until rules and regulations have fully converged, safeguarding a level playing field for mutually comparable domains in this changing media landscape is of

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ever growing importance. What’s more, there is increasing competition in the media sector and the importance of fair competition keeps pace with the aim to safeguard the level playing field.’

#### ***Non-Dutch parties***

Within the scope of a level playing field, the Media Authority attempts to apply a system of voluntary compliance with Dutch rules and regulations for non-Dutch parties in the Dutch media landscape. De Cock Buning: ‘For instance, our research showed all TV channels in the Netherlands exceeded the twelve minute limit which allows a maximum of twelve minutes of commercials per hour. This led to serious talks with these TV channels and even some sanctions. Yet, to maintain a level playing field non-Dutch player RTL, which is technically not under our supervision but also broadcasts in the Netherlands, had to be involved too. We summoned them and indicated we were willing to take the matter to the European Commission if necessary. This resulted in the decision of RTL to voluntarily comply with the 12-minute rule in the Netherlands and, consequently, a level playing field with regard to the advertising rule was secured. In this respect it is interesting to see where, for instance, Netflix will settle its business.’

#### ***Advertising versus unbiased information***

Pressure on the media sector is increasing, since advertising revenues are coming down. De Cock Buning: ‘This results in pressure on the strict separation between journalism and commerce, as product placement and sponsoring in media products keep increasing. The Media Authority deems unbiased information as crucially important. News services, for instance, should not contain sponsored messages or advertising, because it hampers the performance of the democratizing tasks

of media in general. In the Netherlands we are more strict compared to other countries when it comes to product placement, since product placement is not allowed for public broadcasting channels. Commercial broadcasters are allowed to use product placement, which is not allowed for public broadcasters. Commercial broadcasters have to fend for themselves, whereas public broadcasters are subsidized institutions which consequently gives them some competitive advantage.

#### ***Media companies scaling up***

The increasing pressure on the media sector also led to media companies scaling up. De Cock Buning: ‘Cross media companies such as Sanoma and Telegraaf Media Groep (TMG) blur the boundaries between media types as they offer TV and radio content, magazines, newspapers, websites and other digital activities. These media conglomerates get bigger and bigger and this not only entails the danger of diminishing multiformity of media products, but may also involve the acquiring of political interests which constitutes a hazard to, for instance, unbiased news coverage. In the Netherlands, this is currently a theoretical issue only. However, there are a lot of countries, not only China and Italy, where politics and media are intertwined. I think it’s vital that independent organizations, such as ours, monitor these ties. For me the crucial point of departure is that media supervises politics and democracy and not the other way around.’

#### ***Accessibility***

Another important aspect of media the Media Authority watches over is accessibility. Fox as a new player in the Dutch media landscape is exemplary. Fox will partially broadcast football behind a decoder. Summaries of specific football matches have to be freely accessible to everyone according to Dutch Media Act.

De Cock Buning: ‘You can ask yourself to what extent we consider it to be acceptable that certain TV programmes are only accessible using a decoder? But, just as important is the equal possibility for new players to obtain a broadcasting license. All opinions should have the chance to obtain a platform. Freedom of expression and access to infrastructure is crucial.’

### **Tailor-made supervision**

‘Society has high expectations of supervision in general and if problems arise fingers are immediately pointed at the Media Authority’, says De Cock Buning. ‘At the same time government cuts down on supervisory institutions. This situation requires an increasingly efficient way of working which manifests itself in our strategy of tailor-made supervision. This means we choose the most specific and effective instruments which lead to the achievement of our underlying objectives. We take drastic action if necessary, such as imposing sanctions and suspending licenses and act mildly where possible. With regard to the latter, consulting, arbitrating, and advising are key, as well as explaining the origin of rules and regulations, and explaining the purpose of complying with these rules. Using these latter instruments proves very effective.’

### **Self-regulation and meta-supervision**

A set of scenarios for the future as developed by the Media Authority shows that self-regulation will be of increasing importance. The successful Dutch “Kijkwijzer”, a classification system for films and TV programmes, is a good example of this. De Cock Buning: ‘All parties in the Dutch film and broadcasting industry are members of NICAM which is responsible for the classification and we, in turn, are the meta-supervisor of NICAM. When there is a risk of severe

harm to children, the government, represented by the Media Authority, is the designated supervisor and takes action. When it is a matter of possible harmful content, co-regulation through NICAM is sufficient. Given the positive experiences, a well-balanced supervisory model like this would be very suitable for the internet too. NICAM made a proposal to establish a similar supervisory system for on-demand content. Within this scope they consult with, for instance, Google en YouTube as these parties have an interest in a favourable position in national markets and are willing to comply with rules and regulations in these markets. For them it is a matter of corporate responsibility and their trustworthy image towards the public.’

### **Advisory**

The advisory role is getting more and more important as the Media Authority advises national and European legislators on developments in the media sector. A recent issue is the (legal) feasibility of the obligation the Dutch government imposes on public broadcasters to derive 45 million euro revenue from the market in order to partly compensate for the 100 million euro of extra cutbacks on top of the 200 million euros of cost-cutting measures. De Cock Buning: ‘Strictly speaking the possibilities for such market activities are limited under Dutch law. For this reason we are now involved in the mapping of the possible sources of income by an external investigating bureau and we are examining if these fit in the legal framework within which public broadcasters operate. We have to make sure that deriving 45 million euros from the market does not result in unfair competition between public broadcasters and commercial broadcasters. Mapping all the (im)possibilities and consequences makes sure all parties know where they stand.’

### **Monitoring**

Another task that is increasingly important is the monitoring of media markets. In the past ten years, the Media Authority has been monitoring media power blocks and, connected with this, the pluralism of content. De Cock Buning: ‘We present our findings to the political arena, so politicians can decide on the appropriate actions. Our monitoring role can also have international consequences. On behalf of the Media Authority I conducted a lecture in the European Parliament, in the presence of European Commissioner Neelie Smit-Kroes. The lecture was about the need for a European monitoring system for pluralism in news and opinion. Monitoring newspapers made us also reach the conclusion that the present lack of independent research by part of the newspaper market is a serious threat to the democratic function of the media. The copying of ANP and Reuters news coverage is happening on a large scale without conducting independent research. Public relations officers at companies and government institutions, on the other hand, can also hamper critical investigation by journalists, since journalists increasingly copy the contents of press releases.’

### **Independent media need independent supervisory authorities**

‘Our organisation knows the trends and developments in the market’, De Cock Buning concludes. ‘Broadcasters notice we have profound discussions with leading parties also beyond our supervision such as Netflix, Google and YouTube, which contributes to our authority in the industry. The same goes for our cooperation with international supervisory authorities. It is crucial that we have an independent position to operate in this arena, to safeguard the critical position of independent media for supervising the democracy and economy of our European constitutional states.’