

THE PROPERTY NATURE OF TELECOM NETWORKS: A TURBULENT ISSUE IN THE NETHERLANDS

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The Dutch telecommunications sector is anxiously awaiting a judgment of the Dutch Supreme Court on the property nature of an underground cable network. The highest judicial body in the Netherlands will be declaring in the near future whether a cable network constitutes movable or immovable property. The Supreme Court's judgment is expected in tax proceedings; if the network turns out to be immovable property, transfer tax will be due rather than turnover tax.

1. What Are the Relevant Factors?

Cable networks are owned by telecommunication service providers, but also by television cable companies. The cable network is primarily located underground. Overground facilities are usually installed only for the cable distribution boxes and signal amplifiers. The cables are located in ducts in the soil. Cable distribution boxes, signal amplifiers and reception stations are also part of the cable network. The main part of such a network, however, is the cabling.

As a rule, the network is installed in and on municipal land. The principal rule of Dutch law, as set out in the Dutch Civil Code, is that the cable network in the land of the land owner – i.e.: the municipality – is owned by the same party as the land

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and becomes part of the immovable property, the land.² This is known as vertical accession. This means that it is not the cable company that owns the cable network, but rather the municipality that owns the land, and that, in principle, the owner of the cable network has only a right of action against the municipality on the grounds of unlawful enrichment.³

2. Judgment of the Court of Appeal of The Hague

On 2 March 2000, the Tax Division of the Court of Appeal in The Hague⁴ passed a judgment that also answered the questions who owns the cable network and whether the cable network should be regarded as movable or immovable property. The answer to that question is decisive in determining what type of tax is payable to the authorities upon the sale and transfer of a cable network. In the past, it was assumed that the owner/acquirer of the cable network always owed turnover tax on the purchase of the cable network because it constituted movable property. The Court of Appeal ruled, however, that the cable network may be regarded as immovable because it is permanently joined with the land. The Court of Appeal thus confirmed the rule of vertical accession. Consequently, transfer tax is due rather than turnover tax.

The essence of this case can be summarised as follows. A number of municipalities sold and transferred ownership of the community antenna installation that they operated themselves to a third-party buyer for almost NLG 10 million. The tax inspector took the position that this constituted a transaction that was subject to

2 Article 3.3 in conjunction with 5:20e of the Dutch Civil Code. The relevant parts of those Articles are quoted below:

Article 3.1: 'Immovable are the land, any minerals not yet extracted, any plants united with the soil, and the buildings and works that are permanently united with the land, either directly or by being united with other buildings or works.'

Article 4.1: 'Anything that forms part of a good by generally prevailing opinion is a constituent of that good.'

Article 5.20: 'The ownership of the soil comprises, except in so far as otherwise provided by law: [...]

I.e. buildings and works that are permanently united with the soil, either directly or by being united with other buildings and works, except in so far as they are a constituent part of other immovable property.'

3 Article 6:212 of the Dutch Civil Code.

4 Tax Division of Court of Appeal of The Hague of 2 March 2000, no. BK 98/3135.

transfer tax. He imposed an additional transfer tax assessment.⁵ The third-party buyer accepted that, if transfer tax was indeed due, it must be calculated on the basis of the market value of the infrastructure (community antenna installation). That value was NLG 45,000,000, which means that the transfer tax in any case would not be more than 6% of that value, i.e. NLG 2,700,000. The inspector took the position that the infrastructure formed a (constituent) part of the full ownership of the land.

The considerations and the judgment of the Court of Appeal were brief. It is difficult to deduce from the judgment whether the third-party buyer filed any detailed defence. It would appear that the third-party buyer did not fully substantiate its argument in the proceedings that the cable network does not constitute immovable property. In the proceedings, the third-party buyer invoked an exception from the vertical accession rule, known as the horizontal accession rule. The horizontal accession rule focuses on the unity of a good rather than on the link to the underlying land. The consequence of the horizontal accession rule is that the cable network can, in certain circumstances, be regarded as movable property. Generally prevailing opinion⁶ plays an important part in arriving at a decision with regard to horizontal accession as to whether a good is movable or immovable. In the Netherlands, 'generally prevailing opinion' is an opinion on which there is general consensus. In the present case, it had to be investigated in the context of generally prevailing opinion whether the cable network can be regarded as separate property. The question is whether the third-party buyer optimally presented the generally prevailing opinion in the proceedings.

3. Generally Prevailing Opinion

The generally prevailing opinion is a standard for the judge to help him or her assess whether part of a good is a constituent part of that good. The further criterion is whether the good is incomplete without a certain constituent part. There appears to be a direct relationship between generally prevailing opinion⁷ and the requirement

⁵ Article 2 of the Dutch Tax on Legal Transactions Act.

⁶ Article 4(1). *See* note 2.

⁷ Supreme Court 11 December 1953, *NJ* 1954, 115 (*Stafmateriaal*) and Supreme Court 31 October 1997, *NJ* 1998, 87 (*Portakabin*); Supreme Court 15 November 1991, *NJ* 1993, 316 (*Depex/Van Ratingen*); Supreme Court 27 November 1992, *NJ* 1993, 317 (*Tax Collector/Rabobank*).

of being permanently joined with the land.⁸ It must be determined on the basis of generally prevailing opinion whether a cable network is regarded as movable or immovable property. In literature and case law there are different opinions on the generally prevailing opinion.⁹ If the unity of the cable network is the central focus, the cable network can, in principle, be regarded as movable property. However, if the position is taken that a cable network is intended to be permanently installed in the land and that idea is the central focus, the cable network will be regarded as immovable property because it is acceded by the land. In that case, transfer tax will be due.

4. Judgment of the Court of Appeal of The Hague

The Court of Appeal rejected the invocation of the horizontal accession rule and ruled that the cable network was permanently joined with the land and was therefore immovable. This position meant that the municipalities, as owners of the land in question, were also owners of the cable network. The Court of Appeal also ruled that, due to horizontal accession, the municipality's ownership of the cable network also comprised the ownership of part of the cable network that was located in or under privately owned land. Therefore, transfer tax rather than turnover tax was due. The invocation by the third party buyer was considered unfounded.

5. Consequences for Turnover Tax Or Transfer Tax

This judgment has drastic consequences for telecommunications providers in the Netherlands that have purchased existing cable networks in the past few years, since transfer tax (6%) is sometimes due upon the purchase of immovable property.¹⁰ In view of the transfer price of a cable network, all of the amounts involved are very substantial indeed. If a tax inspector follows the opinion of the Court of Appeal, substantial additional transfer tax assessments may be imposed. Also, problems may arise with regard to the deduction of the turnover tax charged. Any turnover tax

⁸ Generally prevailing opinion has also been used by two Courts of Appeal as a standard in determining whether a community antenna installation or a water works installation was acceded by the land. See Court of Appeal of The Hague 24 April 1986, *NJ* 1988, 244, Court of Appeal of Arnhem 16 June 1987, *NJ* 1988, 1049.

⁹ Steven de Leeuw, *Graafrechten voor telecommunicatievoorzieningen*, Iter, 1996, p. 157. In the context of generally prevailing opinion, De Leeuw argues that each part of the mains forms an essential part of the entire public utility network; p. 161. Also in the context of generally prevailing opinion, Van Velten (note 14) raises the question which link applies.

¹⁰ Transfer tax is usually due upon the acquisition of immovable property already put to use.

already paid cannot be deducted from an additional transfer tax assessment, if any.

6. Appeal to the Supreme Court

The third-party buyer filed an appeal against the judgment of the Court of Appeal of The Hague with the Tax Division of the Supreme Court, the highest judicial body in the Netherlands. In that context, the Attorney General has meanwhile published the advice to the Supreme Court, known as the Statement,¹¹ in the specialist publications. The Supreme Court will pass judgment in the near future.

Before discussing in outline the Statement of the Attorney General, it should be noted that it remains to be seen whether the Court of Appeal of The Hague did its work properly.

In the author's opinion, the Court of Appeal wrongly failed to take into account the fact that the cable network may be regarded as separate movable property regardless of whether the cable network is located in the land (or in another party's land). It can indeed be argued on the basis of generally prevailing opinion that, in view of the horizontal accession rule, a cable network must be regarded as movable property.

Moreover, the Dutch Telecommunications Act¹² also provides that the installation of, e.g., cables in another party's land does not alter the ownership of what has been installed. The Court of Appeal also paid no attention whatsoever to that rule. However, that rule of the Telecommunications Act has two disadvantages. On the one hand, its scope is limited. This means that the Act primarily offers ifs and maybes with regard to cable networks under construction. On the other hand, it is regrettable that the legislature has not used this recent Act to stipulate that a cable network constitutes movable property, but merely set out in the Act that the ownership of what is installed is not changed. The Act does not answer the question whether a cable network constitutes movable or immovable property.

7. Statement by the Attorney General

The Attorney General also doubts the correctness of the judgment passed by the Court of Appeal of The Hague, which focused on the additional transfer tax assessment in the context of the acquisition of the infrastructure of the community

11 P.J. Wattèl, *Derde Kamer*, Statement, Fiscalet, no. 36.075, 5 July 2001.

12 Article 5.6 of the Telecommunications Act.

antenna installation. The Attorney General deals at length with the property nature of a cable network and quotes the commentary in the specialist publications¹³ on the judgment of the Court of Appeal as well as authoritative literature.¹⁴ The Attorney General rightly notes that no position has been taken in legislative history on the property-law status of a cable network, so that it must be determined for each network whether it is movable or immovable. The Attorney General opts for the horizontal accession rule, which focuses on the unity of a telecommunications network, regardless of who owns the land in which the cable network is located. It is interesting that the Attorney General also expresses doubt on the position taken by the Court of Appeal that the cable network is intended to be installed in the land and that the cable network is therefore permanently joined with the land. In his opinion, mere burying does not constitute joining with the land. The intention of the party installing the network is relevant here, because the intention of the cable operator is to receive and pass on signals in the context of its operations. It is entirely irrelevant to the cable operator whether the cable network was installed underground or overground. Moreover, the cable network can easily be dug up. These arguments plead in favour of a cable network constituting movable property.

At present it still remains to be seen to what extent a cable network installer can determine by its intentions whether property is movable or immovable. In my opinion, however, there is a relationship between the party's intention and generally prevailing opinion. The party's intention must be in keeping with generally prevailing opinion. Difficulties arise when generally prevailing opinion is still developing. In that case, generally prevailing opinion does not present a definitive answer. It is now up to the Supreme Court.

Moreover, the Attorney General addresses the Telecommunications Act, which was not raised in the proceedings before the Court of Appeal. That Act provides that the installation of cables by the provider of a public telecommunications network or of a broadcasting network in and on land and in and on buildings of other parties does not change the ownership of what has been installed.¹⁵ The ownership of the cable

¹³ O.P.N. Blom: *Is een kabelnet onroerend?* FBN April 2000, p. 15, B. Wessels and R.G. Snouckaert van Schauburg: *Telecom-kabels zijn van rechtswege roerend*, WPNR 2000/6411, p. 533; T.H.D. Struycken: *Het goederenrechtelijke karakter van telecom-kabels*, WPNR 2000/6421, p. 836; L. de Kok: *Uitspraak Hof Den Haag zet telecomwereld op zijn kop*, *Bedrijfsjuridische Berichten*, 14 November 2000/issue 21, p. 207; W. Louwman: *Levering van rechten op transportleidingen en telecomnetten*, JBN November 2000, p. 4.

¹⁴ In particular: *De eigendom van ondergrondse telecomnetten*, Prof. A.A. van Velten, WPNR 1997/6285, pp. 667 *et seq.*, *Ars Notariatus LXXXIII*, Kluwer 1997, *Horizontale splitsing van eigendom*, H.D. Ploeger.

¹⁵ Article 5.6 of the Telecommunications Act.

network therefore does not pass to the owner of the land, but remains vested in the provider of the network. The Attorney General excludes the applicability in this case on the basis of a formal argument. If the Supreme Court also adopts this position, this question will be presented to it for its consideration in the future!

In the author's opinion, the following analysis applies. Even if the Telecommunications Act merely specified that the installation of the cable network in the land of another party does not change the ownership of the cable network, the question whether that cable network constitutes movable or immovable property still needs to be answered. This brings us back to the interpretation of the property nature pursuant to the law and the case law described above. The author agrees with the Attorney General that it constitutes movable property.

8. Private Law Consequences of the Judgment of the Court of Appeal

Although the judgment of the Court of Appeal has a tax background, the issue is also of great importance in the light of private law. The answer to the question who owns a cable network and whether it constitutes movable or immovable property is important as to the manner in which a cable network operator can create, for instance, a security right with regard to the network. In the context of the purchase and extension of a cable network, there is great demand for external financing. The financiers are usually willing to provide funding only if they can create sufficient security for repayment of the money they have lent. From a legal perspective, there is a relationship between opting in favour of creating either a mortgage or a pledge, and the answer to the question whether the object constitutes movable or immovable property: mortgages are created on immovable property and pledges on movable property.

In practice, pledges were used for cable networks until the judgment of the Court of Appeal of The Hague, and usually since then too. If it turns out after the Supreme Court has passed its judgment that a cable network must be regarded as immovable property, many of the financiers will find that they have created incorrect security rights, which will render them worthless. There is therefore every reason for serious concern. It remains to be seen whether all telecommunications providers – in particular the installers of empty ducts – will be able to obtain financing quite as easily then. A security mortgage can be created only with the co-operation of the land owner, who will most likely not co-operate because a possible realisation of the mortgage will then also apply to the land owner's land.

9. Conclusion

The judgment of the Court of Appeal of The Hague has set the telecommunications sector on edge. It is very important in everyday practice whether the Court of Appeal has reached a correct decision. If the judgment of the Court of Appeal of The Hague is also followed in civil law, many telecommunications contracts will have to be differently organised, quite apart from possible additional transfer tax assessments and problems with regard to turnover tax already deducted.

We will have to await the judgment of the Supreme Court, which will probably be available before Christmas. The telecommunications sector is anxiously waiting to see whether Santa will be bringing them a good present this year!