Contribution to the European Commission's 2022 Rule of Law report

The Netherlands

We are giving our contribution as: "civil society/NGO"

Organisations names:

Netherlands Helsinki Committee (NHC)

Nederlands Juristen Comité voor de Mensenrechten (NJCM)

Commissie Meijers

Free Press Unlimited (FPU)

Transparency International Nederland (TI-NL)

Main Areas of Work: Justice System, Anti-corruption, Media Pluralism

Websites of the organisations:

www.nhc.nl

www.njcm.nl

www.commissie-meijers.nl

www.freepressunlimited.org

www.transparency.nl

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NB. In our report, we have included only the questions where we report on developments.

QUESTIONS ON HORIZONTAL DEVELOPMENTS

The CJEU dealt with many crucial rule of law-related cases in the past year. A long-awaited judgement was reached in the case Commission v Poland (C-791/19) concerning the Disciplinary Chamber of the Polish Supreme Court in which the CJEU ruled that the regime for judges in Poland is not compatible with EU law as the disciplinary regime for judges does not fulfil the requirements of independence and impartiality. The CJEU furthermore granted interim measures in the infringement proceedings of Case C-204/21 and ordered Poland to immediately suspend the application of the "muzzle law". The Polish government, however, did not implement the judgement of C-791-19 nor did it suspend the muzzle-law. In September, the European Commission asked the CJEU to impose a daily financial fine for Poland's non-compliance with temporary measures that the CJEU ordered in July 2021 in Case C-204/21 – which the CJEU subsequently did (penalty of EUR 1 M per day). The Commission furthermore initiated the procedure to establish the fact of non-compliance with the C-791/19 judgement. Despite the interim order and the penalty for non-compliance, the suspension of judges, who challenged the status of neo-judges and implemented CJEU and ECtHR judgements in Poland, nevertheless continued.

In the cases C-748/19 to C-754/19, the CJEU ruled that the Polish practice of secondment of judges (where the Minister of Justice who seconds the judges is also the Prosecutor General who can terminate such secondments at any time without providing reasons or criteria) is incompatible with EU law.

While the Rechtbank Amsterdam (Amsterdam Court International Cooperation Chamber) has submitted preliminary questions to the CJEU concerning the execution of European Arrest Warrants given the condition of the judiciary in Poland, the Irish Supreme Court has submitted similar questions to the CJEU (C-480/21).

Several judgments by the Polish Constitutional Court also raised the discussion of a possible "legal Polexit". In July, The Polish Constitutional Tribunal ruled that Poland is not obliged to comply with interim measures of the CJEU if they relate to the shape and functioning of the judiciary (P 7/20). In October, the Constitutional Tribunal practically denied the primacy of EU law over national constitutional law by finding that Articles 1 and 19 of the EU Treaty as interpreted by the CJEU are inconsistent with the Polish Constitution (K 3/21). In December, the Commission launched an infringement procedure against Poland for violating EU law.

The Commission referred Hungary to the CJEU over its failure to comply with the judgement in case C-808/18 concerning Hungary's legislation on the rules and practice in the transit zones at the Serbian-Hungarian border. Although those transit zones are closed by now, Hungary is restricting the right to asylum, according to the Commission. In case C-821/19 (Commission v Hungary) concerning the criminalisation of assistance to asylum seekers, the CJEU found that the 2018 'Stop Soros' law breaches EU law, after the European Commission took Hungary to court. The CJEU made clear that threatening people with imprisonment who assist asylum-seekers to claim asylum violates EU norms.

In case C-564/19, the CJEU found that EU law precludes the Hungarian Supreme Court from annulling a decision by a lower court to refer a case to the CJEU. The principle of primacy of EU law means that the lower court should disregard the Kúria. Furthermore, the CJEU has found that EU law precludes a domestic disciplinary procedure against a judge over referring the case to CJEU, highlighting that such practice can lead to a chilling effect and ward off judges from sending cases over to CJEU.

In case C–650/18, the CJEU dismisses Hungary's action against the Parliament resolution triggering the procedure for determining the existence of a clear risk of a serious breach, by a Member State, of the values on which the European Union is founded.

JUSTICE SYSTEM

A. Independence

Irremovability of judges, including transfers, (incl. as part of judicial map reform), dismissal and retirement regime of judges, court presidents and prosecutors (incl. judicial review)

On 12 August 2021, the Administrative High Court ruled that the discharge age of 70 years for judges is not discriminatory. The court argued that the discharge age is not excessively damaging and not an unreasonable instrument to guarantee the independence of judges and making place for new judges.

Because of insufficient capacity of judges, the temporary laws regarding COVID measures arranged for a temporary deployment of deputy judges up to the age of 73 years. (Article 3.3 of the Tweede Verzamelspoedwet COVID-19)

Allocation of cases in courts

In January of 2020, the Judiciary published a Case Allocation Code, a principle-based instrument (not legislation). It aims to ensure that cases are allocated to a particular judge based on predetermined objective criteria. The code should make it verifiable why a certain judge handles a certain case. As explained in the contribution to the Rule of Law report from 2020, the Code incorporates the ECtHR rulings regarding clarity, transparency, judicial independence and impartiality of assigning court cases: important requirements for guaranteeing the right to a fair trial (article 6 ECHR). Article 3 of the Code dictates that the allocation of cases shall happen in an objective manner that ensures the impartiality and independence of timely and competent justice. Article 4 adds that allocation is to be done randomly.

Since then, courts have adopted case allocation rules for different sectors, including exceptions: cases that are not allocated randomly because their allocation requires tailor-made solutions. Examples include (potentially) high-profile cases, 'mega cases' and cases that transcend jurisdictions. The Explanatory Memorandum accompanying the code does give examples of cases that require a tailor-made approach, but also states that a precise description of such cases cannot be given. This makes the category of 'tailor-made cases' potentially limitless and indeterminate, and calls into question the value of the code in the context of randomisation and thus fair administration of justice. According to a legal analysis in the Dutch Lawyers Magazine (Nederlands Juristenblad), 'a first impression of the drafted case allocation schemes is not hopeful in this respect, as rather broad categories of tailor-made case allocation seem to be designated'.

Independence/autonomy of the prosecution service

An initiative bill of a Member of Parliament is now under revision by the Second Chamber of Parliament. It concerns amending the Judicial Organization Act in connection with the cancellation of the special powers of designation of the minister regarding the exercise of the duties and powers of the Public Prosecution Service. At this moment, the minister can instruct the Public Prosecution Service to investigate or to prosecute in an individual criminal case. Under the new bill, the minister can no longer issue an instruction with regard to the way in which the Public Prosecution Service should use its powers in a concrete criminal case. Formal intervention by the minister in a concrete

criminal case is thus made impossible in the proposed bill. *(Wet verval bijzondere aanwijzingsbevoegdheden openbaar ministerie)*

Significant developments capable of affecting the perception that the general public has of the independence of the judiciary

Citizens and civil society and grassroots organisations are not always sufficiently involved in the drafting of legislation (and policy). While it is crucial that civil society actors are actively approached and are given adequate opportunities and time to express their views, this is not always the case. For example, the internet consultation on the bill that aims to provide a legal basis for the processing of personal data for the purposes of coordination and analysis in the context of counterterrorism and national security ('Wet Verwerking Persoonsgegevens coördinatie en analyse terrorismebestrijding en nationale veiligheid') was only open for five days, whereas the standard minimum period is four weeks. This has led to criticism from civil rights organizations. In addition, on the bill on transparency of civil society organizations ('Wet transparantie maatschappelijke organisaties'), human rights organisations were not consulted outside of the standard internet consultation, whilst informal discussions did take place with other stakeholders.

B. Quality of justice

Accessibility of courts (e.g. court/legal fees, legal aid, language)

The Government announced in its coalition agreement for 2021-2025 a reduction of court fees by 25% in the upcoming years in order to increase the access to justice of citizens and SMEs. Between 2002 and 2012, the court fees for civil cases increased with 40%, and they have not decreased since. In December of 2021, the Civil Cases Court Fees Act (*Wet griffierechten burgerlijke zaken*) was again amended to increase all court fees.

The coalition agreement also states that 'social advocacy', i.e. state-funded legal aid, will be reinforced in line with scenario 1 of the recommendations of the Committee Evaluation of Point Granting of Financed Legal Aid (Van der Meer Committee). The point grading system stipulates that points are awarded depending on the type of case, as well as for certain circumstances of the case. The level of compensation granted for a certain procedure is determined by multiplying the number of points by the base amount. In other words, the more points awarded to a type of case in combination with the circumstances of the case, the higher the amount of compensation which is granted. The legal profession is expected to make a substantial social contribution. In line with the plans expressed by the Minister for Legal Protection in November 2021, this means that commercial law firms will be required to provide funding. However, it is unclear on which competence this mechanism is to be based.

Furthermore, a low-threshold, independent fiscal legal aid system will be set up, following the example of the independent American 'Taxpayers Advocate Service' (TAS). The recent childcare benefits scandal has shown that subsidised or free legal assistance in tax and social welfare matters is necessary in the Netherlands. Currently, the only available fiscal aid is through the 'Tax Information Line' (*Belastingtelefoon*), but the waiting times for callers can be extremely long, and according to the tax authority, the provided answers cannot always be relied upon in court. A system resembling the TAS will provide more independent, tailored aid. In the United States, if a citizen, business owner or organisation cannot resolve their tax issues on their own and qualifies for the free TAS help, they

will be assigned an experienced tax advocate. This advocate then learns the details of the situation, reviews the account, researches the applicable laws, argues on the person's, organisation's or company's behalf, and requests and submits the necessary documentation to resolve the problem.

Since the beginning of the COVID-19 Pandemic, questions have been raised regarding the impact of the pandemic on the accessibility of courts. Many cases were postponed in the first months of the pandemic, and now cases do take place digitally. However, this may have a grave impact on the fundamental rights of vulnerable litigants. A study will be conducted on how the measures have influenced respect for the fundamental rights of vulnerable litigants and their trust in the judiciary.

Resources of the judiciary (human/financial/material)
(Material resources refer e.g. to court buildings and other facilities)

The judiciary is facing a budget deficit of EUR 50 M, according to a 2019 investigation by the Council for the Judiciary. This is largely due to the financing mechanism, in which the judiciary gets paid per case. In the coalition agreement the government states it will aim to decrease the number of cases the government conducts against citizens, but it does not promise extra funding for the judiciary and does not mention compensation for income loss due to the planned decrease in cases.

The coalition agreement for 2021-2025 contains only a short statement pertaining to resources of the judiciary. It reads: 'We will strengthen the entire justice chain and access to justice, including adequate and predictable funding in the criminal justice chain.' However, costs of justice will also be limited by decreasing the number of legal proceedings that the government conducts against citizens.

Furthermore, resources for alternative dispute resolution, outside of the judiciary, are mentioned. The government has announced that it will increase its efforts in the area of socially effective administration of justice and restorative justice; low-threshold alternative dispute resolution, whether or not in combination with partners from the social domain, following the example of 'neighbourhood justice' and 'mediation'. Alternative dispute resolution is mentioned in the context of foreign trade. Alternative dispute resolution, a route some parties will choose because of the efficiency it brings them, is much more expensive, so presumably the government's goal is to generate income. The government aims to set up arbitration through the new Dispute Settlement Court (the Netherlands Commercial Court that was established in 2019) or through other national institutions where possible, and to make additional mechanisms transparent.

Training of justice professionals (including judges, prosecutors, lawyers, court staff)

In relation to training and expanding the knowledge of justice professionals, the Government's coalition agreement for 2021-2025 contains commitments pertaining to cybersecurity and cyber criminality. Firstly, the document states: 'We will strengthen the expertise of tackling cybercrime in all parts of the criminal justice chain.' Furthermore: 'Cybercrime such as "ransomware" is very undermining. We are therefore investing in a broad multi-year cyber security approach and in cyber expertise within the police, the judiciary, the Public Prosecution Service (OM) and defence.'

Digitalisation (e.g. use of digital technology, particularly electronic communication tools, within the justice system and with court users, including resilience of justice systems in COVID-19 pandemic)

The Government's coalition agreement stresses that it recognizes basic civil rights online. It aims to strengthen secure digital communication, part of which is to refrain from applying facial recognition without strict legal demarcation and control, under supervision of the Dutch Data Protection

Authority. The new coalition aims to legally regulate that algorithms are checked for transparency, discrimination and arbitrariness, monitored by an algorithm supervisor. Currently, the Dutch Data Protection Authority (*Autoriteit Persoonsgegevens*) is responsible for monitoring algorithms, but transparency, bias and arbitrariness largely fall outside the scope of personal data and privacy. That is why, according to the coalition agreement, a separate supervisor will be appointed by law. This way, and by investing in better cooperation between different digital supervisors, the government aims to better protect digital human rights. However, the Data Protection Authority already receives insufficient funds to properly execute its tasks and hire enough people. Despite recommendations from the House of Representatives to increase its budget to EUR 100 M, it was announced that it will remain 25 million euro.

According to the coalition agreement, in order to increase transparency the administration of 2021-2025 will promote the publication of judicial decisions. In 2021, only around 5% of judgments has been published. Therefore, in May the chairman of the Council for the Judiciary, announced that in the coming ten years, about 75% of the approximately one and a half million judgments handed down annually by Dutch judges will have to be made available online. However, this will be an immense operation: before judgments can be made available on Rechtspraak.nl they have to be anonymised. According to chairman Naves, it is therefore being investigated whether special 'anonymisation software' can decrease the workload.

C. Efficiency of the justice system

Other - please specify

Since our 2021 submission, there have been several developments in the childcare benefits case. A special parliamentary committee concluded that the administrative courts had not provided adequate legal protection. In response, the lower courts and the highest administrative court (the Council of State) published a report in which they reflected on their role. The lower courts reflected that they had followed the Council of State's strict 'all-or-nothing'-approach for too long for two reasons. First, they did not want to give parents false hope, as they believed that on appeal the Council of State would overturn their decision. Second, they followed the higher court to ensure legal certainty and legal unity between the different courts. They now resolve to give more weight to protecting citizens' interests, by taking a more active approach and critically assessing the government's claims.

The Council of State reflected that it should have changed its strict approach earlier. In its report, the Council outlines three lessons for the future. First, in cases where there is an imbalance of power between the parties, the Council should take a more critical stance towards the government's claims and actively research the relevant facts of a citizen's case. Second, the Council should create more possibilities for dissent, both internal and external. Third, in cases in which the legislation is ambiguous, the Council should take a case by case approach, instead of following existing case law. There should always be room for a fair outcome in each individual case.

At the request of the Dutch Second Chamber, the Venice Commission issued an opinion on legal protection in the Netherlands. The Commission found that, while the shortcomings in individual rights protection uncovered in the childcare benefits case are indeed serious and systemic and involve all branches of government, it appears that eventually the rule of law mechanisms in the Netherlands did work. The reports of the Ombudsman, the Parliamentary committee, and the legislative amendments show the reaction of the different mechanisms in the Dutch system. The rule of law issues revealed by the case are taken seriously by all branches of government, which shows the Netherlands is willing to redress the mistakes. However, this reaction has taken longer than it

should have, and serious damage was caused to the families involved and those who attempted to expose the problem faced much resistance.

The coalition agreement

The coalition agreement for 2021-2025 contains a commitment on the asylum procedure and immigration law, which we deal with in this section, as it is relevant to the justice system and the broader context of the rule of law. It states that although the asylum procedure is good, there is room for improvement in practice. It also promises a full implementation of the recommendations of the report of the Committee on Prolonged Stay of Foreign Nationals (*Van Zwol Committee*).This aims to guarantee timeliness and accuracy, prevent unnecessary piling up of procedures, safeguard the human dimension, and counteract the frustration of the return and departure of rejected asylum seekers. Following one of the recommendations of this Committee, the Cabinet will examine in the short term how the interests of children can best be considered in the asylum procedure, taking into account international case law and policy in neighbouring countries.'

ANTI-CORRUPTION FRAMEWORK

B. Prevention

Measures to enhance integrity in the public sector and their application (including as regards incompatibility rules, revolving doors, codes of conduct, ethics training). Please provide figures on their application.

As noted by GRECO, in the report of the Fifth Evaluation Round of the Netherlands, there is no general integrity strategy for the central government, even though this has been a recommendation for years.

There are no specific provisions on trading in influence in the Netherlands legal framework. The legal framework does not make any specific mention banning illicit enrichment. For public officials, the Netherlands established a measure against revolving doors in 2017, when the Minister of Interior issued a circular letter against revolving doors in the public service. In continuation of last year's submission, two events require attention. The abovementioned circular letter turned out to be overdue. The current minister of Interior saw no possibility to re-implement this in time before all the ministers left their post. This led to two remarkable revolving door cases (Cora van Nieuwenhuizen and Stientje van Veldhoven). In response, parliament voted for a motion to implement stricter rules. The government sent a proposal to parliament, but has not been implemented. Up to this point, there are still no effective rules. As noted by GRECO, no further regulations are in place to address the revolving door for individuals holding top executive functions. The organisation criticises the lack of a general 'cooling off' period and a transparent mechanism to regulate the transfer of high government officials to the private sector.

General transparency of public decision-making (e.g. public access to information, including possible obstacles related to the classification of information, transparency authorities where they exist, and framework rules on lobbying including the transparency of lobbying, asset disclosure rules, gifts and transparency of political party financing).

Article 110 of the Constitution stipulates that the public administration must allow 'public access in accordance with rules to be prescribed by Act of Parliament' during the performance of its duties. These rules are set out in the Government Information (Public Access) Act (Wet Openbaar Bestuur).

This act has recently been replaced by the Open Government act (loosely translated from Wet Openbare Overheid or WOO). The law requires more information to be made public pro-actively. The law is still insufficient: the decision periods are still too long compared to international standards, and it fails to mandate exhaustive lists of all available data that would enable the public to understand what they do and do not receive. There is much resistance from government to publish, leading to poor information disclosure in practice. For example in 2021, the Ministry of Health refused to consider freedom of information requests during the COVID-19 pandemic.

The regulations regarding integrity for members of the House of Representatives determine that MPs should at the latest disclose their ancillary activities and income of the previous year on 1 April. Breaching the reporting requirements can lead to an investigation. The college of investigation can give a recommendation as to whether a sanction is relevant, actual sanctioning only happens through parliament.

There are still no laws regulating lobbying. As noted by GRECO (Fifth Evaluation Round of the Netherlands, recommendation 4): there are no rules with regards to lobbying for officials with persons entrusted with top executive functions. Additionally, there are none for parliamentarians. A noteworthy initiative is a motion in parliament to implement a lobby register. It asks the government to implement a lobby regulation based on the Irish model. This type of legislation is very important. The European Commission should monitor the conversion into policy and a statutory foundation that is presently missing.

As noted in the previous Rule of Law report, there are very few restrictions on party financing, especially on the local level. The law was supposed to be revised, but there is no progress. A new and noteworthy development is that large donations were made in this political cycle. D66 received EUR 1 M and the Partij voor de Dieren EUR 350.000 from a tech-entrepreneur. The CDA received EUR 1,2 M from a member, which they declared after the official registration period. It shows that the law is in dire need of revision and the government should increase its efforts to implement the law.

Rules and measures to prevent conflict of interests in the public sector. Please specify the scope of their application (e.g. categories of officials concerned)

Different governmental sectors, such as the national government, municipalities and provinces, have drafted their own regulations regarding integrity and the disclosure of ancillary activities. Regulations for civil servants employed by the national government for example, state that anyone working for the state should disclose ancillary activities which interests could conflict with the interests of their public position. It does not specify, however, how often disclosures should be made. In order to converge regulations regarding integrity, the Civil Servants 2017 Act will replace all regulations of individual government sectors as of January 2020.

GRECO noted that there is no general integrity strategy for officials entrusted with high public office, even though this has been a recommendation for years. Transparency International Netherlands recently asked the government to disclose financial interests and foreign assets of newly appointed members of the new cabinet, especially when considering the members of parliament. To date, they are not GRECO compliant.

The Senate needs to adhere to a code of conduct regarding Integrity. The code provides clarity about conflicts of interests, indicating that senators should be aware of the additional interests they have due to the other positions they hold. Moreover, senators should abstain from activities that could be seen as conflict of interest. It is important to note that this conflict of interest only relates to a specific self-interest, usually as a result of holding other functions. Senators are required to share the

additional functions they hold besides being a member of the Senate as well. This consists of a short description of the function, the company/organisation for which the function is performed and whether the function is paid or not. Moreover, all interests that can reasonably be considered as relevant, but cannot be regarded as an official function, need to be made publicly available.

Measures in place to ensure whistleblower protection and encourage reporting of corruption.

In October 2019 the EU adopted a new Whistleblowing directive. The Dutch Ministry of Interior has provided a draft law for implementation in the Netherlands. However, the proposal received a lot of criticism from the Council of State, NGO's, the labour movement, parliament and employers. Among the key criticisms: the government makes an unnecessary distinction between EU and Dutch law, making the law complex and unworkable. An arbitrary threshold is introduced, saying that the reported wrongdoing must have "societal relevance". In violation of Recommendation XXII of the OECD Anti-Bribery Convention, to which The Netherlands is a party, the draft does not "provide for effective, proportionate, and dissuasive sanctions for those who retaliate against reporting persons" by the national Whistleblowing Authority.

The Council of State, the highest advisory body to the government, concluded that the law is too complex, making it hard to execute. It indicated Dutch and EU law are so entwined that it makes no sense to have separate reporting channels. In a parliamentary hearing these concerns where shared with parliament by NGO's, labor unions and employer's organisations. In response, parliament returned the proposal to government. The government sent a revision of the law, which is still insufficient. If passed in its current form, the law would not improve the situation of whistleblowers in the Netherlands and not lead to increased protection under EU law. Because of the complexity, as well as a suggestion by the minister on how companies can prosecute whistleblowers, it would end up discouraging them even more.

List the sectors with high-risks of corruption in your Member State and list the relevant measures taken/envisaged for monitoring and preventing corruption and conflict of interest in these sectors. (e.g. public procurement, healthcare, citizen investor schemes, risk or cases of corruption linked to the disbursement of EU funds, other).

In the past years we have seen various cases involving penetration of organised crime into the police. Especially organised crime involved in the drug trade has been able to gain a foothold in the (military) police force. Other than being directly involved in drug smuggling, organised crime has been able to penetrate into the police force by bribing officers for information. Criminal organisations have made attempts to influence local government officials as well. In order to do so, they predominantly adopt the tactic of threatening with violence. In addition, criminals have attempted to bribe local government officials (albeit to a much lesser extent). Criminal organisations have attempted to infiltrate in local governments as well. Especially worrying is the shooting of Peter R. de Vries, a crime reporter. There was also an attempt to assisante another reporter, John van den Heuvel, for which the police arrested a suspect.

Measures taken to assess and address corruption risks in the context of the COVID-19 pandemic.

During the COVID-19 pandemic, we have seen potential corruption in the Netherlands. We have identified risks at the ministry of Public Health, Welfare and Sports. According to the research of OCCRP and Follow the Money, the Netherlands suspended its usual public procurement rules, resulting in large amounts of spending that remain mostly hidden from the public. Some smaller tenders are available in TenderNed, but the prices are rarely disclosed. The Netherlands are listed as

a virtual black hole of information as they rejected reporters' data requests. Recently it was found that contracts have been given to consultancy firms to assist in the execution of the handling of the COVID-19 pandemic. There were no public tenders for these contracts.

Any other relevant measures to prevent corruption in public and private sector

The Netherlands has implemented a whistleblowers protection framework that prescribes companies with more than 50 employees to implement a policy to protect whistleblowers from retaliation. However, it does not establish adequate standards for these arrangements. A 2017 study conducted by the Whistleblowers' Authority found that half of the Dutch companies studied were not compliant with the legal requirement of an internal whistleblowing policy. This is confirmed by an assessment by Transparency International Netherlands concerning the quality of policies of 27 Dutch publicly listed companies.

C. Repressive measures

Criminalisation, including the level of sanctions available by law, of corruption and related offences including foreign bribery

Transparency International found in its 2020 report on "Exporting Corruption" that there is a high level of risk of corruption related to trade. The Netherlands face difficulties combating international corruption cases. This was exemplified by the case of ING Bank. In its report, Transparency International noted that the Netherlands turns out to be a laggard in the execution of effective persecution of foreign bribery. Since 2016, the Netherlands only successfully concluded two out of 18 foreign bribery cases.

MEDIA FREEDOM AND PLURALISM

A. Media authorities and bodies

(Cf. Article 30 of Directive 2018/1808)

Measures taken to ensure the independence, enforcement powers and adequacy of resources of media regulatory authorities and bodies

The Dutch Media Authority (*Commissariaat voor de Media*) is the independent regulator of the media and monitors compliance with the Dutch Media Law. The Dutch Media Authority is financed in two ways, by the government and by the yearly supervisory costs paid by commercial media institutions. The Media Authority is governed by a board of commissioners, appointed by the Minister of Education and Media. In October 2020, new rules were introduced for board members after criticism arose about the transfer of a former commissioner to the lobby department of Netflix. Commissioners are now bound to a 12-month 'cooling off period' after leaving their positions on the board. During this period, board members need permission from the Minister for a new job in a sector that is also monitored by the Media Authority. In the first three months of this period they are required to notify the minister of any new position - regardless of the sector - they take on. That being said, these rules are not enforceable and commissioners are expected to adhere to this new code of conduct solely on the grounds of integrity.

Furthermore, the Dutch Foundation for Public Broadcasting (*Stichting Nederlandse Publieke Omroep*) is the governing entity of the thirteen public broadcasters in the Netherlands and is tasked with the distribution and financing of airtime. As such, it enters into performance agreements with the Dutch

MInistry of Education, Culture and Media every five years. In an advice to the Minister, the Dutch Media Authority stated that the current 2022-2026 Performance Agreement - just as its predecessor - lacks concrete qualitative and quantitative objectives. It therefore does not sufficiently fulfil its purpose of defining and outlining the allocation of public media assignments as it is supposed to.

Conditions and procedures for the appointment and dismissal of the head / members of the collegiate body of media regulatory authorities and bodies

The Dutch Media Authority is led by a board of commissioners, all of whom are appointed by the Minister of Education and Media. However, the grounds on which the commissioners are appointed and/or dismissed are unclear.

Existence and functions of media councils or other self-regulatory bodies

In October 2021, the Dutch Data Protection Authority (*Autoriteit Persoonsgegevens*), the Dutch Consumers & Market Authority (*Autoriteit Consument & Markt*), and the Dutch Media Authority launched the Collaboration Platform Digital Regulatory Authorities (*Samenwerkingsplatform Digitale Toezichthouders*) to increase monitoring of digital activities in the Netherlands. They will exchange knowledge and experience from their respective sectors on themes such as artificial intelligence, algorithms, and online deceit. They will also look into ways to support each other's enforcement procedures. With a rapidly emerging digital landscape and digital activities that transcend the focus and scope of single regulatory authorities, this platform aims to manage the effects of digitalisation on consumers.

B. Transparency of media ownership and safeguards against government or political interference

Safeguards against state / political interference, in particular:

- *safeguards to ensure editorial independence of media (private and public)*
- *specific safeguards for the independence of governing bodies of public service media governance (e.g. related to appointment, dismissal) and safeguards for their operational independence (e.g. related to reporting obligations),*
- *procedures for the concession/renewal/termination of operating licenses*
- *information on specific legal provisions for companies in the media sector (other than licensing), including as regards company operation, capital entry requirements and corporate governance*

By law, the Dutch Foundation for Public Broadcasting is not mandated to concern itself with media content as public broadcasters have editorial autonomy. However, investigative journalism platform Follow The Money uncovered that the Dutch Foundation for Public Broadcasting does in fact exert such influence and sometimes even plays a leading role in the selection of programmes. However, due to a lack of criteria for the selection of programmes, broadcasters are dependent on this discretionary power of the Foundation for Public Broadcasting. In practice, it is important for public broadcasters and content creators to have strong informal relationships with the Dutch Foundation for Public Broadcasting. On top of this, the Dutch Foundation for Public Broadcasting lacks transparency when it comes to the way decisions are made and money is spent, for example regarding which programmes will be aired and/or what productions are financed.

Transparency of media ownership and public availability of media ownership information, including on media concentration (including any rules regulating the matter)

The Dutch media landscape is characterised by a high concentration of (foreign) media ownership. In June 2021, RTL Group announced its intention to take over Talpa Network, which is currently being reviewed by the Dutch Consumers & Market Authority. The approval of this takeover would severely affect the pluriformity of the Dutch audiovisual media sector, as only two major commercial broadcasters would be dominating the field (compared to six in 2018). The Dutch Media Authority has stressed the importance of a futureproof public broadcasting system to respond to this shrinkage. After the 2020 takeover of Sanoma by Belgian-owned DPG Media, the NOS, one of the biggest news media outlets, is currently the only top 12 online news service that is not under foreign ownership.

C. Framework for journalists' protection

Rules and practices guaranteeing journalist's independence and safety

Many Dutch journalists work as freelancers, which means that they often have no other (work) address to register at the Dutch Chamber of Commerce other than their private living address. These addresses are easily obtainable from the Chamber of Commerce registry. This not only raises privacy concerns but also imposes severe risks for their safety. In August 2021 - supposedly as a result of his publications - Dutch journalist Willem Groeneveld was attacked with a fire bomb at his house. His personal address had been publicly disclosed on social media. Another example, although from a different line of work, is the 2019 murder of Dutch lawyer Derk Wiersum in his house after his murderers obtained his private address from the Chamber of Commerce registry. Both attacks illustrate the need for better privacy measures to protect journalists' safety (and the safety of freelancers more generally).

From 1 January 2022, the Chamber of Commerce shall shield all private addresses in its registry. However, this does not apply for registration addresses, which for freelancers are often their private addresses. The only exception is in the event a probable threat exists. Despite advice from the Dutch Data Protection Authority (*Autoriteit Persoonsgegevens*), a majority vote in Parliament to enable the shielding of registration addresses that are also private addresses of journalists and the fact that the Dutch National Association for Journalists offers those fearing threats to register the Association’s office as their work address, the State Secretary for Economic Affairs stated no change in policy would occur, due to conflict with EU legislation.

Furthermore, the Dutch Minister of Justice committed to amend a controversial law that criminalises travel to terrorist controlled areas after heavy pushback from civil society. He did so after the Dutch National Association for Journalists (*Nederlandse Vereniging van Journalisten)*, Free Press Unlimited, media companies, war journalists and others outed criticism. The draft law now includes an exemption for journalists and humanitarian workers. This group will not need permission to travel to such areas.

Law enforcement capacity, including during protests and demonstrations, to ensure journalists' safety and to investigate attacks on journalists

PersVeilig (PressSafe), a project and joint effort of the Dutch National Association for Journalists, the Dutch Society of Chief-Editors (*Nederlands Genootschap van Hoofdredacteuren*), the police and the public prosecutor aims to reduce violence against journalists. Research from 2021 shows an increase in threats and violence against journalists: more than eight out of ten journalists experienced some form of aggression or threats (as opposed to six out of ten in 2017). The frequency of aggression is also increasing: three out of ten journalists are faced with monthly incidents, whereas this was only the case for 18 percent in 2017. In 2021, *PersVeilig* received 270 notifications, which is more than

twice the total of notifications received in 2020. The increase can likely be attributed in part to intensified publicity efforts of *PersVeilig*. 93% of journalists see aggression as an emerging threat to press freedom. In April, a photojournalist was purposely pushed into a ditch with his car after covering a car-fire. In August, a molotov cocktail was thrown into the house of Willem Groeneveld after his critical reporting for a local news website.

According to the above-mentioned research, 25% of journalists feel their employers do not do enough to tackle this violence. Especially freelancers (36%), a group that is particularly vulnerable in terms of limited employee protection, are unsatisfied with their employers' protection measures. PersVeilig recently released a Flexible Protection Package for freelancers who do not have (sufficient) protection from their employers. The package provides personalized protective equipment or measures. Examples of these are a bodycam, an emergency button service, or a house-scan to identify weak spots.

Due to increasing pressure from civil society and the outcome of an official evaluation by an evaluation committee, the Ministers of Justice and Defense proposed a new legal amendment to the existing National Security Services Act (WIV). However, there is still concern about the protection of sources under the new amendment.

Access to information and public documents (incl. procedures, costs/fees, timeframes, administrative/judicial review of decisions, execution of decisions by public authorities)

In October 2021, the new Government Information Act (Wet open overheid) was adopted and replaced the current Government Information Act (Wet openbaarheid van bestuur) as of May 2022, after increasing pressure from (civil) society and the childcare allowances affair. The new Government Information Act is intended to create more transparency and to make government information easier to find, share and archive. However, concerns still exist regarding the actual improvement of this law, especially in terms of sensitive information. Also, the response time under the new law is still below average compared to Tromsø requirements and other countries.

Under the new law, there will be two types of information management: active and passive disclosure. Active disclosure is a new obligation and means that certain government information must pro-actively be made public. More specifically, as of May 2022 government institutions must start actively disclosing eleven categories of information - including in relation to external legal advice, information requests, recommendations and subsidies. For all other types of information, passive disclosure will remain the norm, meaning that journalists will still need to request to retrieve information. In practice, this means that for the majority of (sensitive) information, nothing will change.

An Information Commissioner has been appointed to assist in this transition. The commissioner will supervise the planned improvements in the information management of the various government institutions. There will also be an advisory committee set up, which after evaluation, could take over the commissioner's tasks and supervise the implementation of the Government Information Act as soon as it is up and running.

Lawsuits (incl. SLAPPs - strategic litigation against public participation) and convictions against journalists (incl. defamation cases) and measures taken to safeguard against abusive lawsuits

There is no official data from the Dutch government on SLAPPs in the Netherlands. However, human rights organisations are noticing an increase, for example through a spike in requests for assistance. A 2021 study on violence against journalists indicated that 20% of the Dutch journalists experienced

legal threats or SLAPPs at least once in the past 12 months. However, this data is still mainly anecdotal and thorough monitoring is needed.

Despite concerns in Parliament, the government is not currently considering anti-SLAPP-measures due to a lack of data on the nature and scale of SLAPPs that is necessary to assess the need for legislation. The Ministry of Justice was supposed to start an investigation into this in 2019, but we are not aware of conclusions of this research.

Other - please specify

On 6 July, Dutch investigative crime journalist Peter R. de Vries was fatally shot. This was believed to be in relation to his role as a key advisor to the key witness in the Marengo trial, an extensive criminal trial against leading members of a notorious drug trafficking organisation. Although he is likely to have been murdered not for his journalistic work directly but for his function as a key advisor, De Vries' murder greatly impacted the (perception of) safety of journalists in the Netherlands. De Vries was under police protection long before he took on this role in the Marengo trial, as his journalistic work led to sincere threats to his physical safety.

The attack comes at a time when Dutch media is under increasing pressure: journalists are reporting an increase in violence and threats against them, and a narrative of distrust in the media seems to be on the rise. These trends have triggered widespread public and political attention to the murder of Peter R. de Vries, as well as the subject of safety of journalists in general. In a series of debates and roundtables on the topic of press freedom in the Dutch parliament, politicians, prime minister Rutte and the Royal Family have condemned the murder as an attack on the Dutch justice state and expressed the need for a proper investigation and the strengthening of safety mechanisms for journalists in the Netherlands.

OTHER INSTITUTIONAL ISSUES RELATED TO CHECKS AND BALANCES

COVID-19: provide update on significant developments with regard to emergency regimes in the context of the COVID-19 pandemic

- *judicial review (including constitutional review) of emergency regimes and measures in the context of COVID-19 pandemic*
- *oversight (incl. ex-post reporting/investigation) by Parliament of emergency regimes and measures in the context of COVID-19 pandemic*

The temporary law for COVID-19 measures - came into effect on 1 December 2020 for the duration of three months. Every three months, the Parliament has to decide if the law is continued for an extra term of three months. On the 1 December 2021, the fourth extension of the temporary law has come into effect.

On 23 January 2021, a curfew was instated as an emergency measure. A civil group claimed before the court that the legal basis for the curfew was unfounded. The legal basis used for the curfew was a general emergency law and was considered controversial. The court decided in favour of the civil group. In appeal, the case was overturned, the Appeal Court decided that the legal basis for the curfew was correct. The Supreme Court has yet to decide on the case, although the advocate-general of the Supreme Court advised on upholding the decision of the Appeals Court.

At the same time as the court case, the government submitted - before the decision of the Appeal Court - a new law concerning the curfew with the temporary law for COVID-19 measures as the legal basis. The curfew has been maintained until 28 April 2021. After this, the curfew was removed from the temporary law.

On 15 December 2021, the Advisory Division of the Council of State published an unsolicited advice on emergency and crisis legislation in general. The Council recommends several measures to modernise the emergency law in the Netherlands. This meets the call from the Parliament and society as a whole for a more sustainable emergency policy with a strong legal basis.

D. The enabling framework for civil society

Measures regarding the framework for civil society organisations (e.g. access to funding, legal framework incl. registration rules, measures related to dialogue between authorities and civil society, participation of civil society in policy development, measures capable of affecting the public perception of civil society organisations, etc.)

Globally, as well as in Europe, civic space is under increasing pressure. In light of this worrying development, it is crucial that the Dutch government ensures an enabling space for civil society and does not unnecessarily or disproportionately restrict civic space.

However, in 2021, the government proceeded with several bills that are potentially harmful to the independent position and the space of civil society organizations and critical citizens in the Netherlands.

The proposed bill to criminalise persons travelling to areas controlled by terrorist organisations (Wet strafbaarstelling uitreis naar terroristisch gebied) passed in the House of Representatives. The Senate has postponed further consideration of the bill in anticipation of the additional bill that arranges for the exemption of aid organisations and journalists, which is currently under public consultation. (see also p.12).

The bill for Amendment of the Civil Code to broaden the possibilities for banning legal entities (Wijziging van Boek 2 van het Burgerlijk Wetboek ter verruiming van de mogelijkheden tot het verbieden van rechtspersonen) entered into force on 1 January 2022. Human rights organisations are critical of the bill, as it has far-reaching consequences, while its added value is lacking, it is internally contradictory and contains vague concepts.

The proposed bill for the Administrative prohibition of subversive organisations (Initiatiefvoorstel Wet bestuurlijk verbod ondermijnende organisaties) passed in the House of Representatives and is currently before the Senate. This bill aims to grant the power to the Minister of Legal Protection to prohibit an organisation insofar as this is necessary in the interest of public order if this organization creates, promotes or maintains a culture of lawlessness. The Minister is also authorised, in the case of a legal entity, to dissolve it. The bill is problematic because it contravenes the Constitution in several ways and does not provide sufficient safeguards against potentially politically motivated decisions.

A Memorandum of Amendment to the proposed Civil society organisations transparency act (Wet transparantie maatschappelijke organisaties) was published for consultation in June 2021. Civil society organisations remain critical.

The bill that aims to provide a legal basis for the processing of personal data for the purposes of coordination and analysis in the context of counterterrorism and national security ('Wet Verwerking Persoonsgegevens coördinatie en analyse terrorismebestrijding en nationale veiligheid') is currently pending in the House of Representatives. This bill was introduced after a Dutch newspaper revealed that for years, The National Coordinator for Counterterrorism and Security (NCTV) had collected and disseminated privacy-sensitive information about citizens. Employees also secretly followed hundreds of political campaign leaders, religious leaders and activists on social media. The proposed bill aims to create a legal basis for these practices.

E. Initiatives to foster a rule of law culture

Fostering rule of law culture within the Netherlands

Fostering rule of law culture in the EU

The Covid-19 pandemic has brought an increase of polarisation, not only in society but also in the political arena. For instance, during parliamentary debates, the far-right political party Forum for Democracy has expressed threats of future tribunals. The way communication takes place among politicians, academics and elsewhere in the public debate has taken a rather threatening and hostile tone. Although the EU may not be in the position to alter this occurrence, these developments do affect the rule of law in the Netherlands.

The Dutch parliament appointed two rule of law rapporteurs, Agnes Mulder (CDA) and Roelien Kamminga (VVD). Rule of law-related issues have been subject of discussion and parliamentary questioning in the Dutch Parliament. They include parliamentary questions on Article 7 proceedings against Poland and Hungary, the request from the rapporteurs Mulder and Kamminga concerning the judgement of the Polish Constitutional Court about the primacy of EU law and the discussion of the rule of law report with Commissioner Didier Reynders with Dutch parliamentarians.

In October 2021, Dutch parliamentarians (amongst them the two rule of law rapporteurs Kamminga and Mulder) submitted a motion asking the government not to approve the Recovery Fund plan of Poland before Poland complies with EU law ensuring the independence of the judiciary.

The new government announced in its recently published coalition agreement that in order to strengthen the rule of law in the Netherlands, it will spend more money on the social advocacy and the access to justice. Concerning the Dutch EU-policy, the coalition agreement states that "Member states that violate shared values, agreements or the democratic rule of law will be reprimanded.

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