

## **Freer Markets, More Court Rulings?**

Vrijere Markten, Meer Jurisprudentie?  
(met een samenvatting in het Nederlands)

Proefschrift

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# 1 Freer markets, more court rulings?

## 1.1 Introduction

The governance of economic sectors in Europe has over the past decades been characterized by several important shifts. Two of the most notable shifts are those from state to market governance and from state to court governance (Van Kersbergen and Van Waarden, 2001:31-40). The first shift is the result of a coherent set of policies that have introduced competition in formerly public sectors such as energy, gas, water, telecommunication, and public transport. This set of policies included the liberalization of these sectors by lifting entry barriers, the privatization of public corporations, and the introduction of new forms of regulation, enforced by sector regulators. The motives for these liberalizations may have been different in various states, but underlying all market reforms was the assumption that the market would be a more efficient coordination mechanism for public services than the state. Such an important shift in the governance of economic sectors is likely to have an impact on many aspects of those sectors. It is therefore that the newspapers and commentators do not only present statistics about increased efficiency and lower prices after the waves of liberalization. We also hear about protesting employees turning against the presumed job insecurity that liberalization brings; we see new entrepreneurs complaining about the abuse of market power by former incumbents; we see traveller association representatives opposing the disintegration of public transport networks; we see investors demanding an absence of any public influence and other investors demanding better government protection. One thing that these complaints have in common is that they all involve conflict.

From conflicts, it is only a small step to the second shift in governance referred to in the beginning: From state governance to court governance. In many European countries, litigation rates have increased steeply. Also increases in the number of lawyers, the number of judges, and the number and amount of damage claims indicate that there is a trend toward juridification.

Legal institutions also play an increasingly important role in economic sectors. There are more market regulations and the court is regularly called upon to review decisions of regulatory agencies and thereby to interpret the new market regulations. Economies and societies are increasingly governed through formal legal institutions.

It may be that these two shifts in economic governance are connected. There are various possible links between elements of liberalization and juridification: Introduction of competition leads to more competitors and thereby to more relationships and more adversarial relationships, both of which normally lead to more conflicts; the withdrawal of the legislative and executive powers from the market could create a vacuum to be filled by the judiciary; lawyers and legal advisers could see the liberalized sectors as an interesting business opportunity and direct their marketing efforts toward them; employees of privatized corporations could see an opportunity to reduce their job uncertainty through the court. In short, there is reason to assume that several elements of liberalization lead to juridification.

## 1.2 Research problem

Does liberalization indeed enhance juridification? And if yes, how? These are the main questions this study aims to answer. It does so in the first place by testing the communicating vessels theory developed by Van Waarden (Van Waarden, 2002a; 2002b) in different economic sectors. The theory suggests that there are risks involved with every economic transaction and that each economic sector requires a certain level of risk reduction, which could be provided by a variety of institutions. The primary risk reducing institution in public sectors was the state. After the deregulation of these sectors, other institutions emerged as possible risk reducers, amongst which the legal institutions such as sectoral regulators and courts.

At the same time, this is an explorative study, which aims to discover *how* these institutional processes work. It does so by observing these mechanisms in a variety of economic sectors. As the sets of liberalization and juridification elements are diverse, it is well possible that sectoral variation in their causal relationship exists.

In order to determine the unintended effects of liberalization on juridification, a number of sub-questions should be answered in the context of particular economic markets. Many of these sub-questions are derived from the communicating vessels perspective that will be summarized later in this chapter.

First, it must be determined *which actors are active on liberalized markets and to which new risks these actors are exposed*. Each market consists of vertical relationships between service providers and customers and of horizontal relationships between competing providers (or in case of very scarce goods, competing customers, but this is not likely to happen on a public services market). Uncertainty exists within each of the relationships between these actors. The change in risk and uncertainty

between actors on the services market must be determined by comparing the situation before and after the liberalization of the market. Uncertainty also exists in the relationships between the main actors on the services markets and the actors on supplies markets such as the labor market, the markets for capital goods, and the markets for various kinds of commercial services such as financial and legal services. Here, too, the increase of risk and uncertainty after the removal of the public monopoly must be determined.

After the various new risks and uncertainties to all different actors are mapped, the next question is *which strategies do these economic actors pursue to counter these risks and uncertainties?* The implicit assumption, which must of course be tested, is that all actors concerned with the liberalized markets aim to reduce their own risks. These strategies can be very diverse. Service providers could take a cooperating or a hostile approach toward each other and toward any regulatory institution. Some market parties are likely to strive for more regulations, while others aim to reduce the regulatory burden. Also consumers, interested third parties, vendors of supportive services, etc. are likely to pursue a strategy to reduce the risk that has presumably been produced by the withdrawal of the government from the public services markets.

Next it must be determined *which of these strategies lead to formal legal disputes that are to be resolved in the courtroom.* In the first place, service providers operating on the same market obviously have clashing interests and their strategies to reduce risk may even be aimed at each other. Such direct confrontations will easily lead to conflict. In the second place, there could be conflicts between the buyers and sellers on the liberalized markets. Social groups that are dependent on a cheap provision of public goods may get in conflict with the different interest that commercial firms have. In the third place, the changes on the services markets may also influence the relationships between actors on these markets and those on production factor markets. The labor, equipment, capital, legal services markets, etc. are all impacted by the strategies employed by the actors on the services markets. They, too, face new risks and uncertainties that they will attempt to reduce. This may again lead to conflicts between buyers and sellers on these markets.

The answers to the questions above should result in a list of actors, strategies and court disputes over particular themes that these strategies focused upon. The next question to be answered is then: *Under which conditions does liberalization lead to a particular form of juridification?* This question relates to the possibility to generalize conclusions, namely whether the conflicts in liberalized markets are all sector-specific, or whether there are more general mechanisms at work that will cause liberalization to lead to juridification if certain conditions are met.

The mechanism described above explains conflicts as a result of strategies aimed to reduce the uncertainty resulting from the introduction of competition. Apart from engaging in conflict over uncertainties, market actors may also seek the development of new regulations to reduce this uncertainty. Especially weaker parties may call upon the government to introduce new regulations in order to compensate for their weaker position. Part of this body of regulation is already introduced directly together with the liberalization policy, but in the course of years there may be additional calls for regulation by firms, consumers, and other interested parties. However, these new regulations necessarily contain room for interpretation. In case of liberalized markets, where it was a specific objective of the government to ‘deregulate,’ there is reason to assume that this room for interpretation is large. The call for enforcement of these regulations also brings in a new type of actor with again a different interest, namely the regulator. In answering this question, attention must be paid to the role of regulatory agencies in conflicts.

Attention must also be paid to the question: *How does the legal system influence the trend toward juridification?* This could be done in different ways. Of course, one way in which courts could directly influence the amount of conflicts is by creating precedents. These precedents could prevent future conflicts, but they may also be interpreted differently by parties with conflicting interests and thereby lead to new, more complex cases. Apart from courts, regulators and lawyers can also be expected to increase their influence on the sector. Regulatory agencies are part of the legal system as they perform a legal function. This legal system actively and passively influences the conflicts in the liberalized sectors. Commercial lawyers and legal advisers may try to market their services. In short, attention should be paid to the supply side of juridification.

As indicated in the introduction, the aim of this study is not only to observe, describe, and partly explain trends in economic reforms and their influence on juridification, but also to evaluate these trends: *What are the consequences of juridification in liberalized markets and how should these consequences be evaluated?* The different governance mechanisms each have their strengths and weaknesses in regulating risk and uncertainty in the market. The first task is to make assumptions on these strengths and weaknesses and to test them in particular markets, because it is likely that performance differs from market to market. Next, the new situation can be compared to the former situation.

### 1.2.1 Relevance

The study of a causal relationship between liberalization and juridification is relevant from several perspectives. In the first place, it offers an explanation for the current trend of juridification such as increasing lawyer densities, litigation rates, and judicial power. It thereby forms an addition to other explanations that focus on legal developments, developments in the judicial organization, and other socio-economic trends that influence juridification. In the second place, if a causal relationship is proven, it is important to take juridification into account as a factor in economic policy-making. Currently, juridification has not been part of either ex-ante or ex-post analyses of particular liberalization policies. The debate about liberalizing other economic sectors in Europe, such as health-care, post, and railways, will certainly continue in the future. Juridification may be an important factor to include in these debates. At the same time, it should be incorporated in the evaluation of liberalization policies that have been carried out in the past. In the third place, the study contributes to interdisciplinary scholarship by showing how to use insights from different academic fields. The two central concepts, liberalization and juridification, are normally studied in different disciplines. The consequences of liberalization are an object of study for economists and economic sociologists. The causes of juridification are important topics to scholars of legal studies, sociology of law, and political science. In short, the aim of this study is to build a bridge between two different groups of disciplines and between two different policy areas.

## **1.3 Liberalization**

The independent variable in this study is market liberalization. Like juridification, this variable is better defined as a set of related processes. All processes that fit the definition of liberalization in some way describe a shift from state governance to market governance. In this section, the definitions of these various processes are given, followed by a discussion of the motives, the causes, and the consequences of liberalization. There is a focus on the liberalization of network sectors, because many sectors that were recently liberalized have network characteristics. The section ends with a discussion of juridification as an unintended consequence of liberalization.

### 1.3.1 Definition

Literally, liberalization means that someone / something is liberated, i.e. made free. In the case of market liberalization, markets are freed from a high level of state intervention. Market liberalization can be defined as: To open a market for competition. Behind this seemingly simple policy change is a whole economic and social debate on the best way to organize economic transactions. Liberalization is not only the act of allowing new entrants on a market that was previously served by one public supplier. Liberalization, if viewed in a broad manner, includes several elements.

In many cases, the first element is the introduction of competition in a monopolistic market. This means that other parties must be able to enter the market and that they compete with each other on quality and / or price. According to neoclassical economic theory, competitive markets reach a higher degree of efficiency than monopolies. A transition from monopoly to free competition should therefore automatically lead to more efficiency and, ultimately, lower prices. The reasoning is that under the threat of competition, economic actors will be more inclined to produce efficiently, to listen better to market demands, to focus more on innovative services, etc. The state therefore should withdraw from the actual provision of goods and services as far as possible, taking into account market failures.

The second element is the privatization of public corporations. Although it is theoretically possible to have a public firm competing with private firms, it is from an economic viewpoint undesirable. The theory behind market competition is based on the concept of 'survival of the fittest.' Those companies that manage to innovate and increase their efficiency better than others survive. As it is highly unlikely that a government or one of its corporations goes bankrupt, this threatens the whole idea of free market competition. In order to create a level playing field, it is a logical thing to do for governments to sell off public corporations when liberalizing their markets. This process is referred to as privatization, when that word is used in a narrow manner. As is shown later, the sale of public corporations is not always done on ideological grounds. Privatization often involves more than only transferring the ownership of the firm. It could also refer to a change of legal status, which has many implications. One implication is that the employees are no longer civil servants who are on the public payroll.

A third element is re-regulation. The new market ordering paradigm also brought with it a different need for state involvement. In many countries, the state took over the production and supply of goods and services that could not be

adequately be provided by the market because of market failures or because of a distribution of welfare that was considered to be unfair (Ogus, 1996). The modern state attempts to set and maintain the rules of the game in such a way that the market does provide these goods and services adequately. It is therefore referred to as the 'enabling state,' the state that enables the market to work efficiently (Gilbert and Gilbert, 1999). This requires much work on the process of rulemaking and enforcement. Most notably, rules on competition and antitrust have to be implemented. Competition law consists of regulation of market access, the abuse of substantial market power, the prohibition of cartel agreements, and promotion of competition in general. These rules are then monitored by one or more regulators or competition authorities. This can be done at national and / or sector levels. This active form of regulating has become common practice in all European welfare states (Majone, 1996).

Apart from these policies, there are other elements of liberalization. Worth mentioning are the trends toward performance measurement and toward internationalization. Performance measurement consists of a range of management techniques in which the relationship between principals and agents is governed by measurable and objective criteria that the agent must fulfill. New Public Management (NPM) refers to the idea that public service benefits from clear aims and agreements, performance measurement, and accountability for performance delivered (Hood, 1991; Pollitt, 1993). Out of this line of thought, a number of techniques has been developed to improve the efficient supply of public services. The techniques that resulted from this line of thought vary from performance contracts to the publication of results by organizations in the civil service. NPM, like the other reforms discussed in more detail in this study, has some religious tendencies. There are believers that wish to implement the techniques everywhere possible. There are non-believers that oppose any form of it. And there are people that work with it on a daily basis, without thinking about the fundamentals that underlie the techniques.

There are several links between NPM and the other elements of liberalization. Just as the other elements, NPM aims to increase efficiency in the public sector. NPM and the opening of markets for competition are also connected through information. Only if the performance of market parties can be determined, they can be compared. And only if performance is comparable, consumers are able to make a rational choice. The supply of transparent information is therefore one of the major governmental tasks in liberalized markets. NPM and privatization are also linked. The idea of privatization is on the one hand that commercial companies cannot compete with corporations owned or controlled by the government in a fair way. On the other hand,

control by private parties, which are more likely to implement a number of management techniques, could increase the efficiency of service provision. Re-regulation is connected with NPM mainly through agreements. The regulations could be regarded as the boundaries within which the market is left free of governmental intervention. These boundaries are set when the government believes that service providers, even if operated on a commercial basis, need to take into account the public interest. Think of regulations on network maintenance or a minimum number of public transport services to every town. In NPM terminology, these regulations are minimum requirements that service providers need to fulfil and for which they may be held accountable.

The connections between NPM and economic reforms could lead to the idea that there is in fact one trend toward performance improvement in the public sector, rather than several. Others may claim that the promotion of a competitive environment has facilitated the introduction of NPM. The argument would be that where market incentives could not be adequately introduced, performance measurement was the most efficient alternative. Still others could argue that the introduction of NPM techniques has led to other reforms, in the sense that performance measurement of governmental corporations was not enough in some cases and that market competition could supplement the new management techniques. All of these may be true, but it is clear at least that the two concepts are intertwined to a large degree. It is therefore also difficult to determine which management techniques applied in reformed sectors belong to the NPM line of thought. The privatized monopolists and the new companies on the market are all commercial enterprises, so the management of these firms is no case for NPM. However, the government in reformed sectors applies a number of NPM techniques in its relationship to private firms. Think how a government enters in a performance agreement with a privatized firm. Whether the use of such techniques in public-private relationships is NPM is a grey area.

Internationalization means that the borders of domestic markets become increasingly vague. Aided by new transportation methods and electronic technologies, both consumers and producers are less bound by these borders. Internationalization is an inherent part of liberalization. The lifting of entry barriers invites foreign producers on domestic markets and the privatization of state corporations gives room for foreign investments. Market regulations are harmonized at the supra-national level in order to further stimulate internationalization.

### 1.3.2 Regulation of network sectors

Many liberalized sectors share the characteristic of a network. Examples are telecommunications, electricity, gas, and public transport. This network aspect has resulted in different forms of governmental regulation.

The high costs of network construction and maintenance create a form of a natural monopoly. Under a natural monopoly, it is more efficient to have supply by one producer than by more. Nonetheless, monopolies are inefficient because of a lack of competition and therefore present a market failure. This is often the case in infrastructure markets, as the costs of constructing, expanding, and maintaining the network exceed the benefits that could be reaped from operating a second network. It leads to a situation in which only one network is constructed, often by the government and not by a commercial party. The existence of high sunk costs makes that no second infrastructure is created. The network becomes an essential facility: Access to that facility is the only way of providing the service. In this way a ‘natural’ monopoly is created. The growth of a single network, rather than multiple smaller ones, is enhanced by economies of scale. Up to a certain point, the costs of connecting more people to the same network grow with diminishing returns to scale.

Secondly, all infrastructure markets suffer from a problem of asymmetric information. In network sectors, asymmetric information is mainly caused by the technical complexities of some infrastructures. Only the owner of the network is aware of the true costs of operating and maintaining the network. It can claim to ask a fair price for its expenses, whereas in practice the costs of delivering a service are far lower than pretended.

Finally, it is a fact that most infrastructure sectors are of vital importance to the economy. Energy, information, mail, water, and transport are a framework upon which the rest of the economy and society are built. This gives unusual strong power to the supplier of such services.

These market failures and other features combined have led to an economic policy in which the government has taken control over the infrastructures and the supply of these services. With the recent call for liberalization, the need for governmental interference has not disappeared.

### 1.3.3 Types of liberalization in network sectors

The specific features of network sectors called for a specific regulatory framework when liberalized. In order to guarantee all public interests without taking the supply of such services in their own hands, governments are to make a distinction between several parts of an infrastructural sector. This leads to a chain consisting of three elements. The first is the actual production of the service. The second is the transport of the service over the network. The third element is the delivery of the service. Of course, this framework is analytical and does not capture all services mentioned. The production phase is clear cut in the electricity market, but in case of bus transport there is no clear distinction between the phases. Still, the framework does provide important information to those governments that plan to liberalize their infrastructural sectors. If competition on the market as a whole is impossible, it may be possible to introduce competition on one of the elements of the market. For example, a government may keep the ownership and maintenance responsibilities, but open the market for new deliverers by opening the network to competitors.

This required different ways of liberalizing the sector, depending on how essential the network aspect in that particular market was. A proponent of liberalization would argue that all liberalizations are founded on the same economic ideas, yet the practical application depends on the conditions on the specific market. In infrastructure markets, there are four possible ways of introducing competition, each with a different degree of governmental intervention.

The first is competition between infrastructures. If suppliers of utilities could make use of different network infrastructures, this would be a desirable form of competition. Apart from competition on the basis of the services offered, competition would also occur on the basis of network maintenance and construction. However, the high costs of operating a network makes that in most sectors this form of competition is impossible. Only if technological developments lead to lower costs of construction or operation, it would be possible that competing networks emerge. A final possibility is that the demand for certain services increases, so that competing or complementing networks would be constructed.

A second option is the introduction of competition on the infrastructure. In this case it must be possible that multiple providers can make use of the same infrastructure. The key is to regulate the market in such a way that equal access to the market is guaranteed and that the owner of the network does not abuse its market power. Regulating access by imposing tariffs can be done in several ways, for example by setting a maximum price that the owner is allowed to ask for access (price

cap) or by determining the price by deciding the profit that a monopolist is allowed to make (rate of return). In case the new entrants on the market obtain a more powerful position, it would be logical to lift the access price regulation and let the market parties negotiate themselves. The regulator then only acts in case of complaints, which is a more passive form of regulation.

The third possibility, besides competition between infrastructures and on the infrastructure, is to introduce competition for infrastructures. More precisely, the battle about who gets the right to exploit the network as a monopolist for a certain amount of time. This model is a contracting out model in which the government tenders licenses, for example through an auction. This form of competition is more limited in the sense that there are fewer incentives for suppliers to become more efficient. It also requires more regulation, as the government has to organize a fair procedure and to determine the boundaries within which the future supplier must use the network. Although there is few theoretical backbone and little empirical evidence for the claim that this form of competition leads to more efficiency, it is the only possibility if an infrastructure can be used by only one party. This is often the case in passenger transport.

A final possibility for competition is benchmarking. Like the previous option, there is no direct competition for the customer in this case. Apart from that, there is also no possibility to 'settle the bill' after a number of years. The only competition is between regional monopolists that are compared to each other. 'Naming and shaming' is the mechanism through which incentives for better performance must be guided. The governmental task is to make fair comparisons. This weak form of competition is for example introduced in the Dutch water supply sector (Ministry of Economic Affairs, 2000).

#### 1.3.4 Motives

The motives of introducing policies of liberalization are diverse and often not so clear to distinguish. There are at least three mainstreams that each include a number of related motives (Wright and Perotti, 1999).

The first category is that of ideological liberalization. These are liberalization programs inspired by political ideas about the proper role of the state in coordinating the economy. Behind it is the liberal market philosophy that dictates non-interference of the state. Its political proponents liberalize a sector because they think that the state has interfered too far and should pull back in order to increase efficiency and promote

innovation. Primary examples of such liberalizations are those in the United Kingdom in the beginning, France halfway, and Portugal at the end of the '80s (Young, 1986; Lavdas, 1996).

If this first category is ideological, the second one could be called pragmatist. These are liberalizations that are carried out because of budgetary reasons. If maintaining a welfare state becomes too expensive, a cheap solution is to let the market provide certain services. Most liberalization in Europe not mentioned in the previous category fall under this item. The budgetary advantages are twofold. The state no longer has to pay for the provision and the selling of state corporations provides money quickly.

A third category of motives is that of pressure from outside. Developing countries often have to comply with regulatory reform programs, including the liberalization of markets, if they wish to receive funds from international organizations like the World Bank and the International Monetary Fund. EU countries have to comply with EU regulations that are geared toward creating a European free market.

A problem in studying the motives behind liberalization is that the real reasons may not be publicly announced. Governments may like to claim they base their new reform proposals on widely accepted new economic models that predict growth and prosperity, rather than saying they need to cut expenditures or are softly forced by international organizations. Another problem in determining the true reason is that these reasons are often mixed. In a particular sector, the motives behind its liberalization are best thought of as a continuum that features the two main reasons to privatize. On the one side there are presumed systemic benefits, advantages as mentioned before, that occur with every liberalization program. This is based on the general presumption that government interference is bad. On the other side there are market-specific reasons. Just as there were once reasons to organize certain markets as a state monopoly, there are now reasons to liberalize them. This may be the case in sectors that are going through a process of rapid innovation for which business capital is needed for public firms to keep up in the global economy.

### 1.3.5 Causes

Apart from the motives for public executives to liberalize and deregulate, there is a number of external causes that have shaped the conditions for liberalization policy. Some can directly be traced back from the motives. Liberalizations for budgetary,

practical reasons are often the result of bad economic performance or bad financial management by the state. Regulatory reforms demanded by international organizations are closely related to the powerful position of such organizations in the sphere of international relations.

Some developments, however, take place outside the scope of public policy-making. It is often argued that global economic forces have left little choice for nation states but to privatize. Failure to provide favorable conditions to companies would decrease the attractiveness of the country as place of business. Foreign companies would think twice to settle in an economy suffering from too much governmental interference. Financial investors also prefer to invest in low-government countries or sectors. This perspective of globalization leaves little room for national governments to decide for themselves (Strange, 1996; Cerny, 1997).

Two views challenge this perspective on globalization. On the one hand it underestimates the influence of domestic states. Liberalization is a common practice, but the degree of liberalization is primarily determined internally (Wade, 1996). There is undoubtedly a large difference between transforming monopolies into completely free markets, as done in the United Kingdom, and implementing elements such as contracting out and tendering monopoly rights, as is done in most other European states. A second critique is that it is not true that companies always favor countries where the government takes a low profile. Some businesses may prefer well-regulated societies to do business over countries with less regulation (Van Waarden, 2001).

In line with this debate on the role of globalization is that on Europeanization. The pursuit by the European Commission to create a common free market in the EU has undoubtedly worked as a supercharger of domestic liberalizations. Through directives, member states are summoned to live up to the standards of low governmental interference, as this would influence competition in an unfair way. The EU, however, did not start this process but merely reinforced it. National governments agreed to keep up with the liberal minded European institutions (Sandholtz, 1993; Moravscik, 1998). At the same time businesses demanded faster liberalizations pointing toward the European single market (Smith, 2001).

The different motives and causes explain the differences in time and scope of liberalization between various sectors and countries. These differences in time and scope will be an important issue in the comparison between various liberalized markets discussed throughout this dissertation.

### 1.3.6 Intended consequences

There were a number of intended and expected outcomes of liberalization policies. In the first place, it was expected that market competition would increase the efficiency of service supply. Through motivation and innovation, the market parties would be able to offer services at lower prices than the state corporations. Related to that advantage was the expectation of lower state expenses on these markets and the extra income that was generated from the selling of state corporations. Also, the economic policymakers expected the commercial providers to create more choice on the market. In order to better serve their clients, the large service providers would offer different packages adapted to the consumers' needs, while smaller providers would attempt to find niches. This development would not increase efficiency per se, but lead to an improved situation for consumers. Thirdly, through privatization the government hoped to attract private capital that would finance innovation. Investors would not be likely to invest in a company that was state-controlled, but they would if the government gave up this control. Furthermore, the government could spend the money earned from its stocks to cover other expenses. Finally, it was expected that market regulations enforced by governmental institutions would protect the public values in the sector in an adequate manner. The stability of public services supply remained important to economy and society. They should also be available to as many citizens as possible. Many studies have been conducted in order to test the achievement of the objectives of liberalization policies outlined above. What has received far less attention are the unintended and unexpected consequences of liberalization. Although based on economic ideals, introducing competition on formerly public markets could have unintended consequences on the liberalized markets, related markets, or in society at large.

### **1.4 Shifts in governance mechanisms as a consequence of liberalization**

The structure of economic governance of liberalized sectors gives handles to logically deduct a number of consequences of these policies. The function of the state corporations was not to provide public services inefficiently, but to guarantee a stable supply of these services. The efficiency may not have been high under the monopolistic supply, but the effectiveness was proverbial. The main function of the state monopolies was therefore to reduce any risks and uncertainties that could threaten the stability of supply.

On economic markets, different actors are confronted with different risks and uncertainties. Producers and service suppliers face the risk of bankruptcy if they fail to work efficiently. This risk is central for the market mechanism. There are numerous other risks, for example non-payment by consumers, a shortage of qualified personnel, a larger competitor that abuses its market power, etc. Consumers also face risks. There is often an information asymmetry between them and the seller of a product. They may also be confronted with a lack of supply, or on the contrary with such an abundance of varieties that they are unsure about their choice. It may even be that they are misled and make payments for goods that are never delivered. In short, transaction partners on all kinds of markets, not only on product markets but also on labor markets, financial markets, and all other types, are confronted with a large array of risks and uncertainties. In order to accommodate economic growth, societies have developed institutions to reduce these risks and uncertainties.

Van Waarden (2002) describes a variety of these institutions. In the first place there are commercial market institutions that make a business out of reducing risks and uncertainties. Primary examples of these are accountancy firms that assure that the books of firms are kept correctly, rating agencies that investigate the stability of financial services providers, law offices that formalize transactions and their details in legal contracts, and a large amount of other consultants and offices that reduce the risk associated with economic transactions. The term market in table 1.1 refers to these commercial risk-reducing institutions and should be distinguished from the coordination principle called the market mechanism. The market mechanism (or price mechanism) is in itself a coordination principle between transaction partners. However, in order to work properly, a number of conditions must be fulfilled, one of which is a low level of risk and uncertainty. Therefore, there will be demand from market parties for certainty and commercial organizations such as accountants and ranking agencies may fulfill this demand. This supply is what is meant by the market as a governance mechanism.

The second category of institutions operates mainly in smaller communities. These institutions focus on trust, which is achieved through morality, community feeling, and shared values, but also through informal rules and codes of conduct. These institutions reduce risk and uncertainty because people who share values may be less inclined to cheat on each other. If a trader acts dishonestly, he will lose his reputation in the community and thereby his chance of engaging in profitable transactions. These mechanisms are not necessarily confined to small communities or primitive societies. The very top of the Western business community acts largely

upon such informal relationships that are based on nothing more than trust in each others' honesty.

A more formal version of communities is reached in the third type of institutions: associations. Although also based on horizontal relationships between transaction partners, associations do not primarily rely on trust to reduce risk and uncertainty. Instead, associations govern through internal regulations. The mechanism is often referred to as self-regulation. Many market parties are engaged in associations. Producers and service suppliers on the same market or similar markets often join together in associations, as do consumers, employees, and interested third parties. Governance through self-regulation is more formal than is the case through community values, but the mechanisms overlap, because self-regulation is also partly possible because members of the association run the risk of being excluded from the group. If associations prove to regulate effectively, a government may support the association by cooperating with it. Many industries are therefore governed by producers' associations. Employers' and employees' associations often have a place at official negotiation tables with governmental representatives. Governments may also regulate that membership of a particular association is required in order to trade on particular markets.

If producers or service suppliers consider the risk of buying inputs on a market to be too high, they may decide to incorporate the production of that input. Such firm hierarchies are also institutions to reduce uncertainty. Firm hierarchies govern through internal rules on quality and performance. Unlike the previous types of institutions, firm hierarchies are vertical relationships between producers and buyers. Large organizations constantly monitor whether the costs and benefits of buying their inputs on the market is advantageous compared to producing these inputs themselves.

Commercial providers, communities, associations, and firm hierarchies are all private solutions to reduce risk. Yet, an important set of institutions is provided by the public sector. Whereas the first three types are agreements between similar actors and the fourth between buyer and seller, economic transactions may require an independent third party to reduce risk. Commercial providers also offer independence, but lack the power that the state has in enforcing its decisions. The state has both an active and a passive type of reducing risk and uncertainty. In the active form, the state enacts and enforces laws and lower types of regulation that market parties are forced to comply with. Both buyers and sellers profit from the trust that the legal system provides. They know from each other that the chance of getting cheated is much smaller if there is a law that forbids such behavior. Governments actively steer economy and society through the law.

The passive institution is that of the judiciary. Courts are passive in the sense that they will only use their public authority if disputes are brought before them. Instead of actively reducing risk and uncertainty, courts fulfill the same task simply by being present. Transaction partners may trust the other party, because they know that in case of a dispute they can go to court. This means that dispute resolution is the main mechanism through which the court provides stability to economy and society.

The main thesis posed by Van Waarden is that each economic sector requires a certain level of risk reduction to facilitate economic transactions. If this level is not reached, the weaker of the two transaction partners will refuse to engage in the transaction. As a result, there is less economic growth. Market parties and governments will also attempt to increase the level of uncertainty reduction in order to promote economic growth. Therefore, if one institution fails to reduce risk, it must be complemented or replaced by another. Likewise, if one set of institutions is abolished, actors will seek to replace it by a new type.

<i>Coordination Principle</i>			
Markets			Private
Communities	Informal	Horizontal	Private
Associations	Formal	Horizontal	Private
Firm hierarchies	Formal	Vertical	Private
Courts	Formal	Vertical	Private / Public
States (as rule-makers and rule-enforcers)	Formal	Vertical	Public

*Source: (Van Waarden, 2002)*

Public monopolies were extreme forms of governmental regulation. In terms of the institutions presented above, it would be categorized as the ultimate form of active state governance. The risk that this governance mechanism aimed to reduce was instability in the provision of public services and the abuse of natural monopolies by private producers. Services such as post, telecommunication, water, energy, and public transport are extremely important to economies and societies. The efficiency of the delivery of those services was considered of lower importance, as long as they adequately facilitated economic growth in other sectors. In many European countries, it was decided that the best way to reduce the risk of instability of supply was a governmental monopoly. A monopoly was, given the network aspects of the markets,

unavoidable. It was commercially uninteresting to construct multiple networks. All private mechanisms of economic governance could not guarantee the highest level of risk reduction. Private firms could decide to set prices at a particular level to increase profit while some people could not afford these prices. Similarly they could decrease the quality of services to a commercially more interesting level or decide to disconnect unprofitable parts from the network. Furthermore, public governance ensured the compatibility of different parts of the network. Market liberalization followed from the presumed dissatisfaction of people with the price that had to be paid for this uncertainty reduction. When state expenses continued to increase it was argued that it might be possible to have the public services provided by commercial parties. Although liberalization and privatization operations were often complex operations depending on the particular sectoral characteristics, they all aimed to reduce the mechanism of active state governance. The government would no longer provide the services itself, but instead leave the provision to competitive market parties. The increased risk of losing effectiveness was no longer determined to be smaller than the potential efficiency gains.

If liberalization is viewed as a decrease in the risk reduction by the state, then it would logically follow that there is an increased risk level on the market. The communicating vessels theory then predicts that market parties try to find different solutions to reduce risk and uncertainty on an important market such as the provision of what formerly was considered a public service. Any of the types of institutions discussed before could fulfill this role, but it can logically be predicted which ones will not increase in importance. Communities are not a likely option, particularly not in globalizing markets. Liberalization has, after all, also opened the possibility for foreign parties to enter domestic markets and these newcomers are not part of any informal community networks. Associations are also not a likely option. In order to promote market competition and to protect consumers, firms are bound by strict competition regulations. Whereas self-regulation by associations was encouraged for some time, it is currently often viewed as a constraint on free competition. Especially in liberalized markets it is not likely that commercial firms are allowed to reach agreements in associations. Firm hierarchies are vertical integrations of markets into a firm, whereas privatization often leads to a separation of these markets. For example, whereas the provision of telecommunication services used to be taken care of by one company that supplied network access, telephone services to consumers, and equipment, the market has now been fragmented into several markets, effectively breaking down the existing hierarchies. This type of mechanism is therefore irrelevant. Strategies to reduce risk and uncertainty will therefore focus on

commercial institutions, the courts, and other forms of active state government (Van Waarden and Hildebrand, 2009).

The first type of actor that will experience an increase of risk on liberalized markets is the service provider. The former public corporations are privatized and exposed to competition from newcomers on the market. In order to reduce the risk of bankruptcy, all companies will adopt strategies. In the first place, they will try to increase their efficiency in order to be able to decrease their prices or to improve their service level. Other strategies include the use of marketing techniques to stress the benefits of using their service. Firms may even try to make comparable services less comparable by introducing difficult tariff structures. It is not difficult to see how the different strategies will cause firms to engage in conflicts. It can be theoretically predicted that competing firms will have disputes about such things as marketing, especially when it comes to comparative advertisement, and price schemes.

However, the liberalization of markets does not only affect the horizontal relationships between different service providers. It will also impact all relationships that these market parties have with their suppliers, with their employees, and with their consumers. For example, the liberalization of firms has consequences for the strategies of those firms on the labor market. Rather than focusing exclusively on the best supply of services, cost cutting has become an important strategy for the service providers, which means that they will try to keep efficient workers and to remove inefficient employees. On the service markets themselves, consumers are confronted with commercial firms that are primarily interested in making profit, rather than state corporations that only cared about an effective supply. Each of these changes in relationships is likely to lead to conflict between the transaction partners. Some of such conflicts as a result of different interests are likely to eventually make it to the courtroom.

Another strategy that many actors are likely to pursue is that they call for more regulation. On each market, there are stronger and weaker parties. This is determined by the scarcity of resources. If there is a shortage of supply, then the buyers of the good or service are in the weaker position. If there is an abundance of supply, the sellers are placed in the weaker position. (The market mechanism may correct for that, but only in the long run.) Within the groups of buyers and sellers, market power may differ with size. Large companies and groups of buyers have more market power than small companies and individual buyers. There are more reasons why market power differs between market parties, but the consequence is that the weaker parties often turn to their 'strong brother.' In the case of economic markets, this stronger brother is the government, both in its active and passive form. Most likely, the weaker

market parties will make a call for state regulation in order to protect their interests. Since liberalization leads to greater differences between different market actors, both on the supply and on the demand side, there will be a call for more market regulation. Examples may be social groups whose rights were formerly protected by state regulation and who fear that under market conditions these rights will be neglected by the commercial firms. The government will in many cases respond with regulation to reduce the uncertainty for these people. This may be the case for poor or handicapped people on a services market, but also for employees on the related labor market. Service providers will also make a claim for more state regulation. Newcomers will stress that the former incumbent has too much market power and must be limited in its actions. On the other hand, the former incumbent may also claim that a different type of regulation is required, because as a former state corporation it cannot be expected to make the transition to the free market without a period of adaptation. In short, market liberalization creates many reasons for market parties to call for more regulation, which can be considered an alternative for the public supply as an institution to reduce risk and uncertainty. In some markets, there may be a call for specific regulatory agencies to enforce regulations on a sector specific basis.

The enactment of new rules and their implementation is likely to raise questions about their interpretation. In a situation of conflicting interests, such as will often be the case in liberalized sectors, it is likely that market actors will attempt to reduce uncertainty further by asking for a clear interpretation of the law. The classical division of governmental powers prescribes that it is for the legislature to enact laws and for the judiciary to interpret them. Also, since the objective of many governments was to withdraw from the market, there will be a certain hesitation to implement strict regulation. Therefore, the court will further increase in importance as an institution to reduce uncertainty.

After discussing the market power of various actors, it should not be forgotten that liberalization was intended to strengthen the position of a particular group on the market, namely the consumers. Under the situation of state supply, consumers could influence the supplier only through voice options. Liberalization also introduced an exit option. The possibility to influence the behavior of another in a relationship through the threat of exit is often considered a more powerful instrument. However, liberalization may also have limited the number of voice options of actors on different markets that surround the services market. An example is the position of residents and companies that are largely affected by public transport, either positively or negatively. Under a situation of public supply, they would be marked as stakeholders and their interests would be taken into account. Under market supply, they are suddenly not

part of the market anymore, because they are not the users of the service and therefore not part of the transaction. As a result, risk and uncertainty for these stakeholders increase. Such stakeholder groups may also employ strategies to reduce this uncertainty and may strive for the same institutions as previously mentioned, namely a call for state regulation to institutionalize their voice, or a move to the court in case the service provider acts against the stakeholders' interests.

There are also other mechanisms through which liberalization could lead to conflict. Internationalization could lead to conflicts between market parties if the newcomers are from a different culture than the domestic parties. In particular, if these newcomers come from a more adversarial culture, the number of conflicts in that sector is likely to rise.

Another explanation from the perspective of internationalization comes from the internationalization of lawyering (Van Waarden, 2009). The fact that we live in a globalized World may affect national litigation rates in several ways. Like other issues in globalization, the basic premise is that legal systems and legal styles are converging toward a single point. Consequently, a few authors have argued that this single point lies close to the American way of lawyering: international regulatory competition or emulation forces states to adapt to the American example (Wiegand, 1991; Galanter, 1992; Shapiro, 1993; Trubek et al., 1994; Dezelay, 1996; Wiegand, 1996). Kelemen and Sibbitt (2004) take a different approach but reach the same conclusion. They argue that economic liberalization and political fragmentation are the true causes of the assumed convergence. Political fragmentation, defined as an increased number of veto players, will drive politicians toward legal protection of their policies against bureaucratic and political drifts. By doing so, they cooperate with lawmakers to make detailed statutes regulating future government actions. Economic liberalization undermines the systems of informal cooperation as they existed in the European countries, thereby forcing the government to re-regulate the market. Both political fragmentation and economic liberalization are features of the American model toward which the European countries are moving, thereby taking over elements of the American way of law. Furthermore, Kelemen and Sibbitt argue that American law firms play an important accelerating role, using their scope and experience in liberalized markets to engage in competition with their European counterparts. In the process, they may introduce American lawyering techniques that are largely adversarial.

Based on logical reasoning, it could be predicted that market liberalization calls for increased importance of commercial, legal, and regulatory institutions to reduce risk. Interesting in all three of these is the legal element. Ultimately, any strategy

pursued by the market parties is bound to lead to conflict, either directly because of competing interest, or over the interpretation of new regulations, or because stakeholders have lost their other possibilities to exert influence.

The shift in risk-reducing institutions would not be of large interest if these institutions did not differ in performing their task. However, the costs and benefits of each of these institutions are different in general and some are more suited to particular market conditions than others. For example, informal arrangements within communities may be a cheap form of risk reduction, because it generates a large amount of trust and is automatically achieved within a community. Yet these informal arrangements are not easy to create and its benefits decrease with increasing sizes of communities. Self regulation by associations is often preferred over state regulation, but too much agreement among producers could easily lead to inefficient cartels. Court cases may be an efficient and effective way to reduce risk in a relationship, but if there are too many court cases, the time to process those increases, reducing their efficiency. Moreover, the increase of adversarialism between market actors leads to distrust on the market. Sector specific characteristics may render an efficient institution in one market inefficiently in another. Self-regulation may, for example, be very efficient in a market with many equal producers, but will not work in markets with few or very unequal producers.

In case of market liberalization, the question is how the new risk reducing institutions perform compared to the extreme form of state regulation. The removal of public monopolies has removed the costs and benefits of active public service provision. The main costs that were removed were the inefficiencies of a monopoly. Many economic studies focus on these inefficiencies. Much less attention has been paid to the removed benefits, namely the reduction of risk and uncertainty. Each of the three institutions mentioned in the logical analysis above, commercial solutions, courts, and alternative state regulation, comes with particular costs. Part of the research problem is to map the costs of these institutional shifts and compare them to the benefits, as well as to discover additional benefits or costs that were not expected beforehand.

## **1.5 Juridification**

The dependent variable of this study is juridification. Like liberalization, it is more correct to speak of a cluster of developments that can be labeled as juridification, as will become clear in the discussion about the definition of this variable. This

discussion will be followed by an overview of causes of the various types of juridification that have been suggested in theoretical and empirical literature. One of these causes, the liberalization of economic markets, will be the central topic of this study. Attention is also paid to the consequences of juridification and the evaluation of these consequences.

### 1.5.1 Definition

The term juridification, as Teubner (1987) pointed out, is used by various authors who often attach a rather different meaning to it. He distinguished three definitions that were used by scholars from different academic fields. In the first place, juridification could be defined as the expansion of law: The quantitative growth of laws and regulations. This definition is mainly used in the discussion about juridification in the field of law. In sociology, juridification is defined as the expropriation of conflict. Conflicts are taken from their social context, formalized, and processed by the judiciary. The social reality is thereby reduced to a legal reality. Finally, juridification is also an object of study for political science, where it is viewed as the increased importance of formal legal relationships over genuine political class conflicts. This definition was mainly used to describe developments in the field of labor relations, where laws on the one hand protected the workers' interests, but on the other hand repressed their possibilities for action.

As a discussant of these definitions, Teubner found each of them too limited and too much bound to a particular discipline to be useful in grasping the total meaning of juridification. The quantitative character of the legal definition hides the fact that the true developments take place in the content of legal structures. The sociological definition only focuses on one function of the law, namely dispute resolution. The political science perspective reduces juridification to a strategic choice of labor unions. Instead, Teubner argues that juridification is a broader phenomenon than any of these three fields cover, and refers to legal evolution as described by Habermas (1981).

According to Habermas, juridification cannot be studied apart from state and market formation. The legal system is seen as an autonomous sub-system, as are the political and the economic sub-systems. Habermas argued that since the birth of the bourgeois states in Europe, there have been four thrusts of juridification. In each of these thrusts, the legal system responded to changes in the other system and in turn influenced these systems. The first thrust was when the absolutist bourgeois state was

introduced. The political and economic systems were separated. The law responded by guaranteeing the economic system legal autonomy through the development of civil (contract) law. The next thrusts are processes of constitutionalization. In the second thrust, the legal constitutionalization, the political system was subjected to the rule of law. In the third thrust, democratic constitutionalization, the law came to regulate the democratic process. The political party system and the organization of elections were from that moment backed by the law. In a fourth and final thrust, social constitutionalization, the social welfare state uses the law to exercise control over the economic system. All kind of interventions by the state were formally regulated in the law. In a similar fashion that the law was used to gain grip on the political system through the rule of law and democratic law, it was now used by the political sphere to gain grip on the economy. Habermas, inspired by Weber, thereby defines juridification as the materialization of law. The law is no longer used solely for the resolution of disputes, but also to accommodate interventions by the welfare state. In the last thrust, the law is used by the state to advance socio-political objectives.

The definition as proposed by Habermas and Teubner, to view juridification as the materialization of law, leaves much room for interpretation. Juridification in this definition remains a container of different aspects of legal evolution, which can be confusing. An attempt to solve the confusion was made by Blichner and Molander (2008). They refrained from making normative statements about juridification but sought a proper way of clarifying the different forms of juridification. They proposed five dimensions of juridification that could, but need not, be interrelated. These are: Constitutive juridification, law's expansion and differentiation, increased conflict solving by or with reference to law, increasing judicial power, and legal framing. Each of these dimensions describes a process that forms part of juridification.

Constitutive juridification refers to the establishment or change of norms that constitute a political order in such a way that the legal system's competencies are increased. This constitutive juridification is an essential step in the formation of the constitutional state, even before the actual introduction of a constitution. Every constitutional state needs a body of rules to govern the process of passing and effectuating political acts, to limit political power vis-à-vis individual freedom, and to give certain political institutions exclusive competencies. Together, these procedural, content, and institutional rules form the legal order of the constitutional state. The introduction of such a legal order is the first phase of constitutional juridification. After that, new rules may be added or existing rules may be changed in such a way that the political sphere is increasingly governed by this legal order.

Juridification as the law's expansion and differentiation is a process whereby more and more detailed rules are introduced to govern society. Blichner and Molander distinguish between horizontal and vertical expansion and horizontal and vertical differentiation. Horizontal expansion happens when the law regulates new areas that it did not regulate before. Vertical expansion means that rules from a higher level of government are imposed on lower levels. Differentiation is a process whereby the law becomes more specific or precise. Horizontal differentiation means that one law is split in two or more laws, each valid for a particular branch. Vertical differentiation means that one law differentiates different cases. An important remark about differentiation is that the law becomes more precise, but that it not necessarily becomes clearer. It is tempting to think that an unclear law is clarified once specified for specific cases. However, if this differentiation is done on the basis of substantial arguments rather than with the purpose of increasing clarity, the result is often a more complex law. Law enforcers in that case not only have to take into account the rule, but also have to judge the specific circumstances in which that rule is applied.

Increased conflict solving by or with reference to law is the third dimension of Blichner and Molander's framework for the study of juridification. This process can take place in several ways. First, it may be that the judiciary is increasingly called upon in solving conflicts. The judiciary obviously solves conflicts with reference to the law, often in specialized language and sometimes eloquent speeches. These court cases appear in statistics as litigation rates. Litigation seems to be an easy term to use and measure, but caution is recommended. Friedman (1989) refers to actions contested in court as litigation, but rightly argues that in most of the court cases there is no contestation in court at all. In many typical cases the contestation is done by lawyers beforehand, while the actual court action is there to confirm this work. Such cases are counted as cases, but are formally not part of litigation. However, the courtroom phase is the final stage of only a relatively small number of disputes. Most are settled before this stage is reached. Here, too, legal reasoning may increasingly be applied by expert legal advisers. This second type of conflict solving does not require the judiciary, but the parties still make use of legal experts. Thirdly, conflict solving by people who are not familiar with the law may also be done with reference to the law. Note that it is of no importance to juridification whether the law is correctly referred to or not. The reference itself is the juridification process.

The increase in judicial power is also seen as a dimension of juridification. Contrary to the first dimension, where competencies could be added to the legal order and thus to the judiciary, this process takes place because of developments in formal law. Judicial power increases with indeterminacy and lack of transparency of these

laws. Indeterminacy refers to the interpretation of rules in the courtroom. The less clear it is if and how a certain rule must be applied, the more power the judiciary has to set precedent. Transparency refers to interpretation of laws outside the legal community. The less people are able to understand the law, the more dependent people are on the legal community, thereby increasing its power. In both cases, the judiciary has more freedom of interpretation. However, once interpreted in a case, the number of interpretations is limited by the judiciary itself. Especially in common law systems, such interpretations form the main source of legal reasoning.

Legal framing is defined by Blichner and Molander as “the increased tendency to understand self and others, and the relationship between self and others, in light of a common legal order.” In practice, it means that people increasingly see themselves and others as legal objects living under a specific legal order. Whether buying a bread or casting a vote, the people treat them as legal actions by legal persons. The very fact of being a citizen is indeed increasingly seen as a legal phenomenon rather than anything else, like belonging to a particular ethnicity or culture.

Following the description of these five dimensions of juridification, Blichner and Molander state the assumption that each of these dimensions may be linked to another, but that this needs not to be the case. Often, several dimensions go hand in hand. For example, an expansion of the law is frequently accompanied by an increase of conflict solving with reference to law and an increase of judicial power, which encourages legal framing. However, this does not mean that all dimensions always influence each other. It could well be that an expansion of the law does not increase conflict solving with reference to law. Furthermore, increases in one dimension may lead to dejuridification of another dimension. For example, differentiation of a law may decrease the judicial discretionary power.

Due to the uncertainty about the existence, direction, and magnitude of relationships between the five dimensions, the authors arrive at the conclusion that each proposed model of juridification must be substantiated empirically. Theory can be used to hypothesize possible relationships, but the number of possible alternative models is extremely large.

It can be concluded that the set of definitions provided to study juridification is diverse. The power of some definitions lies in their precision, that of others in their broadness. At least, it is clear that juridification is a process with multiple aspects. The aim of this dissertation is to study shifts in governance mechanisms. The adopted definition should therefore incorporate those aspects of juridification that relate to the governance of economy and society. These governance mechanisms exist because there is a functional need for them. Following the line of reasoning by Weber,

Habermas and Teubner, there are essentially two of these functions: The settlement of disputes and the regulation of behavior by the state. These functions can be performed by a variety of social structures, among which formal authorities and procedures. In this study, juridification is defined as an increasing importance of these formal institutions, which could be called the legal system, in society.

Each of the five dimensions presented by Blichner and Molander fit in this definition, but some aspects clearer than others. Regulatory expansion and differentiation, increased conflict solving by law, and increasing judicial power clearly fit in the picture how formal legal institutions increasingly govern society. Constitutive juridification as a dimension focuses mainly on historical developments in the state, but one of its aspects, namely the increasing focus within state organizations to focus on rules and procedures, fits the picture of legal institutions as governance mechanisms. Legal framing, finally, is a fluid concept that is difficult to observe empirically. Still, the formalization of social relationships both within and between firms could be seen as an aspect of a larger governance mechanism. What all dimensions have in common is an increase in importance of formal legal structures in the governance of society.

### 1.5.2 Elements of juridification

An increased importance of formal legal structures as a governance mechanism becomes apparent in various elements. The most useful way to study these elements is by looking at the formal legal actors that increase in importance in case of juridification. In economic sectors, these are: The legislative powers that issue laws and lower types of regulation, the regulatory agencies that enforce these regulations, the courts that interpret the regulations in case of a dispute, and the commercial legal specialists that assist market parties in case of a conflict.

Laws are the primary mechanism through which the government governs society. Laws are enacted by the legislature and to be enforced by the executive. Apart from laws, there are lower types of regulation that may be enacted by executive powers such as the cabinet or individual ministers without a parliamentary vote. In each legal system there is a hierarchy of laws and other regulations. In general, units at a higher level of territorial aggregation are higher in the hierarchy. Therefore, national laws are superior to local laws and European laws (directives) are superior to national laws. Furthermore, new laws enacted at a lower level must fit the framework of the superior body of laws. Regulations adopted by executives may not contradict

laws. Apart from the laws and regulations that regulate behavior, there is also a body of procedural laws that lays down how the state operates and how laws are effectuated.

Regarding laws and regulations, it is common to distinguish various types of law. A general distinction is that between private and public law. Private law concerns relationships and disputes between private parties. Important categories within private law are contract law and family law. Public law concerns disputes between citizens and the state. Important types of public law are criminal law, constitutional law, administrative law, and social and economic public law. Criminal law defines and prohibits criminal behavior. In a criminal law case, the defendant is prosecuted by a public prosecutor, who takes the place of the victim. Constitutions contain the fundamental framework for government, including civil rights. In administrative law, the formal procedures for the activities of governmental institutions and for procedures of appeal to governmental decisions are laid down. Social and economic public law contains most regulations with which the government interferes in the economy.

Legal systems of countries often differ with respect to the categorization of different law types. For example, the United Kingdom's legal system only makes a distinction between civil and criminal law. Appeals against actions of state organizations are also heard by the civil court. What in continental Europe is called social and economic public law is in the Anglo-Saxon world usually referred to as social and economic regulation.

The implementation of laws is done by the executive power. It may do so through different types of organizations, that will not all be discussed here. Of particular importance is one type of organization, namely the regulatory agency. Whereas in many sectors the laws and regulations are enforced by ministries, regional governments or municipalities, there has been a trend over the past decades to found regulatory agencies. These agencies are placed at arm's length of the government and therefore less integrated the ministerial hierarchy. They often focus on one specific sector or the enforcement of a particular law. Many countries have an independent competition authority, but most also have autonomous regulators for the financial sector, for health-care, and for telecommunication, to name a few. Due to their autonomy, their expertise, and their central position in the regulated sector, these organizations are often in the position to create new norms themselves and to adopt the regulatory style they think will lead to the best outcomes (Kagan, 1994).

Courts fulfill a number of functions in the governance of society, the most important being the processing of disputes. If a problem arises between actors in

society and the parties cannot settle the dispute themselves, the complaining actor may file a case at the court. This can be done against a private person, a private organization with legal personality, or against a public institution. The court acts as dispute resolver in criminal, civil, and administrative cases. Often, specific branches of law are governed by specialized judges or even specialized courts. For example, the Dutch College of Commercial Appeals (College van Beroep voor het Bedrijfsleven) is specialized in appeals against decisions made by regulatory agencies in competition law. In reaching a verdict, the judge will interpret various sources of law in the light of the specific circumstances of the case. The most important sources of law always include formal laws and case law, though their relative importance differs depending on the legal system. Within the trias politica, the court is the only state power that may interpret laws. This does not mean that the court does not effectively create norms as well. The court could create a norm when it reaches a verdict in a particular case. In a case, the court will review an actor's behavior, determine how the law prescribes that the actor should have behaved, and then evaluate the behavior. This creation of norms is a second function of the legal system. In general, the court will review regulatory behavior using a test of correctness. The court determines the correct type of behavior that follows from the law and determines that this is the only correct type of behavior. Reasonable behavior by an actor, for example a regulatory agency, is thereby determined to be wrong if it does not follow the court's interpretation. Of course, the power of the judiciary to create norms is determined by the possible interpretations of a particular law. Apart from correctness, the court may also test on the basis of rationality. In that case, the court refrains from spelling out a single interpretation of the law, but instead judges whether an actor acted reasonably within the legal framework. In such cases, the influence of the court on future behavior is much smaller.

If a dispute emerges, actors may seek legal assistance. Commercial legal specialists advise the actors about their legal position. Given the complexity of many laws and legal documents, not in the last place because of the specific language used, hiring legal assistance is often a necessity. Furthermore, lawyers may represent their clients in court. Again, due to their knowledge of procedures, hiring a lawyer is often a necessity in cases of any importance. The legal services are privately organized. In some countries, such as the Netherlands, there are limits to the commercial possibilities of lawyers. For example, until 2007 they were not allowed to advertise their services and are still not allowed to work on the basis of contingency fees. In other countries, such as the United States and the United Kingdom, such prohibitions do not exist. What also differs between countries are the requirements for becoming a

lawyer. Most countries at least demand a university degree in laws and the passing of a bar examination. Apart from commercial lawyers, larger organizations may also have internal legal specialists, often employed in a function of legal counsel. Furthermore, legal advisory organizations exist that deliver all sorts of legal advice, but that do not employ lawyers and will not represent an actor in court. For both these types of work there are no formal requirements such as university degrees or examinations.

### 1.5.3 Causes

Juridification could be caused by many different developments, from growth in population density to changes in laws and from better education to a more efficient court system. This paragraph contains a selection of these causes that may be relevant to this study. They are discussed per aspect of juridification (rule creation, rule enforcement, dispute resolution, and legal assistance.) A complication in this discussion is that the aspects also influence each other. For example, an increasing lawyer density is part of the definition of juridification, but it could also be seen as the cause of more litigation, or as a consequence of it. This overview, however, focuses on other causes than the interrelation of juridification aspects.

What causes more and more complex laws? At the most fundamental level, this question must be answered stressing the functional need of societies and economic sectors for rules that regulate the behavior of actors. Of course, the development of rules heavily depends the particular characteristics of the actors and their society and even the total number of pages of this dissertation would not suffice to describe their causes. There is reason to mention one cause of regulatory expansion and differentiation in particular because of the relevance to this study, namely the reform of economic sectors. Stephen Vogel (1996) was one of the first to argue that reforms that sought to deregulate the market often lead to the paradoxical situation that more rules were required to regulate the freer markets. Focusing on the reforms in European utilities sectors, Majone (1990; 1996) demonstrates that the term deregulation is wrong also in the European context. The liberalization of economic sectors is in all cases coupled with the development of a new type of regulation in which the ideal of competition in a level playing field are translated into legal doctrines that govern market behavior. Moreover, autonomous agencies were created at the national sector level to enforce these laws and regulations.

What causes more severe enforcement of the law? This question must be answered from the perspective of the regulator who decides how to enforce the law. Kagan (1994) made an important contribution to the study of these regulatory styles. The institutional framework and culture seem to play an important role in the decision of a regulatory agency to enforce the law in a strict or a flexible way. In some countries there is more a tradition of strict enforcement, whereas in others there is traditionally more room for maneuvering. Furthermore, the regulator may decide to cooperate with the main actors in the field for strategic reasons. Also, the autonomy of regulators plays a role. A newly founded regulatory agency may feel the need to show its teeth, whereas a well established department that maintained relationships with the regulatees for a long time may have more trust in them. The possibilities for strict regulation are also dependent on the resources provided to the regulator. Finally, regulators may base their regulation strategy on (the expectation of) whether their decisions are accepted by the court if challenged.

Of all aspects of juridification, litigation may be the one that received most attention in the literature. Litigation can be regarded as the final step in the process of resolving a dispute. Friedman (1989) therefore suggests to distinguish between the causes of disputes and the causes of the move to the court by one of the parties in a dispute. Several authors have proposed the use of several other steps to come to a model of dispute processing. All these models follow generally the same logic as proposed by Friedman: They aim to explain why there are more disputes and then aim to explain why (relatively more) disputes are brought to court. Schuyt et al. (1976) distinguished between conflicts that could be settled with reference to law and disputes that could not. Blankenburg (1989) includes the possibility to settle disputes with the use of legal reasoning without going to court. Genn (1999) incorporates the possibility to hire legal assistance or not in the process of dispute settlement. For this study into economic sectors, it suffices to have an idea of the causes of conflict in economic sectors and to know the reasons for bringing disputes to court.

Increases in the number of disputes are in the first place linked to demographical developments. If the population of a certain area increases, there are more social relationships between people and therefore more opportunities for conflict. Therefore, statistics on disputes are often corrected for population growth. The same argument could be made for economic transactions. If there are more economic transactions, there are again more opportunities for dispute between the transaction partners. It is therefore that litigation statistics are sometimes also corrected for economic growth, although growth of the economy does not automatically mean an increase in transactions. An important social trend that could

cause more disputes to occur is the level of social cohesion. The more individualized people in a particular society are, the more likely it is that problems between them become disputes rather than being talked over informally. A higher level of education is also a possible cause, because higher educated people may be more likely to have knowledge about their legal possibilities and may be more inclined to stand up for themselves in a dispute.

Changes in a particular law could also cause disputes between actors. For example, a change in a particular tax law could lead to a large number of complaints against decisions by the tax authority. Both expansion and differentiation of law is likely to lead to more disputes. In the first place because behavior is more or more precisely regulated. In the second place because there will be uncertainty over the interpretation of these new laws. The second type could disappear over time, the first not. Such causes of conflicts are always specific for a particular legal branch.

Why do actors go to court instead of settling a dispute outside the courtroom? In the first place, it may be rational for an actor to go to court rather than settling the dispute without a third party. In general, if one party is weaker than the other, for example in terms of physical strength, negotiating skills, or market power, it is rational for this party to ask a third party to intervene. In such cases, one of the parties makes a rational calculation of the costs of a court cases and the possible gains. Sometimes conflicting parties even jointly ask a judge to intervene, because both have positive expectations about the outcome or because it is in the interest of both that a clear interpretation of the law is provided. In this rational calculation, actors may also take into account the efficiency of the courts. If courts operate at a higher efficiency, as measured in costs or time required to make a decision, they become a more attractive option for dispute resolution. Efficiency of the courts is therefore an important cause of litigation, as was proven by Blankenburg, who studied the efficiency in the comparable regions of the Netherlands and Nordrhein-Westphalen and concluded that the difference in litigation should be attributed to the efficiency of the German courts. At the same time, this efficiency is of course relative to the alternatives. The Dutch legal infrastructure is known for its alternative institutions that settle disputes outside the courts (Van Erp and Klein-Haarhuis, 2008).

Apart from these causes that come from the legal sphere, there are also social trends that could have an impact on the decision to go to court on a macro level. Individualization was already mentioned as a cause of conflicts, but it could also cause actors to resolve their disputes in court rather than through alternative methods. Education could increase people's knowledge of the law and thereby their likelihood

to persist in legal debates and turn to the courts. An increased number of legal aid insurance policies could cause people to make use of the court more often.

Finally, lawyers could have an interest in increasing the number of judicial procedures in order to increase their market. This argument is compatible to the observation that the number of judicial procedures is higher in countries with more lawyers (Chinloy, 1989; Olson, 2003). Question is of course what the chicken is and what the egg. Several authors (Fotheringham, 1994; Fleming, 1997; Zitrin and Langford, 1999; Crier, 2002) have made a case that lawyers actively exploit their information advantage over clients, so that they are the active parties.

#### 1.5.4 Consequences

Many aspects of juridification have consequences for economy and society. Some of these consequences are positive, others are negative. Most of these consequences follow from more than one aspect of juridification.

Teubner, who viewed juridification as the tendency to use the law to advance socio-political objectives, was rather fatalistic about its consequences. The main problem, he claims, is that the various subsystems are not able to communicate with each other. Laws developed in the political system may be interpreted differently in the legal system. In fact, this is very likely to happen, because each subsystem has a different set of norms and way of operating. Unless systems are structurally coupled, meaning that the different systems are well aligned and able to communicate their purposes, new laws will have negative results in the long run. Teubner refers to this negative course of action as the regulatory trilemma: Either the law may miss the point and become completely irrelevant to the other subsystems, or the law might harm the other subsystems through creeping legalism, or the legal system may be harmed through an over-socialization of law. The second and third possibilities are dependent on the self-reproductive (autopoiesis means self-reproduction) capacities of systems. Self-reproduction occurs through the norms and operations of people working within these systems. The legal system, for example, reproduces itself because when court cases are decided upon and then interpreted in terms of legal and non-legal. After all, the legal systems purpose is to distinguish between legal and non-legal. In the second process of the trilemma, the law becomes so involved in regulating a particular system, that it harms the capacity of self-reproduction of that system by replacing that system's norms with legal norms. In the third variant, the social system influences the law to such an extent, that it harms the self-reproducing

character of the legal system. According to Teubner, there is no solution to the increase of laws, that he called “the natural vehicles of juridification.” However, a structural coupling of subsystems may prevent the regulatory trilemma. This requires a co-evolution of political, social, economic, and legal subsystems.

Although Teubner’s focus was on welfare state law, his trilemma can be applied to the regulatory state as well (Anleu, 2000:51). The regulatory state, too, aims to advance political ideals through the laws, namely by translating the ideals of freer markets into legal doctrines.

Take for example the position of independent regulatory agencies. In line with the two objectives of the government, power was delegated to achieve two goals. The mission statements of regulatory agencies frequently contain statements such as “to enforce competition regulation,” but also “to take decisions that promote competition in the market.” Even if mission statements do not contain such statements, and even if it appears that agencies are initially created as symbols, the law gives autonomous regulatory agencies much freedom to take decisions that promote competition (Wilks and Bartle, 2002). Agencies in such cases create norms infused with the political objective of increasing competition.

Such a situation will lead to dispute in the regulated sector. The regulatory consensus that existed beforehand is broken if the new agency uses an activist approach in promoting competition. In these disputes, companies will challenge the validity of the use of state power by regulators for the promotion of competition. Before economic reforms, law was present in utility sectors, but at the sidelines. The public monopolies were backed-up by public law, but this was not frequently used. Corporations and governments maintained good relationships. The employees at the two sides were colleagues as civil servants. Disputes were settled informally without reference to the law. Under the new regime, law is drawn to the centre of regulation (Scott, 1998, 2004). Not only is it more frequently used to settle disputes, it also forms the basis for all regulatory decisions and ultimately of all economic action in the sector. Since the questions referred to the courts often deal with the (in)valid use of state power by autonomous regulatory agencies, the court is placed in a highly political position. Its decision will not only impact particular disputes, but effectively determine the structure of relationships between regulators and market parties. The courts are thereby governors of the reformed markets (Stone Sweet, 1999). The irony is that this brings the state back in market governance, yet not in its traditional form, but through the courts.

The court will of course base its decision on legal reasoning. It will interpret the law and look whether all legal procedures were followed correctly by the agency. The

only check on decisions by regulatory agencies is therefore a legal one. Knowing that the court will be the only check on its actions, agencies have a strong incentive to carefully follow formalized procedures. Companies, too, know that their only chance of influencing regulatory decisions is by means of a legal dispute. This means that commercial conflicts and conflicts between regulators and regulatees get translated into legal terms and ultimately into legal conflicts. It is a self-reinforcing process. Regulators take decisions that are appealed against in court. The market party will challenge the competency that agencies have in creating political norms. The court will review to what extent has complied with the law. This gives both companies and regulators an incentive to focus more on the law in their daily operations, which again increases the chance that future disputes are also settled with reference to the law or even in the courtroom. This process is aided by the increased employment of lawyers and legal counsels by companies and regulators, as these specialists are used to an adversarial approach. The trigger of this self-reinforcing process is the politically infused decision made by the regulator. The autonomy of some regulatory agencies gives them more freedom than others to pursue the objective of increasing competition. They could also have incentives to use this freedom, for example to position themselves as an effective organization. It could also be that the people staffing the agency are selected on the basis of market ideology, so that they indeed believe in their mission.

In short, the effects of juridification could lead to a number of developments, the most important of which are more adversarial relationships between organizations and more formalized relationships both within and between organizations. These developments can be evaluated from different perspectives.

### 1.5.5 Evaluation

How should the increasing importance of legal governance institutions be evaluated? Some authors are very clear in their normative perspective on juridification. Teubner, for example, finds it a real problem because it would lead to the trilemma described in the previous paragraph. Habermas (1981) also has doubts about it. Whereas the previous thrusts of juridification all guaranteed freedom of the socio-economic sphere from the political sphere, the latest thrust could easily lead to a restriction of freedom. However, it must first be determined on which criteria juridification should be evaluated.

A first useful way is to look at juridification from an institutional economic perspective. Given the focus on economic sectors, all governance mechanisms supporting the economy could be seen as transaction costs. The question of evaluation thereby becomes an issue of summing up all costs associated with juridification that would not have been spent in the absence of adversarial relationships. Such costs are in the first place imposed by the courts that charge a fee to process a case. However, the more substantial transaction costs come from legal specialists that must be hired in the case of transactions. Finally, the formalization of relationships within and between organizations could impose other costs such as less efficient procedures and the need for even more specialists to prepare contracts.

Other authors stress the benefits of strong legal infrastructure. Studies have been carried out in which the value of such an infrastructure for the economy is determined (Van Velthoven, 2005). What really matters is how well the legal infrastructure performs its tasks compared to other governance mechanisms. This could be determined through a comparable cost-benefit analysis.

## **1.6 Research design**

This section introduces the methods used for answering the research question. It is first explained why a comparative case study design was adopted. Then, the main variables are operationalized. The selection of countries and sectors is also described, as well as the selection process of court cases that will be used in the study of juridification.

### **1.6.1 A comparative case study**

The main research question of this study is whether and how market liberalization enhances juridification, defined as an increased reference to legal institutions. Such a question cannot be scientifically studied in the context of just a single market or a single country, because there are too many factors that influence the use of formal legal institutions. The research design to formulate answers to this puzzle therefore takes the form of a comparative case study. The aim of the design was to create maximum variation on the independent variable. If different forms of liberalization lead to different kinds of juridification, then there is good reason to assume the existence of a causal relationship.

Within this comparative case study design, the choice was made to use a methodological approach based on qualitative methods. This choice for a qualitative approach was both fundamental and practical. Fundamental, because the aim of this study is not only to establish a link between liberalization and juridification, but also to learn *how* various elements of liberalization have led to new types of legal conflict. Practical, because the available data did not allow for statistical analysis. The choice for a qualitative design will be elaborated upon later in this section.

### 1.6.2 Operationalization

Several concepts to be studied were fuzzy and needed to be operationalized. This regards in the first place the two main variables, liberalization and juridification. It is also required to state how the risks and uncertainties are analyzed by which liberalization leads to juridification. Also, the consequences of juridification need operationalization in order to use them in an evaluation.

#### 1.6.2.1 Liberalization

Liberalization was defined as the set of policies that introduce market competition in formerly public monopolies. It needs further operationalization for this study because maximum variation on this variable will determine the selection of sectors to be studied. The most logical way to operationalize liberalization is to look at its scope. This could be defined as the type and the degree of market competition that was introduced. This scope of liberalization differs between countries and between sectors. It ranges from the introduction of completely free competition with no state interference to the tendering of small parts of (sub-)markets to private parties. This is a useful way of operationalizing because it may be assumed that a different type and degree of liberalization will lead to different risks and uncertainties and therefore to different strategies to reduce them. The selection of sectors, based on this operationalization, and on the phasing of liberalization, is discussed in paragraph 1.5.3.

### 1.6.2.2 Juridification

The complexity of the concept of juridification was already discussed extensively in this chapter. The final definition adopted was: An increased importance of formal legal arrangements in the governance of economy and society. As the dependent variable of this study, it certainly requires further operationalization.

Several possible indicators for juridification have also been discussed. Possible indicators could be the number of laws, the number of lawyers, the number of court cases, the degree of social cohesion, or a combination of any of these and other indicators. An important characteristic is that many of these indicators are correlated and therefore measure the same development.

What is needed for this study is an indicator that captures the developments in all forms of formal legal arrangements (laws and regulations, contracts, legal disputes, commercial legal services), that can be studied in the context of particular economic sectors, and that can theoretically be linked to liberalization. The number of laws and regulations is not an adequate indicator, because liberalization is in part a legal development itself. To say that liberalization has led to new laws and regulations is not an interesting discovery. The number of lawyers working in a particular sector could be a more useful indicator, but many lawyers are broadly trained and only incidentally take on a case in a particular sector. The choice was made to operationalize juridification in the first instance as the emergence of new disputes that are settled by means of legal contestation about market related issues. Note that this emergence of new types of disputes does not automatically imply a quantitative increase in court cases. This indicator can be studied in the context of a particular sector and can be theoretically linked to the introduction of market competition. Through litigation, many other developments that are part of juridification are captured. The emergence of new types of court cases in which the court acts as a source of market rules automatically implies lawyer activity, a greater importance of legal rules, more judicial influence and ultimately also a higher degree of legal framing.

An issue to consider is that this definition means that all conflicts that do not end in court are not part of this analysis. Hence, it cannot be concluded whether the balance between informally and formally solved disputes alters with liberalization. It was a deliberate choice to focus mainly on court cases rather than non-judicial conflict, because of the direct connection to the increased importance of other elements of juridification. From the perspective of the study of judicial conflicts this is a pity, but at the core of this dissertation is not the question in which ways conflicts

are resolved, but whether the court increasingly functions as a source of rules with the aim of reducing risk and uncertainty. This question is independent from the amount of disputes that is settled in the pre-court phase.

### 1.6.2.3 Other variables

The first research question was whether liberalization of economic markets has increased the level of risk and uncertainty to actors on that market. Answering this question involves a description of the various risks and uncertainties on each of the markets to each of the actors before and after liberalization. This is done deductively by logical analyses of the markets' structures and inductively by interviews with actors in the markets. The purpose of both is not only to state the answer to the question, but also to find out what the risks and uncertainties exactly are. It is therefore difficult to operationalize these risks beforehand. Even the operationalization of risk differs between the different parties. To firms, a risk is a threat to its survival or to its market power. To consumers, the main risks are being cheated, paying too much or getting poor quality, or even dangerous, service. The risks to interested third parties vary with the nature of their interest. At least, in order to answer the sub-question, each risk must be identified.

Once the risks and uncertainties are identified, it must be determined whether any of the market parties follows strategies to reduce them. This is done through interviews with involved actors. At the same time, it can be determined whether the call for risk-reducing institutions is among these strategies and whether these institutions are of a legal nature, which is operationalized as performing a legal function such as settling disputes or creating rules.

### 1.6.2.4 Consequences

To specify one of the consequences of juridification, its costs will be measured. The first aim therefore is to discover the costs and benefits associated with those forms of juridification that are directly or indirectly the consequence of liberalization. This is done on the basis of interviews. The costs and benefits will be monetized in so far possible and compared, giving the net result of juridification. The outcome is compared to the size of the sector, in order to discover the relevance of the extra costs or benefits measured. Finally, two more questions will be answered on the basis of logical argumentation, namely in how far these costs and benefits are temporary or

permanent, and in how far the conclusions from the analyzed sectors can be generalized to other sectors, indicating the effect of reforms on juridification in general.

### 1.6.3 Selection of countries and sectors

In selecting economic sectors that are suitable for answering the research question, the aim was to achieve maximum variation on the independent variable: liberalization.

The study of the effect of economic reforms required at least that all of them would be reformed. It could be argued that the development of juridification should also be studied in and compared to a non-reformed market. This is, however, of little interest. This is an explorative study of the mechanisms through which reforms lead to juridification. Studying juridification in a non-reformed market would add little value to this exploration.

The first criterion on the basis of which a selection should be made is the type or degree of liberalization. Some markets were liberalized to a minimal degree, by introducing regulated competition on a part of the former public monopoly. This could be done, for example, through a concession system in which the exclusive service provision on parts of the market are put on tender. Other markets were liberated to a greater extent, allowing direct competition between market parties for consumers.

The sectors selected were telecommunications and public bus transport. Telecommunication services were liberalized to a large extent in many countries, because direct competition for consumers was allowed on these markets. State incumbents were privatized and market regulations were adopted and enforced to increase the amount of competition. Bus services, on the other hand, were usually liberalized using a concession system, in which there was no competition on the road but only for the road. Consumers and most of the employees were therefore not confronted directly with competitors. This difference in the degree of liberalization and the degree of market competition could have much influence on the types of risks and uncertainties encountered in the market.

The second criterion for sector selection was time. Economic policies such as liberalization could have different outcomes in the short and the long run. The aim was therefore to select some sectors that were recently liberalized in order to directly observe the effect on juridification in the short run, and some sectors that were liberalized a number of years earlier in order to observe the long-run effects of

liberalization on juridification. The easiest way to achieve this variation was to select two countries that had both their telecommunication and bus services markets liberalized, where one country should have liberalized these markets longer ago and the other country more recently.

The choice was made to select the United Kingdom as the country that liberalized its markets some time earlier. Both the telecommunication and bus markets were liberalized in the beginning of the 1980's. The Netherlands was taken as country that more recently liberalized these markets, namely at the end of the 1990's.

	<i>Small degree of liberalization / competition</i>	<i>Large degree of liberalization / competition</i>
<i>Short term effects</i>	Public bus services, the Netherlands	Telecommunication services, the Netherlands
<i>Long term effects</i>	Public bus services, United Kingdom	Telecommunication services, United Kingdom

A weakness of this combination of sector types and countries is that the bus services market in the United Kingdom was only partly liberalized. In some areas of the country there was free competition, in London there was no competition, and in some there were concession contracts. This was not a large problem, because indeed (an increasing) part of the market was subjected to the same concession system, and because the competition on many other parts of the market was very low, contrary to the telecommunication markets.

Another possible weakness of this selection across sectors is that there is a number of other variables that could cause juridification and that the presence of these variables could differ across the selected sectors. For example, it could be that differences in economic welfare, the level of education, or the efficiency of the judiciary differ between countries and that these variables influence the emergence of court cases. If the aim were to explain the emergence of judicial conflicts, this would certainly be a problem. However, in this dissertation the aim is to establish a causal link between court cases and only one type of cause. Even if these four markets differ in many other respects than the scope and time of liberalization, it can still be argued that if the mechanism by which liberalization leads to juridification is observed in different sectors, there is strong evidence that there is indeed a causal relationship.

The selection of two markets and two countries that are the same sometimes allows for an analysis based on the most similar logic. For example, in order to study the effect of autonomous regulators, one could make a comparison between the two

bussing markets that are controlled largely by governmental departments, and the telecommunication markets that are regulated by independent regulatory agencies. Differences can then be attributed to the market type, as long as the influence of the legal system can be argued to have no influence on this particular issue.

#### 1.6.4 A qualitative approach

Measurement of litigation is on the one hand simple but on the other not. Recent court registers are generally well kept and available in electronic formats. It would therefore be a logical approach to investigate a possible causal relationship between liberalization and conflicts using a policy-intervention model. In such a model, the number of cases is measured per sector per year and the coefficients of this function are determined before and after the intervention. Such an approach fails, however, because of a number of problems.

First and foremost problem is the number of cases available. Although the relative number of cases in any of the sectors may be high, the absolute numbers seldomly allow for any statistical analysis. In the Dutch bussing sector, for example, three dozen of cases were registered between 2000 and 2006.

Second, the databases are partially biased in time, since over the years the keeping of electronic registers has improved. Case databases such as Westlaw contain historical cases, some even from the 19<sup>th</sup> Century, but their coverage of the total number of cases improves over time. In the Netherlands, the searchable database of the Dutch courts contains cases from before 2000, but the coverage greatly improved between 2000 and 2002. The problem with this bias is that it greatly affects the trend of the number of conflicts measured. Since the total population of cases in single economic sectors is not known, it is impossible to determine how large this effect is. These databases are not representative for the total number of cases. Other sources, such as court archives and jurisprudence journals, also have their drawbacks. Court archives are not categorized per topic, so that searching for the few cases in particular economic sectors would be too time-consuming. Jurisprudence journals publish cases that are of interest to the legal community and therefore also biased, even though they publish a relatively large amount of cases that follow from market liberalization, because this follows from new legislation.

Third, a number of other explanations could be given for the development of litigation rates. There is a large number of potential explanations for the number of court cases per year, ranging from higher court efficiency to better education. In

principle, a time series design could circumvent a number of alternative explanations, but with such a high number of variables and so few cases, it becomes impossible to attribute part of the increase to the policy.

Finally, questions may be raised about the measurement of cases. Just as with rules, it is questionable whether court cases can be simply added up. They differ in societal, economic, and legal impact. Some cases encountered in the sectors were fought between individuals and small businesses, judged by a single judge, over a small damage done by one party for which the other requests compensation. Other cases involve outright battles between multinational corporations, aided by armies of lawyers. If judging the economic and social impact of juridification is one of the aims of this study, then how right would it be to simply add up these two cases? However, the alternative approach would be to calculate the societal, economic, or legal impact of each individual court case, which would be an impossible task due to the amount of labor and due to uncertainty about the impacts of many of the court cases.

Instead, a qualitative design was used in which court cases are seen as the final link of the causal chain that starts with the elements of liberalization mentioned above. If liberalization indeed led to an increase in risks and uncertainties, if market parties attempt to reduce those risks and uncertainties, and if these strategies indeed lead to legal conflicts, then the answer how liberalization caused these conflicts can be found in the causes of the dispute.

The first step in this approach was to identify the main elements of liberalization in each of the sectors, in order to be able to determine which elements of liberalization could lead to juridification.

The second step was to identify the main actors in these liberalized markets and the new relationships that they maintain. If it is expected that tensions between different parties led to juridification, then it is necessary to map how liberalization changed these relationships.

The third step consisted of identifying the risks and uncertainties to which these actors were exposed after liberalization. This exercise is done in a broad manner and the list of main risks and uncertainties is not confined to those with a legal dimension.

Once identified, then the fourth step was to see which strategies actors pursued to reduce those risks and uncertainties. A distinction was to be made between 'normal' business strategies that any company in any market would follow, and strategies that are specific to these liberalized public services sectors. It was also analyzed whether strategies of one actor could lead to tensions between this party and another actor that pursued a different strategy. For example, a possible risk for regional concession owners in the bussing sector is that companies find ways to cut

costs which goes at the expense of quality for the passengers. A possible strategy is to specify more quality clauses in the next concession contract. However, to transport companies, the possibility to act with some degree of freedom is crucial to operate more efficiently, which makes that they have a preference for flexible contracts with fewer specific clauses.

The fifth step was to determine which topics have in practice led to court cases. In order to accomplish this, the available databases for court cases were explored in order to find cases on the themes associated with the strategies identified in the last step. The verdict normally describes the background of the conflict and the behavior of both parties, from which the followed strategy could be inferred.

In the sixth step, a comparison was made between the two sectors and countries. The court cases were analyzed further in order to determine whether there were one or more general mechanisms behind the various court cases. Explanations of the similarities and differences could form the basis of qualitative generalizability, namely under which conditions a particular strategy will lead to a court case.

Finally, an attempt was made to place juridification into an economic perspective by calculating the associated transaction costs.

This qualitative approach has advantages. It allows for a much better analysis of the mechanisms that make liberalization lead to juridification. Single landmark disputes often provide much information on the actors' strategies after liberalization and how these strategies brought them into conflict with each other.

The approach as outlined above can be viewed as a combination of a deductive and an abductive approach (Schuyt, 1986). Deductive because the starting point is a theory: that of market institutions as communicating vessels. From this theory the hypothesis is derived that market liberalization leads to new types of legal conflict and that the courts thereby increase in importance as an institution of economic governance. The theory starts with a cause and hypothesizes a consequence. Whether this relation holds is verified in a qualitative way by studying and comparing four different market situations. The approach is also abductive. Abduction starts with a consequence, and hypothesizes in an inductive manner what possible causes could be. Court cases in which actors in these markets are involved are here the 'consequence'. These court cases are studied in detail and from them it is inferred whether liberalization is among their causes and, if yes, which element of liberalization exactly. In this way, additional elements are added to the original theory that could serve as hypotheses for future research.

This approach also has two weaknesses compared to statistical modeling. In the first place, the fact that an element of liberalization is among the causes of a dispute

does not mean that it is the only cause. In a quantitative design it would have been possible to control for these other causes, so that the individual contribution of liberalization could have been measured. However, the distinction between cases directly caused by liberalization and those that were merely facilitated is already a way to describe this importance. Furthermore, the fact that none of these types of cases, directly caused or facilitated, could have happened without market liberalization is already an indication of the importance of liberalization among the causes.

In the second place, the reforms could also have caused a decrease of other disputes, so that in total the number of cases would not have increased. There is, however, no theoretical or logical reason why this effect should take place and none of the sector experts interviewed could indicate a type of conflict that had disappeared since liberalization. The focus in this study is therefore still on new conflict mechanisms that have appeared after liberalization.

#### 1.6.5 Sources of information

The sources for the known population of court cases were rechtspraak.nl for the Netherlands and Westlaw and the database maintained by the British and Irish Legal Information Institute for the United Kingdom. For the Dutch telecommunications sector, all cases were available from a study conducted by the Institute for Information Law Ivir (Dommering et al., 2003). This study contained a list of all known cases in the sector until 2003, including those in the fixed, mobile and cable parts of the market. Only those cases that were about the fixed network were analyzed. In discussing these cases, academic reviews of case law were consulted. For the rest of the study, interviews were conducted with policymakers and business persons from the various sectors in order to obtain factual background information. Also, policy documents and researches conducted by governmental researchers provided information on juridification and the role of reforms, although this was often not the main aim of these studies. Finally, company reports and newspaper articles were used to aid in identifying corporate strategies to cope with risks and uncertainties, in addition to the information obtained in interviews.

## **1.7 Roadmap**

The chapters are ordered according to the subsequent research questions. Chapter two focuses on the historical developments in the four markets, of course with a particular focus on their liberalization. The purpose is to determine the elements of liberalization in each of these sectors. Chapter three presents an actor analysis including the possible tensions that could arise between these actors and an analysis of the risks and uncertainties that were the result of these liberalization policies. In chapters four and five a number of court cases is discussed. Each chapter focuses on cases that have a particular mechanism behind their emergence. Chapter four focuses on conflicts that are the result of the introduction of competition. It is argued that due to the specific conditions on the liberalized markets, there is a tension for market parties between battling competitors and at the same time being obliged to engage in cooperation. Chapter five focuses on court disputes that are argued to be the result of the difficulty to protect the public interest in newly formed markets. Chapter six focuses on internationalization as a cause for juridification. Chapter seven describes the role of the legal system in the trend toward juridification. After the establishment of a causal relationship between liberalization and juridification and a description of the mechanisms behind this relationship, chapter eight focuses on the evaluation of these trends. What possible advantages and disadvantages does juridification have in economic sectors and what does this imply for the evaluation of liberalization policies? Chapter nine summarizes the results and examines the generalizability of these conclusions to other sectors and time periods.

## **2 Economic reforms in four utilities markets**

### **2.1 Introduction**

This chapter focuses on the history and current state of the four liberalized markets that were selected for further investigation in the case study. Particular attention is paid to the main actors: The service providers, the regulators, the customers, the employees, and other interested groups. The chapter ends with a comparison of the four markets. The purpose of this chapter is to present the necessary background information which is used in chapter three to describe how these different forms of liberalization have led to new risks and uncertainties in these markets. The aim is not to offer new historical insights and therefore the background story is a summary of earlier findings. The main sources for this historical overview were provided by Groenendijk (1998) for the bussing sectors and Hulsink (1999) for the telecommunication sectors, of course with references to other authors.

In discussing the telecommunication markets, the focus is on fixed telephone services. The entire telecommunication market also consists of mobile telephony, television, radio, and data services. However, this study only concerns that part of the market that was recently transformed from state monopoly to free (but regulated) market.

### **2.2 Telecommunication in the Netherlands**

#### **2.2.1 Origin**

The history of electronic communication in the Netherlands started with the placement of telegraphy wires. During the 19th century, several private companies constructed such wires to be used for business purposes. The first state-owned wire for telegraphy in the Netherlands was constructed in 1852 by the Hollandse IJzeren Spoorweg Maatschappij (Dutch Iron Railway Company) between the cities of Haarlem and Amsterdam. It was not only constructed, but also exploited by the state itself. The years after, the state constructed and exploited telegraphy lines to all important cities. No important private wires were constructed after 1852.

Several motives existed in those days for the state to take control over the market. Although one of these motives was certainly to promote business and trade in the Netherlands, there were also practical reasons. The telegraphy service was part of the Ministry of Interior Affairs and used for communication with the city governments. The state thus used it to improve its own efficiency. Furthermore, the neighboring state of Prussia had forbidden private connections to its own state telegraphy network. Only the construction of a public network could connect the Netherlands electronically with its important neighbor. Just as liberalization is often based on practical rather than ideological grounds, so was state exploitation.

The government did not succeed in making the telegraphy service a great success. The costs of constructing and operating the wires were too high. In an attempt to cut these costs, the telegraphy service merged with the postal service. Employees at the post office became responsible for a second task: operating the telegraph.

### 2.2.2 Telephony

Like telegraphy, telephone services started as a private initiative that was soon taken over by the state. In 1881 the first private networks for voice telephony were constructed. These networks were local initiatives. The government took over the ownership of these local networks and interconnected them, thereby creating a national network. Exploiting the networks remained a local activity. The government tendered contracts for the monopoly rights on these networks for a fixed time period. Note that this system is similar to the concession model described in the previous paragraph and similar to the mode of liberalization in the Dutch bus transport sector. This model was already used in telecommunication in 1888.

Although there was the possibility for interlocal communication, voice telephony was primarily used as support service to the telegraph. Messages were sent by telegraph between larger cities and then transported by telephone to the smaller towns. This reduced the costs of sending a telegram from and to smaller places considerably. The first success of telephony was that it caused a large peak in the use of the telegraph. In 1870 the government therefore decided to merge postal, telegraphy, and telephone services and make the organization part of a new Ministry that was also responsible for economic affairs and trade. It showed that these communication services were considered an important condition for economic

development. The exploitation of the telephone services, however, was still in the hands of private companies that had won a concession contract.

This changed in 1896, when large cities like Amsterdam, Rotterdam, and The Hague bought the concession contracts in their locality. The quality of service had decreased because of a lack of investments by the private exploiters. One year later, the national government took over the interlocal service provision. The interconnected local networks would over the years be replaced by central national network. However, this was a long-term process. The local city networks would only become part of this national network with the start of World War II. The days that post, telegraph, and telephony had been part of a ministry were already over in 1893, when the organization gained independence. It was, however, still strictly regulated. Later the organization would gain the status of public enterprise and had the possibility to save money for future investments. It got the well-known name PTT (Post, Telegraphy, and Telephony) in 1928. Nonetheless, the enterprise was part of the state and its profits went to the Treasury.

During WWII the German occupiers gave the PTT legal personality but retained strict control. After 1945 the legal status was switched back to that of public enterprise, but the call for independence that had sounded before the war continued. Several drawbacks of the governmental interference became apparent. Not only were profits used for other expenses rather than investments, the PTT also had to follow governmental incomes policy. It proved impossible to keep enough qualified personnel to cope with the growing demand. In retrospect, this may well have contributed to the fact that the Dutch telecommunication network was the second automated network in the World, after the Swiss (cf. Brouwer et al., 1993; Kleinknecht, 1996).

After large cutbacks during the 1970s and increasing demand for profits by the State, the PTT had to raise its tariffs while the quality diminished. However, this turned out to be the peak of governmental intervention. The digital revolution of the 1980s required very high investments that the state was not prepared to do. Capital had to come in from the capital market, but this required that the PTT got legal personality. This time legal personality would indeed mean the creation of an independent company. At the same time, a European trend emerged with a focus on liberalization and call for greater efficiency (Schuilenga et al., 1981; Davids, 1998).

### 2.2.3 Liberalization

There was general dissatisfaction at the PTT headquarters because of the lack of freedom to invest, hire personnel, and set tariffs. The call for more competition was answered by installing a committee in 1981 led by Fokker Aerospace President Swarttouw. As simple as most liberalizations are often proposed, as difficult is the process in practice. This is certainly true for the Dutch telecommunication market. It would take exactly 25 years to complete the process of reforms that started with this committee with selling its last stock of the privatized PTT.

The Swarttouw Committee was asked to report on necessary institutional changes in the domain of telecommunication. The committee turned out not to challenge the PTT monopoly on the infrastructure and services, but did advise to liberalize certain other parts of the market, being terminal equipment and value-added services. The committee's advice thus followed the idea of splitting the market in several parts and liberalizing those parts that do not strictly require a governmental monopoly. Equally important was the committee's advice to make the Dutch PTT a leader in the World of electronic innovation. The electronic communications sector was clearly at the brink of large technological developments with the introduction of digital equipment (Commissie Swarttouw, 1982). As mentioned before, the high investments necessary could not be drawn from the government, which managed the PTT as a milkcow rather than a company. The Swarttouw committee therefore proposed to shift the PTT from public to private legal status with government-owned stocks. A council would supervise on all important stakeholders being represented in this new company. In 1984 the Dutch government published a White Paper in which it took over most of the recommendations made by the Swarttouw Committee. It did not take any action apart from establishing a second committee that had the mission to look specifically into the PTT's responsibilities, structure, and performance.

This committee led by Steenbergen continued in the line of splitting markets within the telecommunication sector. It distinguished different possible functions of the PTT. The public utility function, which had been the most dominant until that moment, could be restricted to the markets for infrastructure construction and maintenance. This market could only be liberalized to a certain degree, using a contracting-out model. In the markets for network services and equipment, PTT would have to assume an entrepreneurial role by competing with other suppliers. The committee furthermore distinguished a regulatory function and a policy supportive

function, but these had no specific markets associated with them (Commissie Steenbergen, 1985). The government took over most recommendations for reform in 1985 and in 1989 the institutional framework was in place, thereby practically starting the liberalization program.

The liberalization would take place in several steps. At each step a new decision had to be taken over the most suitable model of liberalization. Legally, the reforms started with the implementation of the PTT Personnel Bill, the Telecommunication Bill, the PTT Authorization Bill, and the Post Office Bill. Most importantly, PTT was now a company, but the government did not dare to immediately split it into a public utility company and a commercial enterprise. It gave PTT five years time to reorganize according to the new demands of a liberalized market. Later this idea was abolished: It was judged to be counterproductive to completely split network ownership and service provision.

After this first wave of reform, the political scene was undecided on how to continue. The aims to protect the PTT monopoly in order to ensure reliable provision, to improve the firm's international position, to stimulate innovation, and to generate profits for the state turned out impossible to realize. The consultancy firm McKinsey recommended in 1993 to choose one of four more coherent scenarios, rather than trying to put conflicting ideas in one law. These proposed models ranged from concession contracts to free competition. The Dutch and the European political scenes in the next years evolved to a more liberal focus and it was clear that the second wave of structural reform would include free competition, thus lifting the PTT monopoly. Competition would become possible both by other networks, as well as on the same network. The network maintenance market would be governed by a contracting-out model.

The end of the PTT monopoly also marked the start of a new, privatized company in 1989. Its name was transformed into KPN (Koninklijke (Royal) PTT Nederland) and immediately became the largest Dutch company if measured by the number of employees. Its two main activities were post and telecommunication, but it soon turned out that telecommunication was a more profitable enterprise. KPN succeeded in drawing large investors to enter the European mobile and multimedia markets. The last element of direct governmental influence in the company, the state-owned shares, was gradually eliminated. Over the period 1994-2006, the Dutch government sold its stocks, including the so-called golden share. Post and telecom were separated as the TNT Post group took over the mail division.

#### 2.2.4 Independent regulator: OPTA

One final element of the recent developments in telecommunication has been left out until now. During the whole process of liberalization and privatization, the need for a new regulatory framework was felt. KPN was granted more freedom to commercialize, but there was no sign of real competition yet. A directorate within the Ministry of Transport and Public Works was given the responsibility to monitor KPN's price policy and its role as a public utility enterprise. This directorate had authority as it also acted as the sole shareholder of KPN. Besides this regulator, a body for advice and consultation was founded called RAPT (Advisory council for Post and Telecommunication) and later renamed CAPT (Commission for Advice on Postal and Telecommunication Policy). This commission had to act as an intermediary between KPN and stakeholders in the respective markets. Problems rose when KPN was reluctant to share information on long term strategies on economies of scale, universal service, international competitiveness, and innovation capacity with the Ministry. Further criticism included that KPN retained an unclear relationship with its stakeholders, that the regulator was too poor equipped to sanction KPN, and that the framework could not cope with European developments that required flexibility in updating legislation. It was therefore called to establish an independent regulatory agency.

This agency was established in 1997 and was called OPTA (Independent Regulator on Telecommunication and Post). OPTA took over the regulatory tasks of the Ministry and the Advisory Committee. It had the authority to investigate possible violations of the telecommunication bill and to settle disputes on issues like interconnection. It could initially only settle disputes explicitly mentioned in the Telecommunications Act, but in 2002 a new set of directives was implemented which made that OPTA could act more in line with new market developments (Danopoulos, 2009). Furthermore OPTA was to held consultation rounds with stakeholders and to set access prices in case the market could not agree on one through negotiation. Finally, it was given the mission to "promote competition in the telecommunication and postal markets in general." This last mission statement is interesting, as it shows that OPTA was to become an active and keen watchdog that had a wider mission than regulating by the book (Hulsink, 1999). The European directives also grant the independent regulatory agencies extensive powers to accomplish this mission. This means that OPTA and other European telecommunications regulators feature a combination of extensive powers and independence (Ottow, 2006). Judges can only

review dispute settlement decisions by OPTA marginally, giving it freedom to interpret open and vague norms (Danopoulos, 2009).

### 2.2.5 Consequences of liberalization and current market situation

Since the introduction of the new regulatory framework for the telecommunications sectors in 2004, the different product markets are no longer defined by the law, but may be defined by the regulatory agency on the basis of market research. OPTA made market analyses in 2005 and 2008.

The most basic distinction in these analyses is between retail and wholesale markets. The retail market consists of connections and services. Most suppliers offer all types of services (local, national, international, fixed-mobile, etc.) to end-consumers. The types of connections differ. KPN offers different types of connections and has coverage of almost 100%. The competition consists of cable providers who also have a high coverage, companies that own smaller networks, and companies that use the right to wholesale line rental to resell connections of KPN in combination with CPS services (Carrier Pre-Select, a service that gives consumers the possibility to make calls over the KPN network though a different provider).

In 2008, the market share of KPN in the both the residential and the business retail markets were between 70 and 80%. In the market analysis of 2005, OPTA also provided segmented data for the different types of services. These were as follows:

<b>Table 2.1: Market share of KPN on the various retail markets of the Dutch telecommunication market in 2005</b>	
	<i>Share of KPN</i>
Local / national	70 – 80%
International	30 – 40%
Fixed-mobile	60 – 70%
Smallband data (06760)	70 – 80%
Information numbers (0800 / 090x)	80 – 90%
Personal assistance (084 / 087)	90 – 95%
<i>Source: OPTA</i>	

As one can see, KPN still held a position of substantial market power in 2005 on several parts of the market. Only in international calls the market share was below 50%.

The products offered on the wholesale market replicate the retail market. There are markets for connections and for services. OPTA distinguishes between four separate wholesale markets. These are the markets for the first mile, the transport of the call, the delivery, and wholesale connections (OPTA, 2008) In the market for the first mile, KPN still has substantial market power and is therefore subject to strict regulation. On this market it is forced to allow CPS services against reasonable tariffs. These tariffs are currently not negotiated but imposed by OPTA. KPN still enjoys a market share of 100% in the local transport. It possesses the essential facilities at local level and it is not likely that other companies will replicate the network at this level. Access is therefore regulated. At the inter-regional level the infrastructure is duplicated by at least five other providers. KPN still has a market share of more than 50%, but competition could take place in this market even without regulation. The only problem is the substantial market power by KPN which could allow predatory pricing (temporarily lowering of prices by a powerful company to kill competition, after which prices can be raised again.) Therefore OPTA does interfere with the market, but only by setting minimum prices. Competition abounds on the market for call delivery. Almost all companies active on this market provide services to the normal geographical numbers. Some are also active on markets for non-geographical numbers. These numbers (084 / 087 / 088) allow the owner to put through calls to any fixed or mobile number at any time. The only statutory monopoly that KPN still holds is that for the emergency number 112, a small ode to the universal service principle.

### **2.3 Telecommunication in the United Kingdom**

Like in the Netherlands, the British Telecommunication service has been bundled with the postal services for a long period of time. The Post Office formed part of the governmental organization and was headed by a minister. In this way, the post and telecom services were placed under direct control of parliament. Prices were controlled by the Department of Prices and Consumer Protection. Further regulation regarding the network was provided by the Department of Trade and Industry, which would later incorporate the Department of Prices and Consumer Protection. One could say that telecom services in the UK were under stricter control than they have ever been in the Netherlands.

### 2.3.1 Cable and Wireless and the Post Office

But like the Netherlands, electronic communication in the United Kingdom started with telegraphy. Before WWII, Cable and Wireless was the largest provider of telegraphy services in the World. Established in 1934 as a merger between Eastern Telegraph and Marconi, it was responsible for telegraphy traffic between all parts of the British Empire and the Commonwealth. C&W was a private company, but was nationalized in 1947. After the death of telegraphy, C&W moved into cable and satellite activities, but still focused on the international market. It remained outside the market for home telephony until the liberalization in the '80s. Contrary to the Post Office, it has never been under governmental control, not even after its nationalization by the Labour government. The period of public ownership ended in 1981 when it was privatized again in 1981 by a conservative government. It also expanded its realm by moving into domestic telephone services, under the name of Mercury.

The Post Office, too, wanted to move somewhat outside the governmental control during the 1960's. The proposal by the Post Office Management to create three public corporations, for postal, giro, and telecommunication services, was not taken over. Instead, by means of the 1969 Post Office Act, one corporation was created within which the separate elements enjoyed freedom to a large degree. For the first time, the government also explicitly stated that the corporation should be led according to more commercial principles.

The 1969 Post Office Act did not silence the discussion about freedom and control. Conservative politicians such as Minister Chataway wanted to liberalize most parts of the telecommunication market and to privatize the Post Office's telecom activities. Others such as Lord Hall, chairman of the Post Office, instead wanted to expand public control by moving his public corporation into other markets like equipment manufacturing. By buying stocks in private firms and setting up a public manufacturing division, this market would shift partly to the public sphere. Had this discussion ended in a victory for these latter proposals, the result could have been nationalization instead of liberalization.

The historical trend that led to the mass-liberalizations in the '80s can be argued to have started with the price restraint policy by the Heath Government between 1972 and 1974. For the Post Office, this meant a 20 % reduction of its investment programs, as well as a statutory requirement to keep prices at low levels. The

measures had several negative effects. Financial performance dropped to negative levels as the price caps prevented the loss of investments to be compensated by higher prices. The Post Office thus became a loss-making item rather than a milk-cow. Moreover, the fact that these statutory measures had been implemented without even consulting the Post Office led to distrust and loss of morale among its employees.

The Labour government attempted to turn the tide through institutional reforms that would be proposed by a committee of Wise Men led by Carter. This committee again proposed to separate postal and telecommunication services. Under pressure of the Labour Unions, the government did not dare to take over this recommendation. Another recommendation, the installation of an advisory council that included all major stakeholders, was opposed by the industry. The government decided to postpone a decision on this item and start a pilot project in industrial democracy instead.

### 2.3.2 Duopoly

The conservatives, led by Thatcher, owed their 1979 election victory partly to its identification of governmental control as the main cause of economic problems. The policy for the next years would be aimed at diminishing this governmental control, but complete liberalization of public utilities was not yet part of the proposed measures. The telecommunication sector was among the sectors that were considered for liberalization. Apart from the aforementioned re-privatization of Cable and Wireless, the Thatcher government cut the knot by separating telecom and postal services. British Telecom was established as a corporation. BT did not enjoy statutory monopoly rights, but was instead granted the privilege to use the network exclusively. Already then studies were made over the economic implications of liberalizing this public network and these studies would have positive outcomes, but it would take until 1989 before the government actually implemented the resale of leased circuits.

Terminal equipment already became a free market with the 1981 Telecommunication act. More importantly, in that year for the first time the idea developed that BT could be privatized. It was the result of practical problems. The State's debt and public expenditure had become too high, and the sale of public utilities, the silverware, was an easy solution to these problems. In 1984, after large-scale protests by the Labour Party in parliament and the BT workforce on the streets, companies and individuals could buy stocks in BT. Buying stock was promoted by the government by leaving the companies with sufficient time and money to convert

to a commercial enterprise and by severely underpricing the stocks (De Zoete, 1984; Scrimgeour, 1984). At the same time of BT's privatization, Mercury became a player in the market and was given a license for 25 years to construct an alternative network. The market thus became a duopoly, in which Mercury did not have to fulfill obligations of universal service. Regulation by the government was reduced to the installation of price caps as proposed by Littlechild (1983).

### 2.3.3 Free competition

This duopoly lasted for seven years. In those years there was competition on the market, but still under quite close regulation by the government. In 1990 the government announced through the publication of a Consultative Document that it intended to further open the market to competition. It wanted to introduce more competitors on the market and hoped to achieve competition between different technologies like fixed, mobile, cable, and satellite solutions to voice telephony. In order to achieve this, the government planned a policy of asymmetry, meaning that companies from the mobile, cable, and satellite markets could obtain a license for the fixed network, whereas the dominant firms BT and Mercury were not allowed to move into these new markets for a period of ten years, in order to compensate for their hegemonic power. Ultimately, this ten-year ban would be replaced by a prohibition to move into entertainment services for ten years in the 1991 white-paper. New entrants were welcomed in the market for domestic telephony. Only in international communications, the duopoly lasted. This market segment remained under price regulation. For the rest, free competition with minimal intervention had replaced the regulated competition that was initiated in the Thatcher era.

### 2.3.4 Independent regulator: Oftel / Ofcom

The regulation of telecommunication in the United Kingdom is the responsibility of the sector specific regulator Ofcom. This organization started as Oftel in 1984 as a governmental department that did not fall under a ministry. It enjoys somewhat more freedom than most comparable independent regulators in Europe as its director is independent from both ministerial and parliament control and cannot be dismissed (except for special circumstances). This independence was used by Oftel to engage in informal negotiations with industry, rather than having public hearings. If the negotiations failed to succeed, the dispute was filed at the Monopolies and Mergers

Commission, but this was an unattractive option both to the regulator and the industry, given the time and costs associated with such a procedure.

Oftel's role changed with the shift from regulated to free competition. It had to implement a more transparent decision-making process and had to execute the new regulation including licensing new entrants and installing price-caps in the international market. Most importantly, the government trusted Oftel with the task of promoting competition during the transition to an open competition (Hulsink, 1999). In 2003, Oftel merged with other regulators into a new agency called Ofcom (Office for Communications). Ofcom regulates all communications markets, including television and radio.

### 2.3.5 Consequences of liberalization and current market situation

Since the move from regulated to free competition, British Telecom has maintained a leading position on the market. In all markets, whether calling, transportation, or receiving, BT is still larger than its rivals on its own or at competing infrastructures. Also with regard to different kinds of traffic, BT still had a dominant market position in 2005. It should be noted, however, that the trend in the first three categories is toward a lower BT share.

<b>Table 2.2: Share of BT on various sub-markets of the British telecommunication market</b>	
<i>Telecom traffic market</i>	<i>Share of BT</i>
Local / national	60 – 65%
International	55 – 60 %
Fixed-mobile	50 – 60 %
Other	70 – 75 %
<i>Source: OFCOM</i>	

Prices of making a call have declined steadily since the introduction of competition. Between 1983 and 2005, average prices have fallen by 2 – 6% each year (Harper, 1995).

Interesting is a final remark on universal service, which used to be one of the main elements of the telecommunication market but that has been almost removed from the agenda in the United Kingdom. Jill Hills (1989), who defined universal service as telephone penetration to individual households, found that liberalization

and privatization have not influenced the number of people that are connected to a telecommunication network. She compared the United Kingdom to the deregulation operation of telecommunication in the United States. High costs of joining the telephone network turned out to be the primary reason for not having a telephone, but liberalization has not influenced the number of households that have one.

## **2.4 Bus services in the Netherlands**

### **2.4.1 History**

Like the telephone market grew out of a different communications market, the telegraph, bus transport originated from different other forms of regional transport. Already in the 16th Century, one could speak of collective transport in the Netherlands as barges regularly transported people from and to markets against a uniform tariff. These services maintained a certain schedule, as these markets took place at fixed days and times in the different towns. The barges were owned by private entrepreneurs who operated in a largely unregulated market with fierce competition (Jongma, 1992). One notable exception is the line between Amsterdam and Haarlem. Amsterdam gave a right to one entrepreneur to use the channel as a monopolist, but set fixed prices and a number of minimal conditions. This was agreed in 1520, whereupon the city of Haarlem gave a monopoly right to a different provider and set lower tariffs, so that there was still some form of competition (Van der Ham, 1989). Further competition came from diligences, which also worked against prices that were determined by the government. It is interesting that price caps and performance conditions regarding schedule and quality in collective transport already exist since the first part of the 16<sup>th</sup> Century.

These regulations came from local governments. There was no national regulatory framework. Important to note is that the local regulations had the aim of promoting local economic goals. This worked well as long as collective transport was a small sector. With the improving quality of the roads, traffic over land became more comfortable and thus more popular. A new development toward busses as we know them today was the omnibus, a vehicle pulled by horses with a capacity of between ten and twenty people. The development of interlocal connections by these omnibuses gave reason for the government to regulate the collective transport sector in 1829 with a transport act. Regulation in this 1829 act is detailed and concerns the quality of the equipment, behavior of personnel, schedules, registration of all passengers and goods,

and the duty to transport. This last element was an important addition and meant that anybody that was willing to pay the set price should be transported, even if only one person used an omnibus with space for 20 people. The omnibus was a great success. It also meant the first intervention of the national government in the collective transport market. Soon after the appearance of the omnibus, the government would be confronted with a more advanced vehicle and had to determine how far it was prepared to intervene.

In 1839 the first railway was constructed. The Dutch government was largely uninterested in the enterprise and only acted in the sense that it gave concessions to build railways. The first generation of railways was privately owned and built with foreign capital. The national government was uninvolved at best and hostile in case the train formed competition for the barge transport sector. As a result, no uniform railway network developed in the Netherlands, contrary to most other countries. Only in 1860 the national government acknowledged that the development of the railways could benefit the Dutch economy in general and that policies should aim at equal accessibility for all people and businesses. Railway concessions were thus granted for lines to the periphery, as the market had already taken care of construction in the Western part of the country. A distinction was made in the market for railway construction, which became a governmental affair, and the supply of train services. Exploitation of the railways was still a commercial enterprise. In 1882 a committee was installed to review the railways market. It concluded that unnecessary losses were made because infrastructures were replicated by companies and competitors were more occupied with combating each other than improving the service level. In order to end this inefficient situation, the committee advised to establish an oligopoly and to distribute the lines among two companies. The result was a duopoly. The two companies started as competitors, but over the years they cooperated more and more. In 1911, uniform tariffs for both providers were established, and in 1917 an agreement was signed that effectively merged the two companies. It was believed to be the most efficient way of exploiting the railways, but the Nederlandse Spoorwegen (Dutch Railways) would have to defend itself against competition from bus services. The development of fuel engines led to a revival of the omnibus. Transport by bus could now also take place at interregional level and thus challenged the trains. Alongside these two transporters, the tram arrived as a third interregional alternative.

As with the previous markets described, collective transport by bus started as a private enterprise in an unregulated market. So-called 'wild busses' drove according to a loose schedule and fixed tariffs. This led to sometimes dangerous situations, as competing busses drove too fast to get to the passengers first or even attempted to

push the other from the road. The government recognized the problems of an unregulated market and responded with the Public Transportation Act of 1926, in which it prohibited the provision of public transport without having a license. In order to get this license, bus companies had the duty to use safe equipment, drive carefully, keep to the schedule, and the duty to transport anyone, who was willing to pay the price. The 1926 Act seems a decisive intervention of the government to establish a regulated market. In practice, the law failed as many meshes were found in the legal net. The wild busses successfully circumvented the law by claiming they did not provide public transport, for example because they only transported members of a certain income group or because passengers had to be members of a special 'bus club.' The Dutch Railways became more and more afraid of these unregulated private competitors on the road and founded its own road division. This firm became a successful player in the market for good transport, but failed to become competitive in the passenger transport market. Controversially, it would take until the German occupation in 1940 before the government gained grip on the bus market. The Germans commandeered most bus equipment and distributed fuel. They drastically limited the number of licenses for regional public transport.

After WWII, the Dutch government decided to keep the number of licenses low and use the situation to finally introduce proper regulation. The Netherlands were divided into regions and only one license was issued per region. If there were more suppliers in one region, they had to share a license. This encouraged cooperation and increased efficiency in a growing market. This growth lasted until the '60s and was the result of a growing demand for transport and the decision by the railways to focus on long-distance transport, leaving regional transport to bus and tram. In practice, the tram turned out to be only an alternative to the bus on the local market, so that bus transport became the most important form of regional transport.

In 1963 the upward trend in the bus market came to an end, due to the rising popularity of the car. The answer was sought in higher tariffs and even more focus on efficiency and cooperation. The number of regions was drastically reduced until the bus region map matched the provincial division. One result of the cooperation was the introduction of the bus card that could be used as a method of payment in all busses. The government introduced a redistribution scheme of the profits of all companies, in order to guarantee equal service provision in all regions. In 1982 the VSN was founded, one organization that incorporated all bus companies. Dutch Railways, which in the mean time had managed to get some grip on the bus market through several daughter companies, sold its stocks to the new organization. Through these

mergers, the provision of bus services had developed into a government-owned monopoly (Groenendijk, 1998).

#### 2.4.2 Liberalization

Friday the 25th of November 1994: The Dutch Minister of Economic Affairs announced a new landmark in the history of Dutch public transport. It was at that date that the first concession contract for the exclusive provision of public bus transport in a Dutch region was granted. From WWII until then, providing bus services had been a public monopoly, carried out by state-owned corporations. The first concession contract was won by the American enterprise VanCom. Three years later the court turned back this decision because the tendering of the concession had been unlawful.

Seemingly determined to show the Dutch how efficient, cheap, and still profitable public transport should be organized, VanCom then bought the Groningen Public Transport Company for 11.2 Million Guilders. Only a few weeks later, VanCom resold the same company for more than 50 Million Guilders to British Arriva, claiming that it saw no possibilities for growth in the Netherlands. The Dutch passengers had yet to experience the joys of the quasi-free market.

These two anecdotes from the early years of the liberalized Dutch bus sector are illustrative for the difficulties of introducing competition in a sector with a clear public interest. It took until the introduction of a new passenger transport law in 2000 before the concession system was introduced. Warned by the VanCom lessons, concession granters hired legal specialists to draft sophisticated contract clauses. Bidding procedures and the actual provision of the service were both subjected to lengthy contracts in an attempt to prevent unwanted situations.

The major characteristic of liberalization in the Dutch bus sector was the introduction of a concession system for temporary monopolies. The public tender instrument is characterized by three phases. During the preparation phase, the various documents that outline the concession content and tendering procedures are prepared and debated upon by the responsible politicians. During the bidding phase, the contract specifications are published. Bids are placed and evaluated. During the implementation phase, the winner carries out the transport services as agreed upon in the contract. In time, the preparation phase takes about one year. The bidding and evaluation phase lasts several months. The implementation phase has a fixed term of eight years.

Any public tender in the Dutch bus sector starts with the writing of a program of requirements. In this program, the objectives that the regional government hopes to achieve in the coming concession period are laid down. A draft version of the program is prepared at the desks of regional public servants and is confirmed by a political executive. In case of a concession area within a province, this is the Provincial Executive; otherwise it is the executive committee of a regional authority. After this stage, consumer organizations are invited to comment on the report. Then it is sent for comments to the legislative body, for example the Provincial States that have the possibility to make changes in the program. The final program of requirements is then confirmed by the executive. This final program is subsequently translated in contract specifications. The contract specifications contain all the information that potential bidders might need. The requirements are elaborated upon so that companies know exactly what will be required of them. Furthermore, the tendering procedure with deadlines and evaluation criteria are made public. The contract specifications are also confirmed by the executive.

There is also a possibility for organized groups that have an interest in public transport. Representatives of these organizations are organized in regional committees called ROCOVs.<sup>1</sup> The regional authority is by law required to construct this ROCOV of representative groups, but it is left to the authority to decide who to invite. Some regions, like the Province of Limburg, invite over 25 organizations, including environmental organizations and stakeholders from important destinations such as schools and hospitals. Other provinces invite only the largest organization of passengers, namely ROVER, and sometimes the Association for the Handicapped. The procedures of tendering allow little room for individual complaints. Only if a collective interest is harmed, one of the organizations represented in the ROCOV may bring the issue to table. In case of house owners, who are often not represented in the ROCOV, this is even impossible. The only way is an individual complaint, which will likely be dismissed if no collective interest is harmed.

While drawing up a program of requirements and finally the contract specifications, a basic choice has to be made on the balance between tendering on the basis of price or on the basis of quality. On the one extreme, the program of requirements contains all quality standards that the future service provider has to abide by. The vote is made on the basis of these quality standards. The interested companies know all the requirements on quality before they make an offer. The evaluation of these offers is then made solely on the basis of the lowest price. On the other extreme, the regional authority starts by setting a budget, which is then voted

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<sup>1</sup> Regionaal Overleg Consumentenorganisaties Openbaar Vervoer

upon. After the budget is set, the interested companies know beforehand how much money the government will invest during the concession period. Their task is to offer as much value as possible for the fixed budget. The offers are then evaluated on the basis of quality.

In practice, most regions use a mix of tendering on the basis of price and quality. However, there are differences over space and time. The province of Noord-Brabant granted its concession contracts during the 2002-2004 period solely on the basis of price. The province of Noord-Holland granted its first concession on a mixed system where price determined 60 % of the score. During later tenders, however, Noord-Holland moved to a quality system with a fixed budget.

The choice made resonates in the bidding phase. Both systems have their consequences for possible conflicts to emerge. Tendering on the basis of price has the advantage of being the most objective criterion, but the risk is a continued pursuit for more regulation. An anecdotal example comes from one Province that decided it would be nice if all busses had stickers on their windows with the text “This bus drives in commission of the Province,” so that people would recognize where their tax money was invested. The Province called the transport company and received the answer that an offer would follow. Days later the Province received an offer in which a large compensation was asked for in exchange for the stickers. A small investigation revealed that the offer was ten times the costs of the stickers, but there was no way the Province could force the company to ask a fair amount. In the next tender, a clause was included in the contract specifications that required companies to put visible stickers with the aforementioned text on the windows of their busses. Some time after the winner of the concession had his busses driving, the Province discovered that there were still no stickers. After complaints by the province, the transporter reacted by placing minuscule stickers, that were indeed visible at a distance of 10 centimeters. The province thus announced that in the next tender, the contract specifications will include a clause that states the exact measurements of the stickers and distance from which they must be readable. Of course, such requirements would have to be monitored as well.

This anecdote illustrates how reregulation happens. There is a tendency within governments to react to every problem by creating and detailing rules, in this case the contract specifications. This has several consequences. One of them is that with more potential sources of conflict, there will be more chance of a real conflict appearing over these rules. Companies have limited possibilities for making profit and thus are evading the rules. The more rules, the more staff the government needs to check and monitor the behavior of the transporter. With every addition or differentiation of a

rule, another potential source of conflict is added. Apart from this contribution to juridification, another side-effect of this reregulation trend is the extra costs that drawing up the contract and monitoring compliance bring with them. Finally, there is a risk that fewer and fewer companies are interested in making a bid. They may believe that the possibilities for making profit are too limited under such a web of regulations. This goes at the expense of the market mechanism. Indeed, after a few years it happened that only one party placed a bid. If that trend would continue, the result would be a private monopoly instead of the previous public monopoly.

The alternative, tendering on the basis of quality, is the preferred option of most companies. Under this regime, they have more freedom to develop their own solutions and to be more creative within the legal boundaries. Alas, this approach too produces conflicts as side-effect. Contrary to the lowest price, it is much more difficult to base an objective decision on a variety of quality criteria. Another drawback is the fact that there is less real competition. If two companies bid for the lowest price, then there is competition on that item and the lowest bidder is likely to be close to the optimal contract. If the two companies each propose different plans, it might well be that company A had the best plan, but that company B could have improved on it, had it followed the same direction. Say that company A proposed to spend € 200.000.- on extra services during the evening, whereas B proposed to buy higher quality busses at the expense of €250.000.-. The government prefers the extra services over the higher quality busses and chooses A, whereas B could have done the extra services and still spend € 50.000.- on other improvements. This is the risk of not competing on one criterion but on many.

#### 2.4.3 Regulator: Transport Chamber of the Netherlands Competition Authority

The sector specific regulator in the passenger transport market was created within the framework of the Competition Authority. The initiator of the project was the Ministry for Transport and Public Works. Its regulatory function is rather limited. It investigates and decides on very specific issues in the markets for local transport, where many transporters are still publicly owned. The Competition Authority NMa is responsible for all other matters regarding competition law such as price agreements and mergers.

#### 2.4.4 Consequences of liberalization and current market situation

After liberalization, the Netherlands counts nineteen regional public transport authorities that are responsible for the supply of public transport. These are the twelve provinces and seven regions that cross provincial borders. Within these areas, the regional authorities are free to determine the amount of concession contracts. There are about 75 concessions tendered, of which about two-thirds fall under provincial responsibility and one-third under that of a region. There are three large companies that have won more than 90 % of the available concessions until now. These are Connexxion, Arriva and BBA. Berenschot has valued the total worth of the concession contracts at € 0.9 Billion. In their evaluation, Berenschot concluded that the market frequently makes use of the possibility to choose a different provider from who held the concession before. In 31% of the cases, a different provider was chosen (Berenschot, 2004).

Passenger association ROVER has conducted its own research into the introduction of the concession model. The main problem identified is that governments base their decision on who will win the contract on price rather than quality. Several negative developments are the result: The abolition of several lines, the cutting of formerly single lines in several parts, frequent changes in schedules, and fragmentation of information because providers only provide information on their on services. However, ROVER found many differences between various concession areas. In some regions, services clearly deteriorated. In others, more services, newer busses, the introduction of dynamic information, and even the introduction of new lines were among the positive developments (ROVER, 2004).

In general, apart from the successful creation of a regional public transport market, the statistics are mixed. The number of bus stops has decreased by 9.5 % and the number of bus lines by 7.7 %. As a likely result of this, the number of passengers has declined by 5 % since the introduction of the Passenger Transport Law. On the other hand, many regional governments are rather satisfied and report cost reductions of more than 60%.

The market shares of Dutch regional transport providers are as following:

<b>Table 2.3: Market shares in the Dutch regional bus passenger market (only tendered areas)</b>	
<i>Company</i>	<i>Market share</i>
Connexxion	48 %
Arriva	23 %
Veolia	27 %
Others	2 %
<i>Source: KpVV (2006)</i>	

## **2.5 Bus services in the United Kingdom**

### 2.5.1 History

The development of the passenger bus transport market in the UK closely resembled that of the Netherlands, with one exception: London. Outside London, private bus companies developed and over the decades these companies were more and more inclined to cooperate (Cheeck, 1995). This led to a merger into one large company for England and Wales, the National Bus Company, and one in Scotland, the Scottish Bus Group. Both organizations were founded in 1968 and owned by the government. This governmental influence went very far, as busses were not allowed to drive on similar routes as trains and not allowed to stop in other places than the center of town.

Regulation of the market from 1970 onwards became further organized at regional levels. Seven Passenger Transport Authorities (PTA's) were installed: Greater Manchester (est. 1970), Merseyside (1970), Tyne and Wear (1970), West Midlands (1970), Strathclyde (1973), South Yorkshire (1974), and West Yorkshire (1974). The PTA's were initially the Metropolitan Councils, but later became more independent organizations governed by elected representatives from the districts served by the PTA. The Passenger Transport Executives were the organizations that carried out the policies of the PTA's. Until 1986, these PTE's carried out passenger transport themselves. They inherited their fleets from the local transport corporations.

There was also a redistribution scheme, just as in the Netherlands in those years. In London, the company London Transport took care of all bus-related services. This company was not a local company, but a national one, because it was

directly controlled by the central government. The reason was the great importance of London for the rest of the national economy.

With the Transport Act of 1980, the Thatcher government showed clear intentions to liberalize the bus market, just as with the telecommunication market. Officially in order to promote efficiency, but practically to cut subsidies. The 1980 Act allowed new entrepreneurs to offer fast services without requirements regarding tariffs, schedule, and route. These were the so-called 'express coach services.' The National Bus Company started to offer such services under the name of National Express. Its main competitor was not a rival bus company but the railways. This proved to be enough of an incentive to lower the prices by half and to drastically improve service levels. Competition on the road failed to threaten National Express. It profited from large economies of scale because it had built up its network in the years before. It also possessed an essential facility: The Victoria Station in London, from which it could exclude competitors. This provided NE with a monopoly on lines to and from London. By means of predatory pricing, NE effectively killed competitors such as Coachways. Six years after the deregulation of express coach services, no competitors were left and prices on most routes climbed to the previous levels (White, 1992).

### 2.5.2 Liberalization

The government considered the 1980 Act as the first step toward further deregulation. In a White Paper of 1984 it set out its further policy objectives. This deregulation operation would not affect London. London was at that moment already crowded and congested. It was argued that more competition would not lead to more supply of transport. Instead, the government opted for a concession model where monopoly rights for London were tendered. Outside London, the white paper proposed three far-reaching measures: Free competition on profitable bus lines, public tendering of unprofitable but desirable lines, and the splitting up and privatization of the National Bus Company. These measures were officially implemented in the 1985 Transport Act. NBC was split in 62 separate units that were privatized, either by management buy-out or by take-over.

In 1986, the PTE's were obliged to transform their fleets into companies placed at arms-length to the government, but that were still publicly owned. The PTA's controlled the stocks of these companies. They were encouraged, and later obliged, to sell their stocks to private market parties.

The liberalization in the UK bus sector has led to a division of the market into three parts. Within London, the market is still regulated far more than in the rest of the country. The regulator plans bus routes and schedules and engages into quality contracts with a single provider. These quality contracts have clauses that reward good service levels while penalizing malperformance. Outside London, there is in principle a free market. Any company that meets a number of minimal standards on safety may hand in a driving schedule and offer public transport, though after the schedule has been fixed, the company must hold on to it. In certain areas where the government considers subsidized passenger transport desirable and where there is no commercial service, a concession may be granted through tendering. Note that the concession does not mean that no other parties are allowed on the market, but only that one particular party is subsidized. It is therefore highly unlikely that another party will enter the market. The vast majority of fares is not subsidized. By the end of the 1990's, about 84% of the fares was not subsidized (DETR, 1999).

### 2.5.3 Regulators: TfL and PTA's

To regulate the British bussing market, a number of regional authorities have been set up. In London, the regulator is Transport for London. The task of TfL is to execute the transport policy of the local government. One major task of the organization is to watch the integration of the entire London passenger transport, which also includes metro and train services. With regard to buses, TfL owns a public company that carries out part of the services, while it engages in quality contracts with other providers as well. These contracts are granted through competitive tendering.

Outside the London area, the Passenger Transport Authorities / Executives are still in place, though since 1986 they do not provide public transport themselves. Instead, they act as regulators on the market. They are only allowed to organize subsidized transport if there is no commercial service and if a bus service is desired. As shown before, this is only a small part of the market. Furthermore, the PTE's take care of bus stations and bus stops. A change of the law in 2000 has introduced the possibility for PTE's to engage in Quality Bus Partnerships. This means that PTE's can set quality standards for buses operating in areas where they have invested much in the infrastructure. Many PTE's have combined their changing role with a new image and a name change. Merseyside became Merseytravel, Tyne and Wear became Nexus, West Midlands became Centro, and West Yorkshire became Metro.

#### 2.5.4 Consequences of liberalization and current market situation

The deregulation and liberalization of the British bus sector has had a profound impact on some of the outcomes of interest, but has failed to reach a number of other objectives. Significant cost reductions have been recorded, but the price to passengers has increased. Supply of services has increased, yet demand has decreased. Subsidies have decreased, but so has the quality of vehicles (Preston, 1999, 2004). These statements deserve some more detailed elaboration.

Outside London, there was a sharp decline in the number of bus passengers directly after the deregulation in 1986. In 1985-1986, 4.8 billion fares were counted. This declined to 3.7 billion in 1993-1994, but stabilized during the rest of the 1990s. In 2004-2005, the number of fares was 4 billion. This is still a 16 % reduction since the introduction of liberalization. Within London, there has been an increase in demand (of about 37% between 1986 and 1997). Outside London, there has been a sharp initial decrease which has tempered off. Since the majority of fares are paid outside London, this trend dominates the national statistics. A similar u-shaped development is noted with regard to the quality of the busses. The statistic used for this is the average fleet age. After rising until the mid-1990s and peaking at almost 10 years, the average age of the bus and coach fleet, as recorded by the Driver and Vehicle Licensing Committee of the Department for Transport, has been falling and at 7.9 years in 2004 is now at its lowest level since 1987.

On a positive note, the number of service kilometers offered has increased in London by 21% between 1980 and 2001 and by 35% outside London in the same period. The costs of operating a service have also steadily declined. The price per kilometer has fallen by more than 40% within five years after the deregulation. It has remained stable ever since and is currently rising a bit as a result of high fuel prices and higher quality standards.

Another statistic kept by the Department of Transport is that of consumer satisfaction, as measured by questionnaires. Satisfaction among bus users had an overall rating of 80 out of 100 between 2000/01 and 2004/05. Levels were slightly lower in London than elsewhere in England but have increased from 74 out of 100 in 2000/01 to 78 out of 100 in 2004/05 (DfT, 2006).

With regard to the balance of companies, there are five large bus companies in the UK. The core of each is formed by former PTA companies that have been privatized, mainly through management buy-outs. These companies have merged, acquired, and engaged into partnerships with other companies, so that these five players remain: First, National Express, Stagecoach, Arriva, and Go-Ahead. They

could theoretically compete with each other, but in practice there is hardly any competition.

<b>Table 2.4: Market shares of British bus service providers</b>	
<i>Company</i>	<i>Market share</i>
First Group	20.9 %
Stagecoach	16.3 %
Arriva	14.3 %
Go Ahead Group	9.8 %
National Express	6.0 %
Smaller Groups	31.8 %
<i>Source: (TAS, 2006)</i>	

## **2.6 Analysis and conclusion**

Although each of the four markets described is liberalized, there are differences in the degree and phasing of liberalization. The similarities and differences are related to the different countries and to the different services provided.

### 2.6.1 Country similarities and differences

Although the structure of the market is the main determinant of the form of competition, there are different types of liberalization between similar sectors in different countries. In this comparison between the UK and the Netherlands, one could say that liberalization in the UK went further and happened earlier than in the Netherlands. This can in the first place be explained from the countries' cultures. The focus in the UK is often on market solutions. Its economy is generally open to foreign entrepreneurs and investors. Its bi-partite governmental system gives much power to the ruling party. If that ruling party is the Conservatives, it is likely that the government will follow a policy of less state interference. Even the British legal system is more dynamic (more focused on the specific circumstances of the case than on the equal application of statutes) and business-oriented than its continental European counterparts. The fact that the UK was the first to liberalize is mostly a practical matter, but the quite radical models adopted for these liberalizations are the result of culture and institutional setting.

The Netherlands was later and less radical in its liberalizations. The Dutch economy, too, is very open. This was a necessary condition for the flourishing trade that has brought the Dutch economic successes throughout history. However, the political setting in the Netherlands is characterized by a consensus model. No policies are adopted before all stakeholders have had their saying and an agreement is reached on the basis of compromise. Thus, the Dutch liberalizations had the aim of shifting power to the market, but this was balanced by guarantees that the social model would not be hollowed out too much. The same negotiation model of balanced policy-making is observed in Dutch labor relations between the government, labor unions and employer's unions. The difference between the UK and the Dutch models is nicely illustrated by the bus sector. The British chose to allow free competition on all profitable lines. The system of cross-subsidization, in which the profits on the cost-effective lines compensate the losses made on cost-ineffective lines, was completely abandoned. The aim was to introduce as much market as possible. Only in case of cost-ineffective lines, concession contracts were tendered. The Dutch have opted for a concession model. The aim was to introduce the market mechanism, but not at the expense of services in the regional cost-ineffective lines. Therefore, tariffs on the profitable lines around the large cities are still relatively high in order to subsidize bus transport in other parts of the region. Market principles are balanced with those of universal service obligations.

Another difference along the same lines is the different mode of privatization in the Netherlands and the UK. Privatizations in the UK can generally be characterized as fast and rigorous. British Telecom was shifted to private legal status and all stocks were sold within a year. In the Netherlands these developments went much slower. KPN was given private status in 1989, but it was only in 2006 that the government sold its last stocks. The main explanation is the motive behind privatization. In the UK, the motive was practical. The national economy had suffered from bad performance for many years and the state's debt was high. The Conservative party was voted in, or at least this is how the party explained its victory, in order to stabilize the economy and tackle the debts. Several years after the first ideas on liberalization were launched, the idea of complete privatization came up and was embraced as the quickest and easiest solution to the short-term problems. Stocks were sold and used to cover the debts. In the Netherlands, the need for privatization was less acute and the policy was based on economic principles and the desire to attract foreign capital. The decision to liberalize markets in the future was already taken. In these newly liberalized markets, there would be no place for state corporations, as this would provide unequal competition to newcomers. Furthermore, if the government wanted

to promote innovation in growing tech-industries like telecommunication, it was forced to seek foreign investors. Such investors are often reluctant to invest in state-run corporations. The decision to privatize Dutch former monopolists was thus based on reasoning as well, but less ad hoc. The sale of stocks was carefully planned and carried out in terms. Even when that majority of stocks were sold, the government still remained in control for some time through its golden share.

A third difference between the Dutch and the British liberalizations is the role of the independent regulator in the new institutional settings. At first sight, they show many similarities. For example, both do not only check on infringements of a law, but actively promote competition in the markets they are responsible for. The British and Dutch bus regulators are part of the regional government hierarchy. The telecom regulators OPTA and Ofcom are both independent and responsible for both regulation and competition issues in their respective telecom markets. The difference between the Dutch and the British organizations is not so much on paper as in practice. The British regulators tend to be somewhat more sensitive to the industrial interests. This is illustrated by Ofcom's predecessor Oftel, which operated completely independent from politics and bureaucracy. It engaged in informal negotiations and worked together with the main service suppliers. Not reaching agreements was bad for the office as well. As a result, Oftel stood more between the parties than above them. OPTA, the Dutch telecom regulator, took a stricter approach. It clearly aspired to become a watchdog of the market. The explanation for this difference can be sought again in the company-led response in the UK toward changes in the market (Hulsink, 1999).

### 2.6.2 Sectoral similarities and differences

Differences in the manner of liberalization can also originate in the type of market. It is quite obvious that telecommunication and bus service markets are very different with regard to product and structure. They therefore required different modes of liberalization.

First point of attention is the network aspect in the markets. Both bus services and telecom services fall under the category of infrastructural markets in the sense that they require a certain network to deliver the service. In the telecom sector, this is a physical network, with the core of the network as an essential facility. Replicating these facilities is a costly enterprise and likely not efficient if watched from an objective perspective (Harper, 1995). This proved to be a severe restraint for

introducing competition. In the UK, there was competition between networks in the form of a duopoly. In the Netherlands, Telfort (a joint venture of BT and the Dutch Railways) owned its own network, yet the incumbents' competitors never reached full national coverage. Instead, the liberalization model prescribed competition on the existing network through carrier select services. In the bus sector, the network consists of time tables and bus stops. It is not difficult to replicate, but the Dutch government keeps concessions for monopolist positions because it finds competition on the road not desirable. In the UK, however, there is competition on the road in many regions.

Competition in the telecom sector is also different from transport services because it is possible, through the aforementioned carrier select services, to compete directly for the consumer. Efforts are made by the various telecom operators to attract customers to choose for them rather than for another provider. The customer can then call directly using another operator's services. In the bus sector, no effort is made to attract more customers. Instead, the marketing budgets are put in the writing of more attractive concession bids in order to win contracts from the governmental tenders. Except in the UK regions where there is competition between bus companies on the road, there is only indirect competition for consumers in the passenger transport market. The consumer does not notice the competition apart from the different colors of the busses.

The role of the government in liberalization is also different. Especially the relationship between national and regional levels has had some impact on the liberalization process. Bus services are regional public transport. Through mergers and cooperation agreements, it had in both countries become a national affair with respect to planning and regulation. Through the concession models, part of the power has shifted back to the regional levels. It is the regional government that tenders the concessions and act as a third party in case of a conflict. In the UK, the London area is a special case, as it is a local affair but falls under responsibility of the national government. The telecom sector also once started as a regional affair. With the interconnection of networks and the cable network construction monopoly of the state, a national network was created. Although we speak of local and interlocal connections, it is all part of the same centralized network and therefore regulated at the national levels.

The sector-specific regulators in the telecommunication markets are much more active and influential than in the bus sectors. This is likely caused by the presence of a former giant monopolist in the market that needed a regulatory counterweight. The

regulators in the bus sectors needed less power to achieve their mission of creating a competitive market.

A final difference between the sectors is the level of technical complexity of the network. Issues such as access and interconnection come with various technical problems. This becomes a problem for competition because of information asymmetries. If an operator is forced to provide access against reasonable costs, it is difficult to determine what the costs of offering carrier Pre-Select facilities is. If one network owner asks an unreasonable price for interconnection in the negotiations with another provider, it becomes very problematic to legally determine whether this price is indeed unreasonable. Technical complexity and the relation information asymmetries is present to a smaller degree in the bus sector.

### 2.6.3 Effects of sector and country differences

The purpose of this chapter is to present the necessary background information which is used in the next chapter to describe how the main independent variable, liberalization, varies across the different sectors. There are several causes that explain the variance in liberalization, and country and sector differences are certainly among them. In the first chapter, liberalization was defined as a set of developments toward freer markets. Since the mix of elements of liberalization policy is so different between the sectors, the case selection indeed can be used to distinguish the effects of different elements of liberalization.



## **3 Risks and uncertainties as a consequence of market liberalization**

### **3.1 Introduction**

The liberalization of the studied sectors has had profound consequences for the relationships between actors in those sectors. In this chapter it is analyzed how these relationships have altered. First it is demonstrated how the number of relationships has increased. Then, the nature of the new relationships is determined. The new relationships turn out to be characterized by high degrees of formalization and uncertainty. The next step is then to observe which risks and uncertainties have emerged from liberalization and whether actors pursued strategies to reduce these risks and uncertainties. As the chapter progresses, it becomes clear that liberalization has resulted not only in more, more formal, and more uncertain relationships, but also in more adversarial ones.

### **3.2 Actor analysis: More markets and more relationships**

In each market, there are different types of relationships. In the first place, there are of course vertical relationships between buyers and sellers and horizontal relationships between competitors in similar markets. Furthermore, the seller on a particular market may maintain vertical relationships as buyer on markets for supplies.

The telecommunication markets are strongly characterized by the network and public service aspects, and this returns in the relationships before and after liberalization. Figure 3.1 is a schematic representation of the Dutch telecommunication sector before liberalization<sup>2</sup>:

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<sup>2</sup> The schematic representations in this chapter, especially those about telecommunications markets, are simplifications. In reality, there are far more markets and actors to be distinguished. For example, there are many different types of connections (PSTN, ISDN, VoDSL, VoIP, VoE, WLL), many different types of services (local, national, international, fixed to mobile, assistance and information services), different types of end users (residential and business users), etc. Furthermore, the market after liberalization should also distinguish the market for call termination, where service providers have to agree on a tariff. These and other complexities are left out in order to better illustrate the main point that liberalization has led to an increase in the number of (sub)markets and in the number of actors.

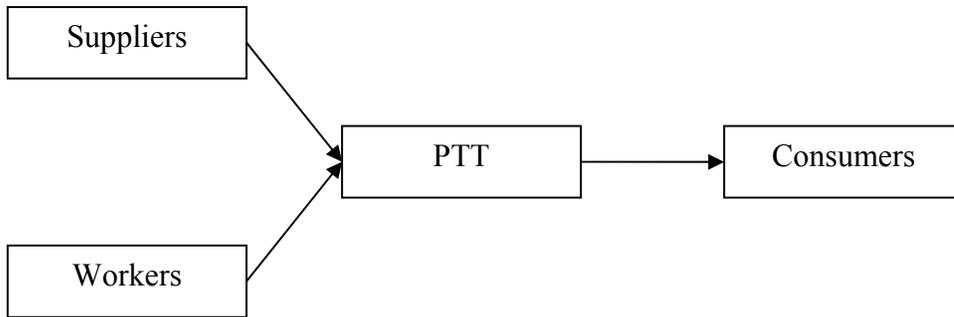


Figure 3.1: Schematic representation of the Dutch telecommunication sector before liberalization

The blocks in the diagram are actors. The arrows stand for the markets on which these actors operate. The arrows run from sellers to buyers. In this case, workers offer their services on the labor market, suppliers on the supplies markets, and the PTT to final consumers. The supplies market is a simplified representation of all the capital goods required for the delivery of services, from computers to notepads. The supplies markets include markets for financial services, legal services, etc. The market served by the PTT consists of all parts of telephone services, from the start to the termination of a call. After liberalization, the same sector could be represented as in figure 3.2:

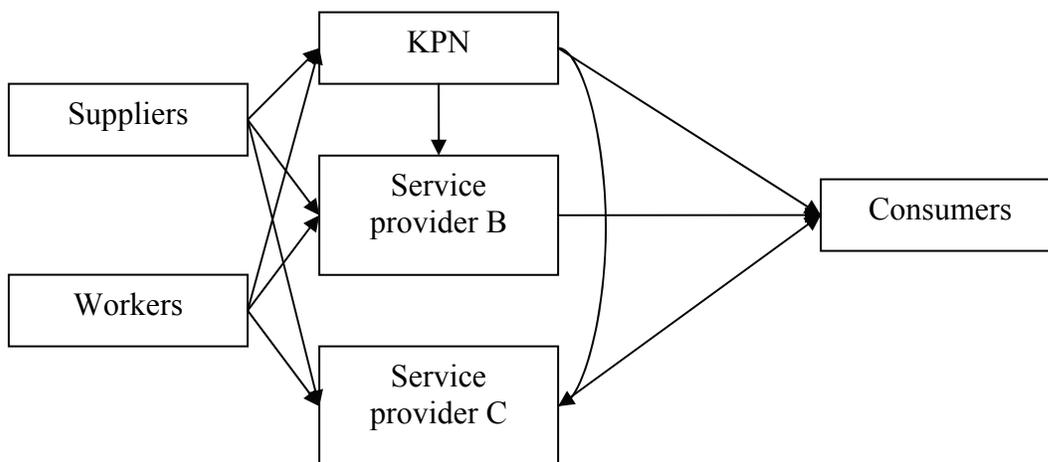


Figure 3.2: Schematic representation of the Dutch telecommunication sector after liberalization

The picture has become more complicated. KPN, the privatized telecom part of the PTT, still trades its services to final consumers. However, the market has been split and new relationships have been added. A number of other firms (here labeled B and C, but there could be less or more than two competitors, this picture is just for illustration,) buys access to the network still owned by KPN. They may do so in various ways, but the two most relevant for this study are wholesale line rental (WLR) and Carrier-(Pre-)Select (CPS). On the WLR market, alternative service providers rent capacity on the KPN network to sell on to final consumers. This does not require any infrastructure investments by the alternative service providers. On the CPS market, service providers install a switch between the home of the final consumer and the local network central. The principle remains the same: KPN sells network access to other providers, who then sell their services to final consumers. The access to the KPN network is regulated through price caps and the obligation to KPN to allow any competitor access to its services.

The first thing that draws the attention is that the number of relationships has increased. Not only are there more markets that each need supplies, there are also more actors. Of course, these markets existed beforehand as well, but they were not distinguished, except internally in the PTT hierarchy. Liberalization could therefore also be interpreted as a breakdown of internal hierarchies into several separate markets.

On the British market, the developments are comparable to the Dutch market, with a number of exceptions. The most important is that there were two competing physical infrastructures after liberalization, a duopoly. This is represented in figure 3.4. Later, the duopoly was abolished and the market structure then more resembled the Dutch market structure.

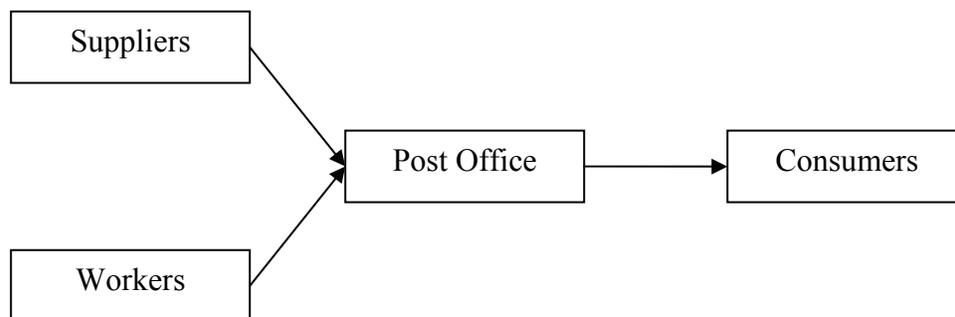


Figure 3.3: Schematic representation of the British telecommunication sector before liberalization

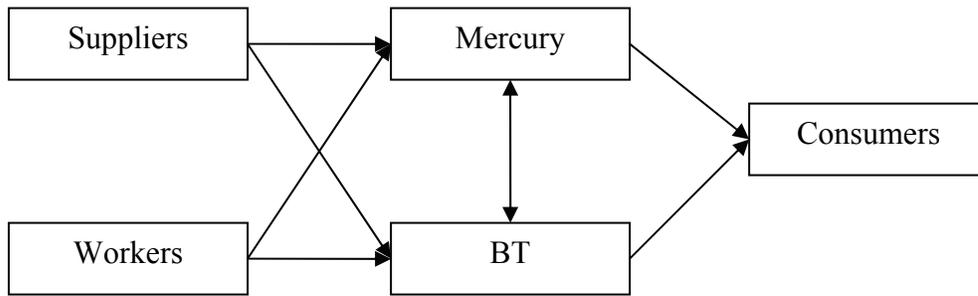


Figure 3.4: Schematic representation of the British telecommunication sector after liberalization

In the United Kingdom, too, liberalization policy has also clearly increased the number of markets. In the bussing markets, the differences between the countries are larger. Starting with the Dutch market, the former situation involved the provision of bus services by state-owned companies.

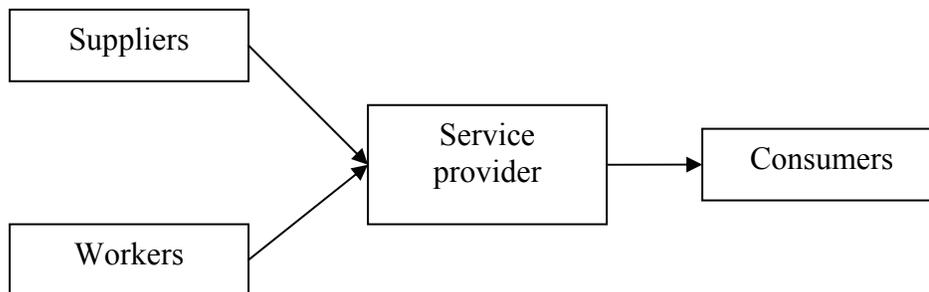


Figure 3.5: Schematic representation of the Dutch bus passenger transport services before liberalization

Contrary to the telecommunication market, the bus services market is regional. Provider is represented as singular, because there is no competition between different service providers. In any given regional market, there is only one provider available. The supplies of bussing are of course completely different, including for example the market for new busses and for maintenance. Furthermore, roads must be provided by the government, but there are only to a limited degree intended to be used by public busses. The new situation again involves a split of the services market.

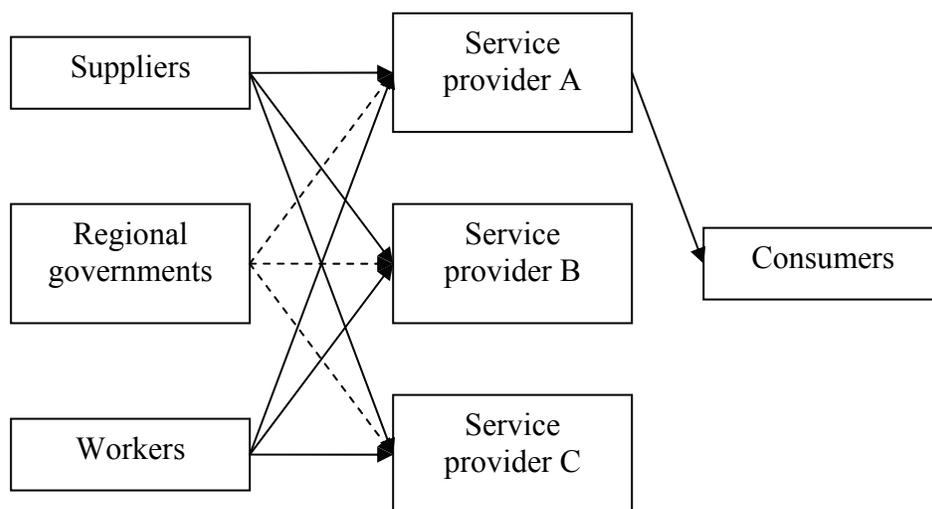


Figure 3.6: Schematic representation of the Dutch bus passenger transport services after liberalization

After the introduction of a concession system, the figure has become more complex. There are multiple service providers that compete for a concession contract. Again, there could be less or more than three firms on any regional market. The government is introduced as the ‘seller’ of the service, but the line is dashed. The government does not really ‘sell’ something in the sense that it makes a profit. It only offers the contract to the provider that requires the least amount of subsidy. Still, the relationship between government and providers is not unlike a buyer-seller relationship, and this representation keeps this scheme in line with the other sectors.<sup>3</sup> The final consumers buy transport services from the service provider that won the concession contract. In the case of figure 3.6, this is provider A. Note that the different markets also represent different phases of a tender. First, there is competition between the different service providers. During the implementation phase, there is only one provider left who carries out transport in the service of the government.

The similarity with the telecommunication liberalizations is that again there are more markets (because there is now also a market for concession rights) and more actors, and therefore more relationships within the liberalized market.

The British market is slightly more complicated because there are separate market conditions for London, cost-effective lines outside London, and cost-ineffective lines outside London. However, the situation in London clearly resembles

<sup>3</sup> Another possibility, that is just as correct, would have been to represent the service providers as sellers of transport service packages to the government (after all, they make ‘offers’), after which the government decides who to grant the monopoly rights to serve its citizens.

the general picture before liberalization with a single provider. The cost-ineffective lines outside London are tendered much in the same fashion as in the Netherlands. Therefore, only the scheme for cost-effective lines outside the London area is drawn. The first picture represents the relationships on the British bus market before liberalization, the second for cost-effective lines outside London after liberalization.

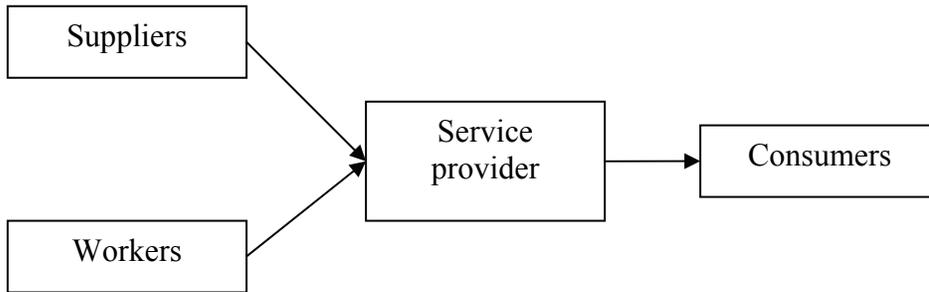


Figure 3.7: Schematic representation of the British bus passenger transport services before liberalization

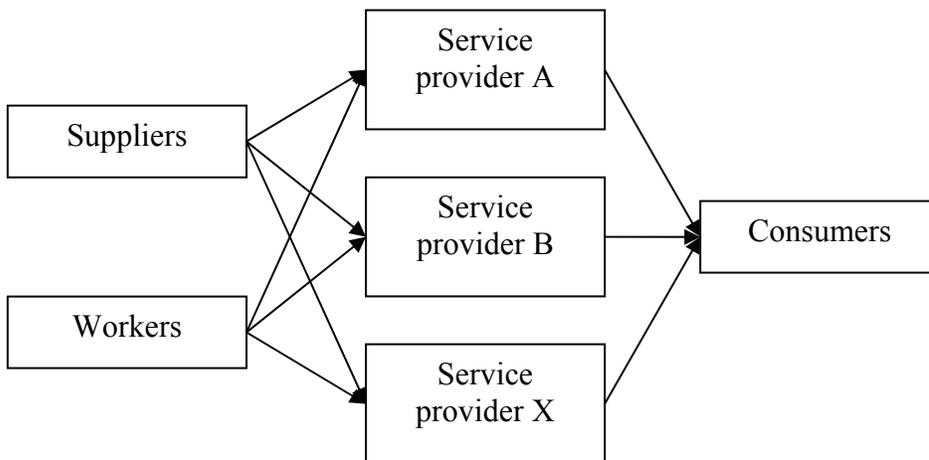


Figure 3.8: Schematic representation of the British bus passenger transport services after liberalization on cost-effective lines outside London

There is one essential difference between these two market structures, namely that there are multiple providers on the services market. In practice, it is more that there is a threat of competition than actual competition on these cost-effective lines. This is the only of the four markets in which hierarchies are not broken down. There are therefore not more submarkets.

### **3.3 More formalized relationships**

Not only the number of markets and actors and thereby the number of relationships have altered after liberalization. These relationships are also of a different nature. In the first place, they have become more formal. More formal here means that the relationship is subjected to rules, which could be laws, regulations, or contractual agreements. This section indicates which relationships have become more formalized. The reason behind this exercise is that more formalized relationships could lead to more formal ways of dispute settlement, as there is less room for informal conflict resolution.

Four types of actors who maintain relationships with each other can be identified in the various markets. These are: Companies, public organizations, customers, and interest groups of different nature. Given the fact that each category consists of multiple actors who also maintain relationships amongst each other, this means that there are many relationships to be explored for formalization.

#### 3.3.1 Formalization in the Dutch and British telecommunications sectors

In the Dutch telecommunication sector, the relationship between companies is very formal. Especially between the former incumbent and the newcomers, there is no other possibility than to maintain formal relationships. The newcomers are dependent on the possibility to make use of KPN's network, but regulation is required to force the incumbent to cooperate. As a result, possible contacts between those two types of parties are subject to regulation. A good example is that there is a statutory obligation for the two types of parties to negotiate interconnection tariffs. The companies are furthermore of course not allowed to make other agreements that may harm competition.

The relationship between companies and the national government underwent profound changes. The former incumbent is not longer publicly owned and no longer staffed by civil servants. The government agency involved is not a Ministry but an autonomous regulatory agency. The relationship between the former incumbent and the agency has also become more formalized. The independent regulator frequently had to take decisions against KPN's interests as such decisions often proved to be the only way to force the former incumbent into a certain direction. In the procedure before a decision is taken there is also interaction between companies and regulators. Companies are invited to present their views on upcoming regulatory decisions during

consultation rounds. Given the high amount of legal instruments employed by the regulator to steer the former incumbent, the relationship for this study is marked as more formalized.

Just as the nature of service providers and governmental institutions has changed, so has the role of consumers been altered by the reforms. In the relationship between companies and consumers, the consumer has become the target of marketing. The aim of newcomers on the market is to convince consumers to sign a contract with them. The relationship before the reforms was different, but also involved the signing of a contract between client and service provider. Moreover, under both regimes, the network owner is obliged to supply each household, under most conditions, with access to the network. There have therefore been only a few changes in the role of the relationship between companies and consumers, thanks to the possibility to switch to another provider and that companies may use marketing tools. The relationship has not become more formalized due to the reforms.

Several interest groups are involved as actors in the Dutch telecommunication market. In the first place these are the labor unions, which opposed the reforms and later represented the employees' interests during the transformation of KPN from public corporation to commercial service provider (which brought many dismissals.) The relationship between company and labor unions has not improved after the reforms, but the question is whether it has become more formalized. The answer is no, because the institutional legal framework governing labor relations in the Netherlands already governed the relationship to great detail. The same framework governs the relations between the new companies and their employees. There is therefore no change in the nature of this relationship and therefore not in degree of formalization.

The different role of the state in the market has also introduced several new relationships within the state structure. In particular, there is a relationship between the regulatory agency and the Ministry of Economic Affairs, between the agency and other regulators such as the competition authority and the consumer authority, which was created in 2007 in the Netherlands. These relationships are governed through formal documents, specifically designed for each link. These are relatively short documents containing clauses in the form of: "If OPTA is dealing with a case on which the Consumer Authority also has competence, then OPTA may continue but has to notify the Consumer Authority." The general pattern in these documents is that in case of two organizations having competencies, the more sector-specific regulator should be given the initiative. Of course, many cases will require the cooperation between the two organizations, in which case the documents prescribe negotiations on the resources invested by any of the parties. In practice, the relationships are largely

based on informal cooperation and information sharing, governed by a minimum amount of rules in the cooperation agreements. It should therefore not be marked as formalization of economic relationships.

The introduction of new governmental agencies has of course also impacted the relationships between governments and consumers. In particular, the agencies have a mission to place the consumer in the center of the market. If a consumer wants to complain about a particular matter in the market, there is a special procedure to govern their relationship. This means that the complainer must identify himself and identify the market parties it complains against. OPTA will have to treat this information confidentially. The case is decided upon by the College of the regulator and appeals against this decision may be filed first to OPTA and later to the administrative court. This is a very formal procedure. On the other hand, the relationship before between consumers and the former market governors, the Ministry and the service provider, were also already formal. There is therefore no formalization change in this relationship.

The Dutch and British telecommunication sectors share many similarities in the types of relationships. The formalization in the British market is therefore only discussed if the circumstances or the results differ from the Dutch situation. For example, the relationship between companies is different because there are more companies and also two competing infrastructures. The type of relationship, however, does not differ.

The relationship between company and regulatory agency was formalized to a smaller degree in the United Kingdom than in the Netherlands. The British legal framework designers deliberately left room for a more informal style of regulating. The aim was to prevent an entirely legalized sector, although some commentators complained that the informal system left too much uncertainty for the companies. Later, the British system adapted to a more legalistic style of regulating, when the regulations on all media and communications were bundled in one law and enforced by one organization. However, initially, the formalization was less than in the Netherlands. Compared to the situation before the reforms, the company-government relationship has clearly become more formalized, but the level is certainly lower than in the Netherlands.

The labor unions were a bit more activist in the United Kingdom than in the Netherlands. In both countries, the unions opposed the liberalization plans and went on strike. However, the consultative framework for labor relations was not so well developed in the UK as in the Netherlands. In order to guarantee job security, additional legal agreements were made between British Telecom and its employees.

Therefore, the relationship between companies and interest groups has been marked as subject to formalization.

Summarizing, not only are there more relationships in the telecommunications sectors in both the Netherlands and the UK, but these relationships are also of a more formal nature. As a result, it is not likely that any conflicts will be resolved in an informal way, but more that the conflict will be taken through a formal cycle of objections and/or appeals against the actions of other parties.

### 3.3.2 Formalization of relationships in the Dutch and British bussing sectors

The service providers in the Dutch bussing sector have always experienced change. Starting as numerous local companies, they merged into a few regional ones owned by the provinces. The largest of these became Connexxion, which offered services throughout the country. After the reforms, the market is characterized by a triopoly. In determining the formalization of relationships between companies in this sector the question is to determine what to compare. A solution is easy to find, because of the specific type of competition in a concession system. Before the reforms, the regional bus service providers hardly maintained any formal relationships. The only forms were agreements on joint technology investments, agreements on the integration of services at the border of regions, etc. Under the new situation, these relationships remained intact, although the concession holders may change now and then so that new agreements must be reached. The situation during a concession period remained therefore almost unchanged. During a tender, the companies are not allowed to make agreements on anything that is related to the tender. Therefore, apart from the negotiations after a concession switches to another service provider, there are no extra formal relationships. Having the more formalized relationships between the telecommunication companies in mind, which maintain a much more intensive relationship due to the nature of the market, there is no further development of formalization.

The relationship between the bus service providers and the government has certainly become more formalized. Whereas service providers before the reforms were governed through internal structures and through informal contacts with their fellow civil servants, the government currently has only formal-legal devices to steer. Even small tasks must be specified in the concession contract, or else the service provider will have no incentive to follow the instructions. This development was supported by the case law in which it was confirmed that the government lost its

competence to change anything in the concession once a contract is tendered. This relationship was the clearest case of much increased formalization encountered in all types of relationships explored in this study.

Companies and customers are a different story. Contrary to the telecommunication sectors, where there is direct competition for consumers, bussing companies compete with each other for the favor of government. The consumers, the passengers, are not central actors in the bus services market. The main way in which consumers may engage in an economic relationship with the transport company (other than buying a ticket) is through an association. The general public transport travellers' association ROVER is the primary example, but there are also groups that represent smaller groups such as handicapped people. The relationship between these two parties has not changed much. The main mechanism through which ROVER and other associations work is by checking the performance of companies and actively pressing for better results. This function and the way it works have not changed after the reforms. The same holds for the relationship between other interested third parties, such as residents close to bus routes.

Related to that are the relations between government and consumers and between government and interested third parties. Before the reforms, the organizations representing the interest of (specific groups of) travellers and residents mainly had to act on their own initiative, although most governments such as the Ministry of Transport would invite their opinions. Under the new situation, these relationships are specified in the law, which determines at what times the government should formally inform the interested third parties about its future plans and invite their comments. The law even prescribes that these comments must be recorded in writing and implemented if they are an improvement over the governmental plans. The relationship has also been formalized in another direction: Outside these opportunities, the consumers and interested third parties have no more possibility for intervention. Due to the increased specifications of these relationships in the law, they are marked as more formalized.

Another point is the relationship between different types of government. Before the reforms, most of these relationships were coordinated by the Ministry of Transport, which also fulfilled most of the primary functions. After the regionalization during the reforms, this central position was removed. Regional governments maintain several relationships. In the first place, they must negotiate with local governments about the program of requirements. Just as with consumers and other interested groups, the exact moments of possibilities for intervention are specified in the law. Though, it must be said that these negotiations were also already

specified before the reforms, only in internal rules. In this respect, the change is not so large as between governments and interested third parties. A second type of relationship is that between regional governments, in where they negotiate about the integration of networks and the exchange of routes. These negotiations are not governed by strict laws and are therefore of a more informal nature. The same holds for the situation in which different regional governments must cooperate in a regional tendering committee. All in all these observations do not justify a claim of formalization.

As far as it concerns the part of the market that is tendered in concessions, the observations for the UK bus sector are similar to those of the Dutch. The differences that are indicated below relate to the profitable part of the market that is not tendered (less regulation) and the London area (no competition).

The relationship between companies on the cost-effective lines is more competitive, as they can possibly meet 'on the road' in direct competition for the consumer. In practice, this is rarely the case and the relationships between companies therefore have had no chance to formalize. Within London, there are no other companies to maintain relationships with in the same economic market. The relationship with the government is far less formalized on the cost-effective lines. Public Transport Authorities had very few instruments to regulate the companies on such lines. This situation changed with the latest reforms, but since the object of study is the impact of the economic reforms as they took place in the '80s, it cannot be marked as more formalized. On the contrary, compared to the situation before the reforms, service providers had far less rules to take into account and maintained a less formal-legal relationship with the authorities, simply because the relationship as a whole decreased in importance. It is therefore one of the few examples of greater informalization. Within the London area, this informalization has not taken place.

Interest groups, on the whole, play a far smaller role in the formal institutional structure than in the Netherlands. These relationships have not been affected much by the reforms and have also not become more formalized ever since. Within the government, however, formalization has increased. Whereas before the reforms the regional and local governments owned their own fleet, the new law brought specific rules on the relationships between the competencies of the national, regional, and local government. The Public Transport Executives are founded on clear descriptions of the powers of each of the local members. Especially the relationship between the local and the regional level is formalized to a much higher degree than in the Netherlands and should therefore be marked as such in the analysis. The results of the 'relationship analysis' are presented in table 3.1.

<b>Table 3.1: Types of Relationships that have become more formalized due to market liberalization</b>	
<i>Sector</i>	<i>More formalized relationships</i>
Telecom NL	<ol style="list-style-type: none"> <li>1. Between firms</li> <li>2. Between firms and government</li> </ol>
Telecom UK	<ol style="list-style-type: none"> <li>1. Between firms</li> <li>2. Between firms and government</li> <li>3. Between firms and labor unions</li> </ol>
Bus NL	<ol style="list-style-type: none"> <li>1. Between firms and government</li> <li>2. Between government and passengers</li> <li>3. Between governments and residents</li> </ol>
Bus UK	<ol style="list-style-type: none"> <li>1. Between governments</li> </ol>

The conclusion must be that there are not only more markets and more relationships on these markets that could lead to more conflict, but that several of the relationships are also characterized by a higher degree of formalization after the market reforms. The type of relationship that has become more formalized differs between the sectors, but there are several in each market. The relationships between companies and governments has become more formalized in all sectors. In the telecommunications sectors due to regulations created and enforced by the sector-specific regulators, in the bussing sectors due to the contractual agreements between government and private bus companies.

### **3.4 New risks and uncertainties**

The two previous sections described how liberalization led to more relationships and to more formal relationships. These alone could already lead to more conflicts directly. However, the change of rules of the game has also introduced a number of new risks and uncertainties in the markets. These, too, could lead to conflicts.

Of the many parties that are active in the four markets, the focus is on those parties that engage in the main transaction, which is defined as that part of the market where competition was introduced. In the telecommunications sector, this is the transaction between service providers and customers. In the bussing sectors, this is between governments and service providers for almost all parts of the markets that are governed by a concession system (most regions in the Netherlands and some regions

in the UK) or by private contract (the large cities in the Netherlands and London in the UK).

### 3.4.1 Risk and uncertainty in the Dutch and British telecommunication sectors

In the telecommunications market, the essential transaction takes place between service providers and customers. Since on the retail markets there is direct competition for consumers and since it is relatively easy for consumers to switch, the market mechanism works relatively well. This means that the first, and obvious, risk to companies is that they are outcompeted by another one on the retail market. The incumbent has a special position. On the one hand the incumbent has to compete with other companies, while at the same time it has to cooperate with its competitors by allowing network access and interconnection. These asymmetries lead to a number of specific risks and uncertainties.

One risk is that of cut-throat price competition. In the market for fixed network telecommunications, it is difficult to compete on quality. Quality is mainly dependent on the main network and this network is the same for all companies. Therefore, the market will be open for price-fighters that operate at low margins. This is a risk, because the end-result is a market where profits are comparatively low.

Another risk is the loss of reputation. Especially former state companies had an image of being bureaucratic, but very reliable service providers. In a new commercial setting, they are highly dependent on their image of being a reliable company that works in the interest of its customers. On the other hand, there are many threats to this reputation. Reorganizations in order to increase efficiency are likely to go at the expense of customer service and marketeers of new companies actively use their fresh image in comparisons with the old rusty incumbents.

A third important risk is that of investing in the wrong technology. Technological developments are a major source of uncertainty in the market, because technological innovation requires large, long-term investments of which it is uncertain that they will ever be profitable. The primary example of telecommunications, although in the mobile part of the market, was the auction of UMTS frequencies by various national governments. Being afraid that they would not be able to compete in the future, all major companies invested large sums of money to obtain a license. It is still questionable whether the investments in UMTS, including the license fees, will ever be earned back. This also holds for new data transfer technologies in the fixed network market.

To newcomers on the market, a number of other risks exist. In the first place, they are dependent on an essential facility that is in the hands of another company. This makes them dependent on cooperation of the network owner. They also may be cheated upon if the network owner does not provide correct information about the costs, and thus the price, of network usage and interconnection. In the second place, they have to compete with an incumbent that is, at least in its domestic market, much larger and therefore much more powerful than the newcomers. On the other hand, most newcomers are related to large companies or to incumbents in other countries.

Consumers on the telecommunications markets run not so many risks. Their position has in many ways improved because they have the possibility to switch to another service provider. The main uncertainty for consumers is that of intransparent tariff structures. The large amount of variables on which they may be charged means that consumers cannot easily calculate in advance which provider is the cheapest choice. It makes the offers by different companies hard to compare. Since most consumers will not spend hours calculating the results of different offers, they will choose a suboptimal offer. Some consumers may be lured into an offer that looked cheap but is in fact not.

### 3.4.2 Strategies to reduce risk in the telecommunications sectors

A number of actions were taken to reduce some of these risks and uncertainties mentioned in the paragraph above. They are here referred to as strategies, even though some would normally not be called so.

Service providers pursued a number of strategies. One of these was attempting to influence the regulatory process through lobbying. This was mainly done in the rule-making stage. Once the new regulation was enacted and ready to be enforced by agencies, the informal lobbying was less often used. Instead, the regulators often held consultation rounds in which viewpoints could be exchanged. Another strategy was of course to simply run an efficient business and to market services. One important element of marketing was comparative advertisement. Since the competition was mainly on price, companies focused on the message that their services were cheaper than the others' in their advertisement campaigns. In order to back up this claim, tariff structures were compared.

These strategies led to tensions between these parties. In the first place there were the normal tensions between competitors that take place in every market. But there were also tensions between the incumbent, who was forced to cooperate with his

competitors, and the newcomers on the market, who wanted more regulations and strict enforcement because otherwise they would not stand a chance against a party with so much market power. And there were tensions between the incumbent and the regulators, who wanted a more competitive market.

These tensions led to conflicts on several occasions, as will be shown in the next chapters.

**Table 3.2: Actors, risks/uncertainties and strategies to reduce them in the telecommunications sectors**

<i>Actors</i>	<i>Risks / uncertainties</i>	<i>Strategies</i>
Incumbent	<p><b>Cooperation with competitors</b> As a main network owner, the incumbent is obliged to make arrangements for interconnection and access with other parties. The incumbent is thereby forced to cooperate with its competitors</p>	Offer minimum cooperation. The incumbent has an incentive to interpret the legal obligations in a minimal way, because it reduces costs and because there is no reason to help the competitors more than necessary.
	<p><b>Competition from pricefighters</b> The newcomers on the market can design relatively lean organizations which enables them to offer lower prices.</p>	One strategy is to stress the solid reputation that the incumbent has built up in the past. Another is to adapt the tariff structure and use comparative advertisement to show how these structures are favorable under particular conditions. Since there are many variables in the tariff structures, these tend to be complicated to compare for consumers.

**Table 3.2 (cont.): Actors, risks/uncertainties and strategies to reduce them in the telecommunications sectors**

<i>Actors</i>	<i>Risks / uncertainties</i>	<i>Strategies</i>
Incumbent	<p><b>Regulatory action</b></p> <p>The mission of autonomous regulatory agencies is to create a level playing field. This will in certain situations clash with the interests of the former monopolist.</p>	<p>Challenge and appeal decisions by the regulatory agency. This can sometimes turn the decision around, but another advantage is that such procedures tend to take much time, leaving the competition in uncertainty. A counter-strategy used by regulatory agencies is to involve the parties in the decision process using consultation rounds.</p>
New entrants	<p><b>Dependency on essential facility</b></p> <p>New entrants cannot choose which network they prefer to use, as they are dependent on the main fixed network and therefore have to cooperate with its owner.</p>	<p>Regulation on network access and interconnection is vital to the new entrants so they will lobby for more favorable regulation. They will also challenge alleged misuse of market power or non-cooperation by the network owner.</p>
Employees	<p><b>Switch to commercial status</b></p> <p>The privatization of the public service providers meant that the employees lost their civil servant status. Furthermore, the introduction of competition necessitated re-organization in order to turn public corporations into competitive companies.</p>	<p>Securing certainties. Employees, often united in sector-specific unions, demanded job certainty for the workers at the incumbent.</p>

**Table 3.2 (cont.): Actors, risks/uncertainties and strategies to reduce them in the telecommunications sectors**

<i>Actors</i>	<i>Risks / uncertainties</i>	<i>Strategies</i>
Other	<p><b>Conditions for installation</b>            Due to the shift from public to private legal status of the network owners and due to the entrance of new firms that might want to construct their own network, there could be clashes between the interests of the companies, the landowners and the general interest.</p>	<p>The main strategies for all parties involved lobbying, negotiating, and challenging non-cooperation.</p>

### 3.4.3 Risk and uncertainty in the Dutch and British bussing sectors

The essential transaction in the Dutch bussing sector takes place between the government and the bus company, because this is the market where competition is taking place. The introduction of competition has led to new risks to both the regional governments and the transport companies. In the United Kingdom this is also true for areas where contracts are tendered, but most of the risks also exist in the London area, except for the risks that are specific for the auction mechanism in the tendering of a contract.

The regional governments have to organize the tenders of the concession contracts. They must translate their policy objectives into a concession contract. This leads to a number of new risks and uncertainties.

In the first place, the government is responsible for a certain quality level. Therefore it must specify quality standards in the concession contract. Such quality standard could range from a minimum number of service hours between certain places to the type of chairs in the busses. The risk is that the government must set these standards in advance, not knowing whether they will still be relevant in the future and whether other aspects will become more important. For example, certain bus routes may not be used very often, while the contract requires extra services on this route. Or new technological developments may lead to an innovative bus that is easily

accessible for handicapped people. Even if the government would like to have this bus, it must often wait until a new tender.

In the second place, it is always uncertain whether the transport provider will live up to the standards specified in the contract. Therefore, the government must take up punishments in the contract, but then it runs the risk that the fine is not high enough. It has happened in some cases that the bus company decided that the profits of using busses for tourist trips rather than regular bus services would more than compensate the fine it had to pay to the government for not delivering the proposed service.

In the third place, it is a difficult task to translate the policy objectives into a legal document. The risk is that there is more than one possible interpretation of the contract clauses. An example is the contract clause that an 'air refreshing device' should be installed in the busses. The government meant that all busses should be equipped with air-conditioning, but the bus company interpreted this as the possibility to open a window (In the resulting court case, the judge agreed with the company that an open window indeed fit the definition of an air refreshing device.) Although this is a funny example, the risk is serious and exists for many of the contract clauses.

In the fourth place, there is a risk that no company makes an offer. The government must therefore estimate the budget and quality standards that it can demand from the market. If there are no interested suppliers, the government must adjust its standards and decrease its demands in order to attract at least one interested party. An associated risk, always present in markets with few suppliers, is that of cartel formation.

Finally, in setting too many or too specific quality standards, the government runs the risk of fixing too many details and limiting flexibility. The problem is that companies need this flexibility in order to come with innovative solutions. If all standards are fixed, the role of the companies are reduced to service organizations that only compete on price, while one of the main aims of introducing competition was to profit from the innovative capacities of transport companies.

An associated risk is that companies may not be interested at all in delivering such services. A large international transport company that has invested much in its innovation department may not be interested in a market where it cannot profit from this knowledge.

To transport companies, there are also new risks. An obvious risk is of course to loose too many tenders, but there are also other risks present.

Just as the government has to specify its contract for years in advance, the company has to make an offer without being aware of future developments. The risk

is that these developments could render profitable business unprofitable. This is of course a business risk, but due to the contract terms, there is not even a possibility to adapt to the situation.

In order to reduce the risk for personnel, Dutch transport companies are obliged to take over the personnel of the previous concession holder. It is uncertain whether this personnel suits the demands of the new company. The new concession holder has to provide information on its personnel before the tender starts, but of course it provides as little information as possible, because this is strategic knowledge. Moreover, the previous concession holder could try to keep the well-performing people and try to leave underperformers to the new company.

Some companies run the risk of being focused on only a single region. They cannot afford to lose their home region. As a consequence, they have to offer a very low price in order to be certain to win this contract. This is especially a problem in the larger cities, who had (and often still have) their own local providers.

A risk is also that the concession contracts are too rigid, leaving very little room for new initiatives and forcing companies to focus almost exclusively on cost-cutting.

Other groups, outside the essential transaction, are also exposed to new uncertainties. The situation of personnel has already been discussed. Their main risk, namely to lose their job, has already been taken care of through the law. Another risk is that the focus on efficiency within the companies goes at the expense of their terms of employment. Travelers, the customers of bussing services, run the risk that companies use their freedom to alter routes and schedules or use poor quality busses. Residents share these concerns, in the sense that they are also dependent on the routes that companies decide to take.

#### 3.4.4 Strategies to reduce risk in the bussing sectors

Both partners in the main transaction pursued strategies to reduce such uncertainties. Transport companies had three main goals.

In the first place, they tried to win contracts that gave as much freedom as possible. They wanted to be evaluated on the basis of only a few performance indicators so that they themselves could determine how to achieve these in the most efficient way.

Secondly, they interpreted contractual clauses broadly and tried to find mazes in the net. In this way, they could fulfill their obligations at lower costs.

Thirdly, in order to be less dependent on a specific region, many transport companies merged into larger firms. In the UK, this led to five large national companies. In the Netherlands, all major companies were eventually taken over by a foreign party.

Regional governments pursued almost the opposite strategies. They attempted to rule out uncertainty by laying down more and more quality requirements so that they knew beforehand which routes and schedules would be followed and what busses would be used. Furthermore, they became more and more specific in their formulation of these requirements in order to reduce the number of possible interpretations. Finally, they had of course an interest in as many bidders as possible and tried to attract more of them.

It is not difficult to see, perhaps clearer than in the telecommunications market, how these strategies directly lead to tensions between the main actors. These tensions again frequently led to conflicts. To that it can be added that passengers and residents also had different interests than governments and transport companies. These interest conflicts led to conflicts between the main actors and third parties.

<b>Table 3.3: Actors, risks/uncertainties and strategies to reduce them in the bussing sectors</b>		
<i>Actors</i>	<i>Risks / uncertainties</i>	<i>Strategies</i>
Service providers	<p><b>Limited amount of concession areas</b></p> <p>A limited amount of tenders make that a few losses can lead to a very different business situation within a year. This could be considered a normal business risk, but in a market with a few large tenders per year, only a few not-wins could already threaten the existence of a company.</p>	<p>Challenging the decisions made in tender procedures if they are negative. This could sometimes lead to a different decision or to a new tender procedure. The potential gains are high and therefore almost always outweigh the costs.</p>

**Table 3.3 (cont.): Actors, risks/uncertainties and strategies to reduce them in the bussing sectors**

<i>Actors</i>	<i>Risks / uncertainties</i>	<i>Strategies</i>
Service providers	<p><b>Future market conditions</b> Companies have to prepare an offer the will be valid for several years, during which the market conditions could change. This could be considered a normal business risk, but there is no option of choosing a contract for a shorter period of time.</p>	<p>Reconsider making an offer. The main uncertainty to service providers is to be stuck in a rigid contract for many years, so companies could also have a strategy to make an offer for more flexible contracts only.</p>
	<p><b>Taking over of personnel</b> New concession holders are obliged to take over the personnel from the former concession holder. However, they often have not all information available about the status of this personnel.</p>	<p>The potential bidders could request extra information from the tender organizer. The tender organizer in turn will turn to the concession holder, who may or may not want to provide this sensitive information. After the procedure is finished, complaint can be filed about the obligation to take over particular employees.</p>
	<p><b>Dependency on a particular geographic area</b> Certain bus service providers have historically focused on one particular area. That area could become a concession area.</p>	<p>If the particular area becomes part of a concession contract, the company is almost forced to submit a very low offer, since losing the tender would in many cases be the end of its existence. Another strategy could be to lobby for not putting public transport in the area on tender.</p>

**Table 3.3 (cont.): Actors, risks/uncertainties and strategies to reduce them in the bussing sectors**

<i>Actors</i>	<i>Risks / uncertainties</i>	<i>Strategies</i>
Consumers	<p><b>Loss of influence on the quality of service</b></p> <p>Although in most cases of liberalization the consumers gain power, in this case they run the risk of decreasing quality. They have less influence as their opinion is only indirectly relevant during tender procedures, whereas there is still no alternative provider of similar services.</p>	<p>Consumers unite in associations and attempt to increase the influence before and during tender procedures.</p>
Residents	<p><b>Loss of influence on the routes and schedules</b></p> <p>Residents that have an interest in the existence (or non-existence) of particular stops, routes or schedules have fewer possibilities to exercise influence, because the transport company is free to act within contractual clauses.</p>	<p>Influencing the concession contract in such a way that the desired stop, route or schedule is taken up as a contractual obligation to the transport company.</p>

**Table 3.3 (cont.): Actors, risks/uncertainties and strategies to reduce them in the bussing sectors**

<i>Actors</i>	<i>Risks / uncertainties</i>	<i>Strategies</i>
Concession owners	<p><b>Translation of policy aims into tender criteria</b></p> <p>The tender documents will have to reflect the policy aims of the concession owner, but it is a legal exercise to rule out different interpretations of the contractual clauses that could go against policy aims.</p>	Drawing up well designed contracts with the assistance of (external) legal experts.
	<p><b>Future market conditions</b></p> <p>This uncertainty is similar to the uncertainty to companies. One has to draw up a contract that will be fixed for many years. Market conditions (and the public interest!) could change drastically during that time.</p>	Build in flexibility in the concession contracts.
	<p><b>Enforcing the contractual obligations</b></p> <p>Since most concession contracts do not give incentives to providers to earn extra income by improving their service, one of the few ways to increase profits is to interpret the contractual clauses in such a way that costs are minimal.</p>	The main strategy is to carefully design the legal clauses of the contracts so that there are no different interpretations possible.

<b>Table 3.3 (cont.): Actors, risks/uncertainties and strategies to reduce them in the bussing sectors</b>		
<i>Actors</i>	<i>Risks / uncertainties</i>	<i>Strategies</i>
Concession owners	<p><b>No interested parties</b> Due to uncertainties to companies, there could be no parties making an offer for a concession contract.</p>	The concession owner could design the contract in such a way that it becomes more attractive to service providers. This will usually involve flexibilization of the contractual terms, because the main uncertainty to service providers is to be stuck in a rigid contract for many years.
Employees	<p><b>Switch to commercial status</b> The privatization of the public service providers meant that the employees lost their civil servant status. Furthermore, the introduction of competition necessitated re-organization in order to turn public corporations into competitive companies.</p>	Securing certainties. Employees, often united in sector-specific unions, demanded job certainty for the workers at the incumbent.
Other governments	<p><b>Interest conflicts between local/regional governments</b> Different governments could have different interests in case of a tender. Within a concession area, local governmental interests could clash with other local interests or with regional ones. Between concession areas, there could be clashing interests between the two neighboring concession owners.</p>	Attempt to influence the decisions of the concession owner when designing the tender and the contract. Discussions and negotiations beforehand could be organized by the concession owner.

### 3.5 Analysis and conclusion

After the background chapter on liberalization of the four studied markets, it was concluded that there were many differences between the market structures and therefore between the ways in which they were liberalized. The main conclusion of this chapter on relationships in the liberalized markets is that the consequences are largely similar: In all sectors there is an increase in a number of relationships. These relationships are characterized by higher degrees of formalization and risk. Most actors pursue strategies to reduce these risks and these strategies lead to tensions and interest conflicts between these actors.

The higher number of relationships is the result of the breakdown of hierarchies and the introduction of competition. In all sectors, the main market for public services has broken up into several new markets. Also in all sectors, the introduction of competition has opened the possibility for multiple public service providers to enter the market. There are therefore more vertical (between actors on different markets) and horizontal relationships (between actors on the same market.)

In all markets, there were also some relationships characterized by a higher degree of formalization, which means that the relationship is subject to more specific rules, such as laws or contracts. Liberalization has led to more formal-legal arrangements.

But there is a second trend in the nature of these relationships. The relationships on many of these markets are characterized by higher degrees of risk than before the liberalization. This is not surprising, because the very high level of governmental regulation (i.e. public monopolistic service provision) reduced many of these risks in the past. The result (or even: the aim) of introducing competition was of course to increase the risk level to service providers, and in some markets also to infrastructure providers. Some of these risks are generic to all similar actors in the four markets. All market parties face the risk of bankruptcy, all customers face the threat of declining service levels or intransparency, and all governments have to deal with the uncertainty of regulating a market under changing conditions. Some other risks are more sector specific. In telecommunications, technological development and the existence of an essential facility lead to challenges for governments, incumbents and newcomers. In the bussing markets, the main challenge for governments has become to write complete contracts and to reduce interpretation problems, whereas transport companies attempt to negotiate freedom and escape clauses and search for different interpretations.

The main general conclusion about these strategies is that most of them lead to tensions between some market parties. In the telecommunications markets, the main tensions are between incumbents and newcomers, and between incumbents and regulatory agencies. In the bussing sector, the main tensions were between tendering regional governments and the transport companies. Contrary to the telecommunications markets, the specific market structure made that there were not many tensions between transport companies themselves, simply because they never competed for consumers directly against each other. Another difference between the sectors is that in the bussing markets, the tensions existed between the parties engaging in the main transaction (regional governments and transport companies), whereas in the telecommunications sectors the main tensions were not between these main transaction parties (companies and consumers).

The conclusion must be that there were more relationships in all sectors, that these relationships were of a more formal nature, that there were new risks, that there were strategies to reduce these risks, and that these strategies led to tensions between transaction parties themselves and between transaction parties and third parties. All of these developments could finally lead to more (legal) conflicts.



## **4 Legal conflicts over the creation of new markets**

### **4.1 Introduction**

In this chapter, legal conflicts are presented that can be traced back to one element of liberalization, namely the introduction of competition.

A number of risks and uncertainties, as well as the strategies followed to reduce them, were identified as a consequence of competitive behaviour. Also it was determined that these strategies could lead to tensions between different actors.

Among them were the tensions between competitors that on the one hand have to outcompete each other, but on the other hand sometimes have to cooperate under asymmetrical market conditions. Newcomers in the telecommunications markets are dependent on an essential facility which makes that incumbents and newcomers have to cooperate to some degree. This is especially the case in the telecommunications markets. The main characteristics of these markets are the network aspect and the fact that these markets were controlled by a monopolist. In order to liberalize such a market, the incumbent must cooperate with its new competitors. The newcomers are dependent on the actions taken by the incumbent, which therefore has high market power. If it does not cooperate, or insufficiently, the only option for the new companies to be able to stay in business is by filing a complaint. (Ottow, 2006) It is therefore this combination between market power of the incumbent and the introduction of competition that has led to many of the new court cases. The incumbent sometimes has good reason not to cooperate (for example to buy time, which can be crucial in this fast developing market) and often the only solution this situation is a court case.

Regulators are important actors in this area, as their mission is precisely to promote the market mechanism by creating a level playing field. In some markets a tendering system was introduced, in which competition takes place over only a short period of time, so that risks were further reduced. A final consequence of the introduction of competition is that different market parties are allowed to offer different tariff structures and to use marketing to compare these structures.

Some of these tensions led to the emergence of new conflict issues in the studied markets. The first three sections of this chapter summarize the various conflicts that appeared as a result of some of the tensions mentioned above. The first section focuses on market asymmetries, the second on tendering, and the third on other cases resulting from the introduction of competition. In the fourth section, these

new areas of conflict are linked to the causal chain (introduction of competition leads to more risks and uncertainties which leads to strategies to reduce them which could lead to tensions and ultimately to legal conflicts). It is also discussed which tensions identified in the previous chapters did not lead to conflicts, whether there are differences between the sectors, and whether the emergence of new conflict areas is temporary or permanent.

## **4.2 Competition and cooperation under market asymmetries**

Many network sectors, such as the sectors studied in this study, are characterized by access barriers. In order to compete on the market, service providers must be able to have access to certain facilities. The network aspect increases uncertainty to newcomers on the market, because they are dependent on the network owner who has to allow and provide access. The regulatory process with regard to market access was a process of expansion, because no regulation existed in this field at all. In most sectors, the body of rules regarding access is still expanding, but the main process is that of differentiation. An important mechanism that leads to conflicts turns out to be the increased precision of these regulations, i.e. to be making these requirements more precise and measurable. Since telecommunication and bussing are very different with regard to network and access aspects, they are discussed separately.

Apart from access to the market, the body of regulations in liberalized sectors also contains clauses on fair competition once access is granted. Such provisions usually stem from general competition policies, but are gradually adapted to sector-specific circumstances and are enforced by sector-specific regulatory agencies. Since direct competition is not possible in the bussing sector, this section focuses on telecommunication. It turns out that also in this area, the competition regulations have frequently caused disputes over their interpretations and applications.

### 4.2.1 Interconnection and Carrier (Pre-)Select services (CPS)

In telecommunication, a main issue is that newcomers must have physical access to the network operated by another company, as well as access to the organization of the network operator (i.e. to be recognized as a service provider). This operator is often the former public monopolist. The network operator is allowed to charge a fee for the use of its network services. Regulations have become more and more specific on the details of such access services and fees. An important source of such regulation is

usually the independent regulator, which is allowed to determine the fees to be charged for access to the core network by both other network owners (interconnection) or virtual network operators (Carrier-Select services). There has been an abundance of conflicts on these regulations. Most of these conflicts are filed by the former incumbents, in their capacity of network owner, against the regulatory agencies. The former incumbents believe that their position is weakened too much by regulations. Only in some cases is it a newcomer who appeals to the court about access, for example in the first case below.

An interesting starting point are the landmark cases (1994) *Mercury v. DGT and BT* and (1995) *Mercury v. DGT and BT*. They were about the procedures followed by the Director General for Telecommunication (DGT, i.e. the Director of Ofcom) in solving an interconnection dispute. Mercury and BT, which then operated in a duopoly on the infrastructure market, referred their dispute to the DGT, who reached a decision in 1992. The regulator also published an explanatory memorandum in which it set out its reasoning in determining the price of interconnection. The aim of the regulator was to increase competition by enabling other operators to reach agreement with BT without intervention by the regulator. Mercury did not challenge the decision itself, because it was clearly favourable. It feared, however, that the reasoning behind it would set an unfavourable precedent. In other words, it wanted to keep the decision but to challenge the reasoning behind it (Booth and Brandenburger, 1995). The real issue was whether a regulatory decision on a private contract could be challenged in court (Johnson and Paul, 1995; Craig, 1996; Cunningham, 1996; Harker, 2005). Several judges in the Court of Appeal maintained that decisions by Oftel could not be challenged in court except in a procedure of judicial review, but the House of Lords agreed in majority with Mercury. Just the fact that Oftel had exclusive competency in applying norms did not mean that this also held for its interpretation of these principles.

Like in other countries that have liberalized their telecommunication markets, the UK in 1991 had rules that a network owner should facilitate competition by other operators. Companies could buy capacity on the BT network and resell it to customers, thereby operating a telecommunication company that did not need a separate network. Customers could use these services by calling a special number before they made their call. These services were called Carrier Select services. Later a device was invented that automatically called the carrier's number and the service became known as Carrier Pre-Select (CPS.)

In facilitating access to these CPS companies, BT purchased devices that were not fit for providing sufficient access, so that these new companies were troubled. The

end-users now complained to the new companies about mistakes made by BT. Oftel issued a report in which it blamed BT for the problems and accused the former monopolist of trying to force customers to move back to BT services. After that, BT's service improved, but Oftel concluded that the competition had suffered severely, if only because potential customers were wary of moving to another company. The first Service Provider, as these new companies were called, was Nextcall. It, too, had severe difficulties surviving. When BT threatened to stop providing capacity if Nextcall would not pay 11.3 Billion Pounds of overdue invoices, Nextcall went to the court. After all, it felt that BT had caused the troubles itself by not providing access. The court case (2000) *Nextcall v. BT* was preceded by a fruitless mediation session. Nextcall demanded a complete set-off of the bills to give it a fair start. It argued that the bad facilitation of access had caused both financial and reputation damage. The case proceeded by a stream of financial statements of lawyers and accountants on how large the damages due to the breach of contract by BT were and if Nextcall would succeed in a trial to get compensated.

The implementation of CPS technology in the United Kingdom was also influenced by the European Union. The European Commission had imposed an obligation upon the regulatory authorities of Member States to require organizations such as BT to introduce CPS by 1st January 2000. However, BT's switches were of a nature which required extensive technical changes at BT's exchanges in order to fully implement CPS. Therefore, the UK submitted a request to the European Commission for a postponement of the deadline for up to twelve months. This application was only partially successful, as the UK was granted an extension of only three months. Since it was impossible for BT to make the necessary changes in three extra months, the only way in which the European Directive could be satisfied was by introducing a temporary solution, Intermediary CPS (ICPS). The solution consisted of autodiallers that were placed in the consumers' homes. These would automatically dial the correct provider number. In the mean time, BT would upgrade its switches to support CPS. The Office for Telecommunication decided that BT should pay 50 % of the costs of this ICPS solution. In (2000) *BT v. Director General of Telecommunication*, BT appealed this decision for the High Court. The judges concluded that the conclusion reached by Oftel was inconsistent with the European Union regulatory principle on technological neutrality: "Promotion of competition should not attempt to promote particular technologies nor particular outcomes (Oftel, 2000).

Under the Dutch 1998 Telecommunication Act, companies had an 'interconnection duty'. Every provider had to enter in negotiations with all other

providers to reach agreements on the basis of which interconnection was established.<sup>4</sup> OPTA read this as a result obligation, meaning that all companies had to reach agreement on interconnection. Possible disputes would have to be solved by OPTA. This did not fit with the practice in other European countries. Oftel only required licensed operators to engage in negotiations, but formulated no expectations on the outcome. Only companies with Substantial Market Power (SMP) were obliged to provide interconnection at reasonable terms. In the Dutch 2004 Telecommunication Act, the interconnection duty was removed and replaced by the duty to negotiate. OPTA was only allowed to intervene under strict conditions.

(2004) *KPN v. OPTA* was a case that concerned the level and purpose of fines. KPN appealed against a decision that it had not given access to competitors at reasonable price. The appeal was purely over the level of the fine. In determining a fine, the regulator must choose between two objectives. A fine at the level of illegal profit made would suit the idea of not interfering with the market. The problem is solved anyway. A higher fine is justified if it wants to scare the offender, giving a warning for the future. Countless appeals just focus on this legal debate. Rather than on the issue itself, it was purely over the level of fines. In this case, the judge ruled that the objective of the fine ought not to be punitive. Thus, the level of the fine should be in order of the profit that KPN made by wrongly interpreting a rule.

In (2005) *KPN v. OPTA*, KPN was forced to improve its procedures to allow people and companies to actually use CPS. Apparently there had been a lot of complaints from the field. The judge ruled that KPN had a legal obligation to actually assist people in switching to another provider. An essential step in that process was to arrange discussion meetings with other providers. What is also interesting is the fact that many terms used in the law and in the verdict were actually undefined. It remained open for (legal) debate, for example, what was exactly meant by ‘meeting other providers.’ The judge further noted that due to the technical complexities of the CPS technology, it was very difficult to determine whether KPN lived up to its obligations or not. There was simply no agreed norm to measure such cooperation in technical terms. This issue appeared in the Netherlands and the United Kingdom alike.

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<sup>4</sup> Article 6.1(6) of the Dutch Telecommunications Act 1998

#### 4.2.2 Substantial market power

The main threat to fair competition in reformed markets is the abuse of substantial market power (SMP). A party with substantial market power could use this power to push other parties from the market, for example by predatory pricing (temporarily charging prices below profitable levels until competition has eroded) or by charging high prices for interconnection to the network. The reason for this being the main threat is that most reformed utilities markets are characterized by the presence of a party with an overwhelmingly powerful position. The competition policy in such markets is therefore not to let this market power grow further by takeovers and to prevent the misuse of SMP.

In the telecommunication markets, conflicts on SMP power have mainly concentrated on the determination of such power. Once it is decided that a party has SMP, it has to comply with a large number of extra regulations. One of these provisions is that the SMP holder is not allowed to impose its own interconnection tariffs.

In (2002) *KPN v. OPTA*, KPN complained about these consequences of having SMP. According to KPN, the regulations that were supposed to create a level playing field in fact promoted the interests of newcomers. Direct causes of the complaint were the private contract signed between Energis and KPN and a decision by OPTA. In 1997, Energis and KPN agreed on an interconnection contract. Each party would provide terminating access to the other party at a certain tariff. These tariffs were equal to both parties. However, after studies carried out by OPTA, the regulator decided to determine new tariffs for terminating access for parties with SMP. KPN therefore had to lower its tariffs. It sent a letter to Energis, in which it demanded that Energis should lower its tariffs as well. KPN considered the interconnection contract as a mutual agreement to charge unequal tariffs. Energis, however, refused to lower its tariffs and as a small party it was also not obliged to do so. Until 1999, KPN continued to pay higher tariffs for terminating access rather than the other way around. From then onwards, it only partly paid its bills up to the level of its own tariffs. Energis filed a court case, but the judge determined that only OPTA was allowed to determine the proper interconnecting tariff. After OPTA had decided to have KPN pay the 1997 tariff to Energis over the period from 1999 onwards, KPN challenged this decision. KPN applied for a preliminary provision, because Energis had already sent the bill, but the judge refused such a decision.

A similar case was (2002) *BT Ignite v. KPN*. The problem arose when KPN had to adjust its tariffs and paid BT a price similar to its own tariffs. KPN expected BT to

adjust its prices to the same level as KPN did, but BT refused this and demanded the remainder of the payments. This was a logical request, as BT kept to the contractual agreements. The judge refused to accept this request, however, as the court first wanted to see the result of the appeal in the case described before, which was at that time treated by a higher court and would serve as case law in all following interconnection cases. This scenario, however, would never happen as the court ruled that KPN could not be considered a company with substantial market power, which rendered the OPTA regulations invalid. The conflict between KPN and BT, in which the first verdict was reached in March 2002, ended only in February 2006 with a failed appeal by KPN. Interestingly, the judge in this verdict confirmed that the 1996 telecommunication act did not contain any definition of ‘provision of interconnection’. In that case, the judge attempted to use the term as seemed most appropriate to the aim of the law, using the memorandum that accompanied any law that is to be voted upon in parliament.

Formally, parties with substantial market power profit from the presence of a regulator. (2005) *KPN v. OPTA* was a case that received much attention. OPTA annually sent a bill to KPN for supervising the offering of the telecommunications network and telecommunications services. KPN argued that OPTA was only allowed to send such bills to market parties that profit from this supervision. Since KPN was the only party with substantial market power in the Dutch fixed telecommunications market, it was of the opinion that it did not ‘profit’ from the regulatory actions. The judge did not agree on this point, arguing that every market party, even a party with substantial market power, profits from the fact that tariffs are in line with the market situation (and in general from a healthy competitive environment.)

#### 4.2.3 Information asymmetries

For purpose of transparency and level playing field, all information about the concession in its current state must be provided by the government. This government is again dependent on the information provided by the concession holder, who has an interest in gaining the concession again. In order to prevent any advantage to the current concession holder, all information must be based on objective and measurable indicators. This also holds for personnel. The new concession owner is obliged to take over all direct and indirect staff assigned to the concession. The data are checked by an external accountant. Again, such accountancy services increase the transaction costs of a tender.

In case (2005) *Arriva v. Noord-Holland*, Arriva complained that Connexxion had provided misleading information about the number and costs of personnel required for the concession. Before the concession was tendered, Connexxion had stated that it used 401.06 FTE (Full Time Equivalents, note the precision by which these indicators are measured) of direct personnel and 80.21 FTE indirect personnel in operating the concession. The accounting firm KPMG confirmed this statement with two additions. In the first place, 20 FTE of the indirect personnel were employed by another company of the Connexxion Holding and were responsible for repairs and maintenance. The law did not specifically require these personnel costs to be supplied. Secondly, the balance between direct and indirect personnel was not based on data about the concession, but on the balance between direct and indirect personnel within Connexxion as a whole. The government notified Connexxion about the first point, indicating that it should provide a new calculation without the 20 FTE employed by the maintenance company because these did not belong to the concession. Connexxion thereupon adjusted the calculation that then amounted to about 460 Fte. Questions were asked to the accountant as to the second point about the balance between direct and indirect personnel. KPMG responded that data on the balance direct / indirect personnel would be biased if based on the actual data of the years before. Proper personnel data about those years (2000-2001) were lacking. Moreover, the service level in the concession area declined over that period. Therefore, the personnel data would be biased toward a far higher number of indirect personnel than actually would be required under the new concession. After all, a lower service level especially requires less indirect personnel. The transport itself is carried out by direct personnel, while the additional service such as information provision is provided by indirect personnel.

When Arriva made its offer, it based its calculation on 300 FTE direct personnel and 45 FTE indirect personnel. This total of 345 was significantly lower than the 460 people employed by Connexxion, because Arriva claimed it could operate far more efficiently. It indicated in the offer that it considered the 460 FTE indicated by Connexxion as misleading information and that it did not intend to take over the remaining staff. It proposed to have another accounting office to re-calculate the real amount of FTE employed by Connexxion in order to lower the number of staff assigned to the concession. It furthermore states that if that calculation showed that more personnel was required over the 345 FTE to be taken over by Arriva from Connexxion, it would go at the expense of the government. Noord-Holland thereupon decided not to allow the offer made by Arriva, because it did not fulfill all the requirements (namely to take over all personnel assigned to the concession and to

have extra personnel working at the expenses of the government.) Before the government took this decision, it once more checked with KPMG whether the calculation by Connexxion would be acceptable. The judge accepted this procedure, despite Arriva's complaints that Noord-Holland should have asked for clarification. Arriva claimed it did not mean not to take over all personnel, but simply to employ it in a different way. However, since this personnel would then fall outside the concession, this calculation could not be allowed by the government. After all, Arriva stated explicitly in the offer that if it had to employ more people to provide more services, it would go at the expense of the government. The judge furthermore indicated that Arriva could not challenge the calculation made by KPMG. The law explicitly demands such calculations to be made by independent experts and KPMG followed all the required procedures in this case. The essence is thus that creating a more efficient operational structure so that less labor is required is not possible, which discourages or hinders innovation.

### **4.3 Other cases resulting from competition**

The concessions market is one that only exists for the bussing services in this study. The main actors are the service providers (the buyers of concessions) and regional governmental institutions (the sellers or concession owners.) Risks increased between the different service providers, between service providers and concession owners, and between the various concession owners. All of these actors were said to pursue strategies to reduce these risks, but conflicts were only encountered between the service providers and the concession owners. Apart from these main actors, a host of other parties have an interest in the concessions market. They, too, were confronted with increased uncertainties. Passenger associations, ad-hoc coalitions of residents, and lower governmental institutions all pursued risk-reducing strategies on this sub-market. Of these groups, the latter two also appeared as litigants in cases. They normally sued the concession owner, because the transport company is legally only carrying out the orders of the concession owner as laid down in the contract.

#### 4.3.1 Access to the market: Meeting the requirements for tenders

In order to be allowed to participate in the tender, a company must meet a number of criteria. It must, for example, possess a license to carry out public transport. Most regional governments specify a whole list of requirements that interested companies must meet. Apart from the possession of a license such criteria generally focus on finance and on equipment and personnel. Failure to meet such requirements results in offers being rejected by the tendering governments. In fact, in case (2003) *Arriva v. Noord-Holland*, the dispute was whether a decision by the government not to allow an offer to the procedure was actually a decision of denying access. Case (2005) *Arriva v. Noord-Holland*, which was discussed earlier, was about the same tender as this dispute. The dispute in 2005 was about a concession holder that according to Arriva had provided misleading information, whereas the 2003 dispute was about whether the offer by Arriva should be allowed at all because it did not meet the formal requirements of the tender. Arriva had made an offer, but failed to meet the explicitly stated requirement of taking over the 460 Fte's of personnel belonging to that concession. Also when the Province asked for a clarification, Arriva confirmed that it did not intend to take over a sufficient amount of personnel. The government then decides not to accept Arriva's offer. When Arriva complained to the judge about the decision, the Province argued that no formal decision had been taken. The only instance in the tendering procedure when a decision is taken was, according to the province of Noord-Holland, when the winner is appointed on the basis of an evaluation. Arriva simply failed to meet the requirements. Not allowing them to the procedure was therefore simply a technical matter and not a decision. The judge disagreed. According to the verdict, participation in a tendering procedure is an essential step for a public bus services provider. Deciding to reject an offer effectively puts it out of business in that particular concession area and is therefore as much a decision as granting a concession to a party. This verdict stressed the function of requirements in a tendering procedure as de facto regulation of access to the market.

The body of regulations (at the provincial level, outlined in the concession contract) expands and differentiates. Public interests are guarded in formal requirements, companies are triggered to improve their bidding by fulfilling additional desires, and innovation is stimulated by rewarding options proposed by the companies themselves. However, such procedures also make tendering a complex process, both in constructing the program of requirements and in evaluating the bids. The evaluation can be regarded as a large sum of scores that each company gets, the result of which is compared to the results of the competitors, after which the

economically most advantageous bid is selected. Requirements are fairly easy to quantify and evaluate. A common formal requirement is a minimum number of regular service hours supplied by the provider. Failing to meet such a requirement would result in excluding the provider from the bidding. In practice, companies only have to sign that they will comply with the requirements. The real challenge of evaluating requirements is the monitoring the performance of the supplier on quantitative criteria after the concession period has started.

Desires and options, on own initiative or stated by the regional government, are of course much more difficult to evaluate. Desires could include offering extra services or premium quality services such as more luxury buses. Options could take all kinds of forms, from using environmental-friendly fuel to special types of vehicles for handicapped people. Companies know that they will get bonus points for offering extra services, but are uncertain how exactly their offerings will be evaluated. In order to solve this uncertainty, consultation rounds were held in the process of constructing the program of requirements, in the form of round-tables with the responsible civil servants and the interested companies. Furthermore, written questions could be asked and were answered with copies sent to the competition. Finally, meetings are held between individual companies and the government. The information provided in these meetings is not made public.

Governments attempt to rule out uncertainty about the quality of service in order to safeguard the public interest. If the previous concession holder has used poor quality busses, then clauses on this quality are introduced in the next tender. Such clauses can range from a requirement to drive with busses that are less than five years old to a requirement to cover the seats with a particular kind of soft material (which is a true story, because in a concession area where this requirement was not specified, the transport company installed plastic seats because they were cheaper.) However, the high number of clauses provided many reasons for disagreement and many opportunities for challenging actions by the concession owners.

In (2003) *Novio v. Overijssel*, the conflict between the company seeking access and the tendering government was on financial requirements. Overijssel had decided to take up a requirement in the program that interested companies should have sufficient financial capacity to carry out the required tasks. The fulfilment of this requirement could be annual statements of accounts over the last years, proofs of revenues over a number of years, or a financial guarantee issued by a bank that the company possessed sufficiently financial capacities. Novio turned out to be unable to meet the requirements, but it still made an offer. In this offer, it had increased the yearly revenues by the revenues that it would have generated if it had acquired the

concession area of Salland, the area for which the tender was being held. Novio argued that the whole point of financial ratios was to make visible how large the new concession area would be in comparison to the company's other activities. The government disagreed and did not allow the offer to proceed.

The decision by the court was logical, as Novio clearly did not meet the financial criteria. It could also not claim that the procedure had been unclear or intransparent, as four other companies had made an offer based on the correct financial methodology. However, it does raise questions about the access barriers to the Dutch bussing market. Nowhere in the Passenger Transport Law, nor in its explanatory memorandum or in the history of the law was it mentioned that only large companies should be able to access the market. On the contrary, from a liberal law it should be expected to promote competition between as many parties as possible and entry requirements on size makes the entry for newcomers more difficult. The requirements set by the tendering governments at the regional level are explained by their pursuit to rule out uncertainty about the continuity and stability of public services. They do not want to run the risk that a small company drowns in the demands of operating a large concession area. However, this implies that the market is cut off for all smaller companies seeking access and this is likely to generate disputes between the large companies and governments on the one side and smaller firms on the other.

#### 4.3.2 Evaluation of offers

The bussing sectors are wholly (the Netherlands) or partially (United Kingdom) governed by a concession system. Under such a regime, there is no direct competition for customers. There is competition 'for the road' rather than 'on the road'. This form of competition has also caused legal disputes, not so much directly about competition, but about the conditions for competition. This section can therefore be read as a demonstration of how the market structure has influenced the type of legal conflict following the introduction of competition. During a tender, service providers compete with each other and this often leads to disputes between the companies. A company that has lost a tender has a motive to formalize this dispute, but because it is not part of the 'transaction', it cannot sue its competitor. Instead, it must file a complaint against the government, the market regulator that has taken the decision. If that complaint is rejected, the company may file an appeal at the administrative court.

Therefore, most conflicts in this sector take the form of administrative procedures of a service provider against the government.

The competition for concession contracts tendered is regulated by both the national government (regulations on when and how to organize a tender) and the regional governments (by translating their transport policies into requirements that service providers have to fulfill). The procedure is put down in writing and must be carefully followed by the companies and the civil servants. Bids may only be granted on the basis of measurable criteria. Therefore, all competition takes place in this single period in which the bids are placed and evaluated. In competing for the contracts, companies have several possibilities to use the law. One opportunity is during the bidding procedure, if other companies are considered to have an unfair advantage. Another possibility is to challenge the evaluation of the bids, claiming that not the winner's bid was the best, but yours. However, companies are seldomly able to directly sue their competitors. Instead, they must file a case against the governmental institution that put the contract out for tender.

(2002) *Connexxion v. Regio Utrecht* was the first case on evaluation criteria in the Dutch bussing sector. The region of Utrecht had decided to grant the concession contract for bus transport in Woerden to BBA. Connexxion had also placed a bid for this concession. After applying the granting criteria, there was only a minimal difference between the two parties. The following rating table was published in the verdict:

	<i>BBA</i>	<i>Connexxion</i>	<i>Maximum</i>
Services	23	23	40
Quality	28	28	30
Subsidy construction project	15	12	15
Acceptation	10	10	10
References	2	2	5
Total	78	75	100

The difference between the parties was small and only due to a difference in one category, the subsidy. The final decision made by the board was of course far more detailed. It now seemed that both companies acquired equal amounts of points in the other categories, but this was not true in practice. They gained points for different sub-criteria and the amounts differ in the decimals. During the court case, Connexxion had in each category reasons to doubt the final decision. The main focus,

however, was of course on the subsidy criterion. This was the item where the difference was made. The criterion was based on a road construction project that had to be completed by the concession holder. The region would give the subsidy that the companies mentioned in their bids. This should have triggered competition between the companies based on the lowest subsidy required to still make profit. BBA required about 100.000 Euro to complete the project, Connexxion asked for triple that amount. The reason was that in the program of requirements, the government had stated that it favored a quick completion of the project. The plan of Connexxion provided for a much faster completion, though at higher costs. The points given on the criterion turned out to reflect only the price element. Connexxion claimed that the region had provided misleading information to the bidders. The judge ruled in favor of the regional Public Transport Authority. In the verdict it was also stated that it was not required to mention the weight given to various sub-criteria in the Specifications. It is sufficient to mention all these sub-criteria and place them in an order of importance. The list of selection criteria must be seen as a tool, rather than the aim of bidding for a concession, according to the judge.

The reason that this dispute turned into a court case was that it was a good strategy to start a legal case. The dispute occurred in the first place because the bids were extremely close to each other. Connexxion was not concerned with the correctness of the information procedures, but simply saw a chance to challenge an unfavorable decision by the Public Transport Authority with a reasonable chance of winning, because the evaluation was so close.

There was also a dispute between a service provider and the government on the legal definition of public transport that set it apart from private transport. This was a dispute between Connexxion and the Province of Noord-Holland. At stake was the so-called beach bus, a bus that would drive along the beach and stop in favorite coastal towns. Connexxion claimed that the beach bus was an infringement of its monopoly position and that the service should be terminated. The bus drove according to a schedule, but access was restricted to people who were in the possession of a train ticket. The advisory committee agreed with Connexxion that the group of train ticket holders is not defined narrowly enough to speak of private transport. This dispute was, like the others, based on legal grounds. The next point of dispute was whether the beach bus qualified for an exemption. According to Connexxion, this could not be the case as its interests were harmed by the new service. This last point is interesting because at that time, the route of the beach bus was not served by Connexxion, although the success of the beach bus proved that there was clearly a demand for it. The Ministry did not grant an exemption. In the next tender, the beach bus route was

part of the concession contract. Connexxion won the contract and now incorporated a competitor's idea into its own organization. This strategy to eliminate risk certainly succeeded.

#### 4.3.2.1 Increased precision

An important cause that led to many access cases in the Dutch bussing sector was the interpretation of quantitative indicators for the evaluation of offers. (2005) *A. v. Amersfoort* was an illustration of how quantitative clauses in the contract could lead to dispute. The city of Amersfoort had used its limited powers as a local government to relocate a bus-stop that was first located on a place where it caused danger to children. However, the plaintiffs, citizens from that neighborhood, feared that the new location might be even more dangerous. They were supported in their opinion by an independent expert and actually also by Amersfoort, but the latter claimed it had no choice but to install the bus-stop at the new location. It wanted to place the bus-stop further away, but there was a very explicit clause in the concession contract that least 95 % of the residents must live within 400 meters from a bus-stop. The local government therefore only had the freedom to move the bus-stop for a few decameters.

The case nicely illustrates how tough these contractual criteria are. Against the desires of residents, government, and safety experts, the judge had no choice but to refuse the appeal. During the drawing up of the contract, the 400 meters were the operationalization of a general idea that bus-stops must be in reach of the majority of houses. It could have been 450 or 500 meters as well. However, once included in the contract, the operationalization of "being in reach of the majority of houses" has become a fixed criterion that reduces an important aspect such as road safety to a position of secondary importance.

The tender of the concession areas Noord- and Zuidwest Fryslân offered another good illustration of how procedures take a formal legal and quantitative form in public bussing tenders. It ultimately ended in case (2006) *Arriva v. Fryslân*, but the phase before the conflict is of interest as well. The province of Fryslân had decided to use a combination of both concession models (see chapter 3). Companies had to fulfill a number of criteria in order to win a contract at a fixed subsidy. For most criteria, the bids only needed to confirm that the companies would fulfill them. In some cases, it needed to be elaborated how the criterion would be fulfilled. Apart from the criteria, it was also possible to earn bonus points in the bidding. These categories were labeled

as desires. Finally, companies could indicate offer options in addition to the requirements and desires indicated in the program of requirements. This tender incorporated all insights that Dutch regional governments have obtained about organizing tenders of public bussing contracts.

The various criteria were quantified in one of two different ways. The first was by a formula provided beforehand. The extra number of service hours, for example, is easily translated in a formula. The second means of evaluation was applied to those criteria that are more difficult to represent in a formula. The evaluation was then made by an expert committee that rated the bids on a ten-point scale. Such evaluations were made for each relevant criterion. For example, companies had to provide an implementing plan for the concession, which was to be evaluated on three criteria: the marketing plan, the security plan, and the plan for introducing a chip-card system. Each sub-category was rated from 0-10 points, and then multiplied by a certain factor (in this case, 5 for marketing, 4 for security, 1 for the chip-card system). The result was again multiplied by a factor to determine its influence on the final result. The factor of the implementing plan in this case was .15, so that the result counted for 15% in the final number. Far more important was the transport plan, including the quantity and quality of services, which counted for 70%.

This case is another example of a dispute over quantified norms. In this case, two companies placed a bid. Arriva obtained a final score of 821.8, Connexxion won with a bid worth 882.58 points. Since the bids are made public, Arriva had the possibility to challenge the correctness of that decision. Given the high number of indicators, it would be surprising if they failed to find several arguable decisions. Arriva supported its complaints by two arguments. In the first place, the tariff plan proposed by Connexxion did not fit the requirements. Connexxion had planned the introduction of the chip-card system. This system offered a number of advantages over the traditional bus card, because companies could work with different tariffs at different hours of the day. Connexxion had calculated that it could ask a higher price, for example by raising tariffs during peak hours and using a discount tariff during quiet hours. As a result, it could increase its earnings per kilometer and thereby offer more service hours than its competitors. A prominent detail was that Arriva only knew about this practice because the Province had accidentally sent the notes from its private discussions with Connexxion to Arriva. The judge was convinced by the explanation of Fryslân that it merely included the wish of a chipcard system to make parties think of such a system beforehand, and that the clauses on tariff structures had only been included to make the offers quantitatively comparable. The province had been convinced by Connexxion's expected earnings because of a small experiment

that it had conducted with the assistance of a transport research institute, despite Arriva's claim that this study did not reflect the real situation.

The second challenge by Arriva was that Connexxion had not met the requirement of installing dynamic information displays at 24 bus-stops. Indeed, there was a contradiction in Connexxion's offer. It offered to place displays at all major and minor bus stations in the region, at a total of 24, but also mentioned a total of 19 displays. To complicate things, it offered a list of all locations that would be provided with a display, but this list only contained 22 bus-stops. According to the letter of the law, the Province should have rejected the offer, because it did not meet all the requirements. The province, however, accepted this offer, arguing that Connexxion could never have had the intention to make an offer that did not conform to the requirements. The judge agreed with this acceptance, because Connexxion had even fulfilled a number of desires regarding the displays. It could not have fulfilled these desires if it had not respected the requirements.

This case showed several characteristics of the increased precision mechanism in a concession system. In the first place, tenders tend to become more and more complex. They include many criteria and the criteria are of different nature (requirements, options, desires.) Such complexity is undoubtedly intended to serve the public interest, but also leads to an increased number of opportunities for legal contestation. In the second place, the judge affirms that even if procedures are entirely quantified, the tendering government still has some discretion. Although Connexxion's offer contained mistakes in the numbers, it was still accepted. Finally, the case already revealed the importance of transport research institutes in the sector. These institutes are increasingly necessary to provide objective analytical data to prove compliance with the quantitative requirements. The use of such institutes increases the transaction costs of a tender.

An important, yet particularly difficult, element of increasing precision in bus tenders is personnel. In addition to the previous cases, several characteristics of the increased precision mechanism can be derived from the previously mentioned case (2005) *Arriva v. Noord-Holland*. Note in the first place that the Fte's are indicated to an extreme precision of two decimals. This gives the impression that the books have been kept very precisely and that there are indeed, for example, 401.06 FTE employed directly in the concession as bus drivers and ticket sellers. However, it turned out that the books had not been kept at all on this point, as KPMG concluded that the information on personnel was not available for the past year. Increased precision here was therefore something different than precise measurement; it needed not to represent the actual number of Fte's. If the proper data were not available, an

estimation was made that could or could not be right. For the law, it was sufficient that this estimation was made by an independent expert such as the accountant.

Apart from the conclusion that quantitative indicators do not represent reality, there is the related problem that parties will try to influence these data to gain advantage, even in an objective, transparent, and measurable procedure. The inclusion of indirect personnel, for example, was disadvantageous to the government. Including more of such staff raises the subsidies needed for public transport in that particular concession area. If indirect staff is left out, it goes at the expense of the concession holder who has to bear higher staff costs. Indirectly, such costs are converted in the offerings, but then it is spread out over all concession areas rather than only one. The government therefore has an interest in leaving out the service engineers and is in the legal position to do so. The current concession holder also has a particular interest, namely in keeping the total number of personnel as high as possible. If it wins the concession, it can continue to work as it did before. On the other hand, if it loses the concession, costs are minimized while a competitor has to take over a large amount of people that it does not need. Again this is a legal form of data manipulation, as the external accountant approved of it.

Another example of this was *Connexxion v. Leeuwarden and Arriva* in which Connexxion did not agree with the way in which concession holder Arriva calculated the size of indirect personnel. According to the law, Arriva had to base this size on the ratio between the revenues of the concession and the total revenues of the concession holder. This ratio had to be taken from the last year before the concession period ended. However, that was exactly the year in which the new concession was tendered. Arriva decided to base its ratio on the last finished financial year. However, in some parts of the calculation it used older or newer data, depending on availability. For example, it used old statistics for subsidies received and ticket sales. Connexxion claimed that this way of calculation was inappropriate and furthermore claimed that Arriva should specify the composition of the group of indirect personnel. The judge identified that a literal application of the law was impossible in this case, so that a solution had to be found that was in the spirit of the law. He ruled that Arriva had supplied the best data possible. He also ruled that the group did not need to be specified further, because this obligation only existed for direct personnel. The reason for that was that specifying the composition of indirect personnel could lead to the publication of data in the specifications scheme that would point toward a specific person. One driver is an anonymous term, one manager sometimes is not. This case became the main source of case law in the problem of indirect personnel.

This does not mean that no other cases were fought over this matter. In (2003) *Connexxion v. Groningen (Province), Drenthe, Groningen (Municipality) and Arriva* and (2003) *Groningen v. Arriva*, Connexxion again complained against the calculation methods of Arriva. One of the complaints was that Arriva included a number of staff members as indirect personnel, although they actually worked for other parts of the company than Arriva Passenger Transport. The legislators, according to the judge, had apparently not realized that transport companies work in multi-divisionalized firms. It was therefore not specified in the law that indirect personnel could also work for different divisions. However, they did form part of the indirect personnel and should be included in the calculations. The judge explained that this could indeed be used by current concession holders to conceal the amount of fte's that was in reality working for the concession on tender. However, one of the objectives of the Public Transport Act 2000 was to protect the personnel and this aim prevailed over the transparency to potential bidders. This job protection was the main point of negotiation with the trade unions in the process of designing the new transport law.

It is an interesting observation that some of the major conflicts about increased precision have been over people. Perhaps this is because the contribution of indirect personnel is difficult to quantify. Also trade unions are of course aware of this fact and stress that when it concerns people, companies and governments should be hesitant in speaking about numbers only. However, unions too support their members by means of quantifying their rights and duties. A dispute between Arriva and its works council supported by the major trade unions, shows how labor relations are increasingly quantified. In (2005) *Arriva v. Ondernemingsraad Arriva and FNV*, Arriva complained that its works council had refused to accept a new schedule of working hours. The company had pursued such a new schedule for some time in order to improve its efficiency. Part of the schedule is the number of minutes that bus drivers are allowed to spend for preparation and finishing of their service, the so-called 'get-on' and 'get-off time.' The time to get on the bus must be spent to take a paper form at the main office, to walk to the bus, to install equipment, and to start the engine. The time to get off is used to walk back to the main office and to hand in any paperwork. Each of these tasks is exactly defined and in the former collective labor agreement the employer and unions agreed on a 10-5-5-5 schedule, where the numbers represent the number of minutes allowed to spend on each phase. The first two numbers were the get-on and get-off time for a full service (from and to the same bus station), the latter two for a split service (from one station to another where a different driver takes over.) The company in its new schedule proposed a 3-1-2-1

schedule on weekdays and a 4-1-2-1 schedule in the weekends. Moreover, the drivers would need to install a device (the Hastus system) that would measure these times. With the employees council it was agreed that until these devices would be ready, the schedule would allow 5-3-5-3 times so that the council could measure whether further reduction of the times would be feasible. Later, the works council found out that a mistake had been made. The description of tasks did not include the fetching of a bag with tickets and money drawer by the driver. Moreover, the new Hastus system posed the employees for a problem. The system based its calculations on average get-on and get-off times and applied them to each employee. However, some employees needed more time due to local circumstances, so that they were allowed to take less break-time. Not only was this considered to be unfair, it also went against the collective labor agreement. The works council therefore refused to accept the agreement. After further negotiations, Arriva sought acceptance from the court, which could replace the refusal by the council. The court then had the task of judging whether the works council acted reasonably when it withheld its consent. The first point resulted in a battle of interests between employers and employees, the bags-battle. The judge came to the conclusion that the get-on and get-off times were meant as instructions given by the company. As the company found it apparently not necessary to allow time to collect and deposit the bags, it needed not to adapt the times to this point. The judge also decided that the system of average get-on and get-off times is in itself not wrong. If in practice drivers at a certain location cannot manage to perform the instructions within that time, then the system should be fine-tuned at a local level. The system of using averages is, however, not wrong in itself. The judge therefore ruled that the works council had been unreasonable in withholding its consent.

In the appeal, (2006) *Ondernemingsraad Arriva, FNV, and CNV v. Arriva*, the judges follow a completely different line of reasoning. According to the court, the judge should not only have evaluated the case from a legal viewpoint. It was decided in first instance, for example, that the time for getting a bag out of the deposit was not part of the employer's instructions and therefore by definition needed not to be part of the schedule. However, the court stated that schedules also had an economic, organizational, and social dimension, without being represented in laws and regulations. These dimensions should also be included in the test of reasonableness. In the example of the bags, drivers felt very unsafe if they had to take the bags with money to their homes. For that reason, they demanded time to deposit the bags.

Two dimensions of increased precision have become apparent from this case. In the first place, it showed how the relationship between employers and employees is quantified to an extreme degree. Regulations govern the relationship almost on a

minute to minute basis and everything that the drivers do or not do is evaluated on the basis of quantitative indicators (such as in Taylorism). The reason why these relationships are quantified to such a degree is that both parties profit from it. For employers it is a good yardstick to measure performance and exercise control. For employees the quantified system protects their rights and provides certainty. A continued process of differentiation and increasing precision is therefore logical, although it complicates the relationship. Before, agreements were made between the state corporation and the union. After the reforms, each company had to maintain separate relationships with its works council, which increased the opportunities for dispute. The second point to be noted is the problem of averaging variables, as was done in this case with the time schedules. This is a tempting practice after a successful system of measurements is introduced. However, if the measurements do not take into account specific circumstances, it is likely that those people who are worse off with an average time will complain.

The best-known conflict in the Dutch bussing sector with increased precision as the underlying mechanism was (2005) *BBA v. Noord-Brabant*. The Province of Noord-Brabant had tendered two concession areas at the same time. Several companies made an offer for either one of the areas, both areas separately, or both areas combined. Noord-Brabant had chosen to base its tender mainly on the basis of service hours and price. The bidder that could deliver the most mileage per Euro had a good chance of winning the concession, which is a clear evaluation criterion. BBA (Brabantse Buurtspoorwegen en Autobusbedrijven), the Brabant based company that was taken over by Veolia, had made best use of this information. Its bid for both areas combined was, according to the calculation model, the economically most advantageous. Nonetheless, the Province decided to grant the concession to Connexion. It notified BBA that it had laid its offer aside, because its offer included a calculation error. BBA challenged this decision in court, because the evaluation of offers could only be based on the calculation that made BBA as the winner.

The whole case evolved around the failure of the Province to include a maximum budget in the program of requirements. It had stated that it would not grant the concession to companies that exceeded a certain level of financing required to carry out their offer, but had not indicated how large this amount actually was. Its plan was to stick to the maximum budget that the Province had allocated to public passenger transport by bus, but this limit was stated nowhere in the program of requirements. BBA had used this to its advantage. Bus service providers, like most companies, have fixed costs in addition to their variable costs of letting their busses drive. Therefore, the price per hour of service declines with the increase of service

hours. BBA therefore had maximized the number of service hours. As indicated before, the calculation model used in the tender rewarded such strategies, so that BBA's ended as the economically most advantageous. The government then used its clause to deny the concession because BBA had clearly exceeded the limit of the available budget. BBA complained that it did not know this limit and that the government was obliged to grant the concession to the economically most advantageous offer. The government on the other hand, accused BBA of manipulating the calculation model to such a degree that granting the concession to BBA would pose risks to the government and citizens of the Province. It had included the maximum limits precisely because it knew that the calculation model made such unacceptable offers possible. It also claimed that BBA could have known that its offer was unacceptable, because of the large difference with the current size of the concession and because of the exceptionally low price per service hour compared to market averages that BBA proposed.

The conflict here confronted the judge with the problem of following the legal doctrine that rules are rules and that the calculation model is sacred, or to the more common sense approach of the government that admitted that it made a mistake but that a reasonable company would not have exploited this small inconsistency between calculation model and the reality of a limited budget. The judge in this case used a limited form of judicial review. It ruled that the company could not have known from the program of requirements that there was a limit to the financial size of the offer. Since all required information must be provided in this program, BBA could not have reasonably known that such a limit existed (despite the fact that all public policy budgets are limited and that it would not be logical for the government to suddenly make extreme increases to the budget available for public transport). As a result, the government had violated the transparency principle that applies to public tenders. The judge therefore ruled that the government should withdraw its decision to put the BBA offer aside. The Provincial Government later decided to start a new tendering procedure.

Relevant to the mechanism of increased precision is that this case shows how the judge followed the strictness of the calculation model and affirmed that companies only had to focus on that particular model without having to pay attention to what the numbers, used in the model, meant in practice. As was stated in the introduction to this section, the current concession system works in this way, because all other solutions would not comply with the principles of objectiveness and transparency. This case received much attention in combination with a second case. The Provincial States of Noord-Brabant issued an investigation into the matter. This shed light on

several other mechanisms outside increased precision, such as the complexity of the law, litigation strategies pursued by the government, and the role of legal experts. The second case, as well as the report and interviews conducted on these cases, are dealt with in chapter 8.

The cases mentioned above were of particular interest in studying increasing precision. However, a certain degree of increased precision was encountered in many other cases as well and in many of these, transparency and NPM mechanisms were behind these conflicts as well. For example, in (2003) *Novio v. Overijssel*, part of the conflict was the financial calculation model used by the Province of Overijssel. In order to meet the financial criteria of capacity, companies had to deliver revenues over the years 1999, 2000, and 2001. A ratio was then calculated by dividing the value of the concession area (€5.300.000) by an average of the revenues from 1999, those from 2000 multiplied by 2 and those from 2001 multiplied by 3. The resulting ratio should not have exceeded 0.3, meaning that the concession to be tendered should not constitute more than 30% of the averaged yearly revenues. Novio failed to meet this requirement, but would succeed if it used the years 2000-2002 in the calculation. This seems as a fair proposal, because those revenues are more recent and therefore proved that Novio did in fact have the financial capacity to carry out the work in the relevant concession area. Both Province and judge did not allow this procedure, because if one company delivered the revenues from a year later, they would become incomparable to the numbers provided by the other companies. Objectivity in these cases went above the aim of sorting out which companies were actually capable of providing the services. Novio was not excluded because it possessed insufficient resources at the moment of the tender, but because it possessed insufficient resources for four years before. The latter, however, happened to be the objective and transparent requirement set by the government.

The conclusion of the review of all court cases on access regulations must be that the mechanism to call for more and more detailed regulations is in both sectors followed by conflicts over these new regulations. The mechanism is driven by the fact that no rule will truly eliminate all uncertainty. After one type of party has succeeded in getting more regulations (newcomers in telecommunication, concession owners in the bussing sectors), other parties interpret these regulations more to their advantage, so that ultimately an independent party has to give the correct interpretation. The mechanism was visible in all sectors apart from the British bussing sector, where market access is much less of an issue and where very few regulations apply. This means that in that sector, there were also few opportunities to challenge these regulations.

#### 4.3.2.2 Performance measurement

Since increased precision turns out to be such an important element in the bussing sector, it is interesting to see what role performance measurement plays in all cases. There are roughly four challenges to designers of regulatory systems: What to measure, how to measure, how to overcome information asymmetry, and how to sanction.

In the Dutch bussing market, there have been numerous cases involving measurement. These cases involve three of the four categories. Only the determination of sanctions was not a ground for conflicts. Many cases involved the criteria selected by the principal (the regulator) for the evaluation of bids. These were mainly cases filed by residents or other interested third parties that claimed that the evaluation model did not take their interests into account to a satisfactory degree. There were also several disputes on the correct measurement of criteria, mainly financial criteria. Finally, there were several cases on the correct information supplied by concession holders for the new tender in their area. Interestingly, in the British bussing sector there were very few cases found that involved a dispute on measurement of criteria.

Thus, measurement only played a role in cases in the Dutch bussing sector. The explanation is not that there is more measurement in the Dutch bussing sector than any of the other sectors. The market analyses and decisions taken by telecommunication regulators are at least as much based on measurable criteria. There are also not more decisions taken by bus regulators than by regulatory authorities in the telecommunication, so that the number of opportunities for dispute was also not higher. The main explanation for the high number of quantitative cases in the bussing sector is the fact that many criteria can be interpreted in multiple ways. Many regulators have not yet succeeded in adequately translating their policy objectives into measurable criteria on which the service providers are evaluated. Several criteria therefore remained open for interpretation by the market parties. This uncertainty led to the disputes involving measurement. For example, in (2002) *Connexxion v. Regio Utrecht* it was unclear to the market parties whether the government favored a fast or a cheap execution of a road construction project. One party interpreted the programs of requirements and came to the conclusion that the government favored speediness. Another party took the calculation model and found out that financial savings counted for more points than fast completion. The governmental policy objective of a fast and

cheap construction of the project was therefore ground for disputes. The conclusion of this, and all other cases on measurement in the Dutch bussing sector, must be that the possibility for multiple interpretations of calculation models provides grounds for conflicts. If it is possible to set standards that can only be interpreted in a single manner, then measurement is in itself no ground for dispute.

The disputes filed in the Dutch telecommunication sector evolved around the issue of measurement in market analyses, but again it would go too far to say that measurement issues caused the cases. If that were the case, then there would be an equal amount of such cases in the UK, where such market analyses play an equally important role. It is more logical to find the causes of these cases in strategic behavior by KPN (has an interest in buying time by challenging decisions) and OPTA (which has a mission of watching the market) than in the issue of measurement.

### 4.3.3 Technology

One of the main objectives of liberalization was to draw capital from the market that could be invested in technological development. Investors would only be interested in private companies. From a research perspective, this means that the selected sectors are likely to be more than average driven by technology. Therefore, the effect of technological development on juridification should be taken into account. The main contribution of technology to juridification is through indeterminacy and non-transparency. Both are the consequence of the inability of the law to cope with the pace of technological developments. In the first place, laws are more difficult to interpret if they are based on older stages of technology. Secondly, for radically new technologies it is often unclear which law is applicable. Thirdly, laws on technology are less transparent than other laws, as they take into account future developments in technology. Yet, despite the difficulty to regulate technological developments through the law, it is often necessary, because these developments change the (level) playing field.

The most important question to be asked beforehand is: “Are laws adequate instruments to regulate technological developments?” One clear answer, given by all experts in the telecommunication sectors, is that this is not the case because the technological developments simply outpace the law-making and amending procedures.

Laws turn out to be inadequate to strictly regulate innovation in the telecommunication market, but the government has to use them as part of its duty to

create a level playing field. As most new technologies are in one way or another dependent on the network owned by the former monopolists, there must be some type of regulation that forces the former incumbents to cooperate with the installation of new services and the provision of technological assistance, even if the company itself is not yet ready for this innovation. Examples that turn up in the court cases are on specific forms of interconnection and the entire range of carrier select services.

The legal solution for this dilemma is technology neutral regulation. The core assumption of such regulation is that if a service is similar to another service that is already regulated, then the same regulation applies to the new service. In practice, this solution turns out to be difficult to maintain. In the first place, because it is often not so clear whether a technology is similar to another. Well-known cases that caused legal troubles in both countries were VoIP, broadband, and leased lines.

Voice over IP, a protocol that allows people to communicate with voice using a computer network, became very popular as an alternative to regular telephone services, especially for the use of international calls. The quality of service was almost equal to wired telephones, yet the costs were significantly lower. Is such a technology comparable to telephone services? If yes, then the same regulations apply to VoIP companies that apply to other providers. However, the technology used by VoIP can do much more than just allowing 'phone calls'. In fact, the main objective of a computer or the internet is not to use it as a phone line. The same holds for broadband services, which also use the telephony network, but for data transmission rather than voice. If telecom regulations would concern broadband companies, the monopolists would be forced to share their network and supply facilities.

Due to the difficulty of defining technical matters, regulators will need to differentiate the law further. (2000) *KPN v. OPTA* could serve as an example of such a differentiation process. OPTA had received complaints from the field that KPN had not implemented procedures to facilitate the use of CPS services. Within the framework of the law, OPTA decided that KPN should implement adequate procedures, including having consultations with CPS service providers about alternative procedures, so that customers could actually use the CPS service. This is already a differentiation of the law. KPN then went to the court and complained that several terms needed further definition, notably "adequate procedures," "consultations," and "practically use." What are adequate procedures if the regulator did not base the requirements, for example, on the average number of attempts that a customer must try before being able to use the CPS service. The court agreed with KPN and even took the differentiation process a step further. If the regulator thought it could solve the issue by improving its argumentation for measuring the minimal

number of successful attempts, then it also had to define terms such as ‘attempt.’ This shows how difficult it is to translate technological issues into legal doctrines.

#### 4.3.4 Comparative advertisement

A final main strategy that caused conflicts between parties was that of marketing. Companies disseminate information about their products to consumers to convince them to become their customers. In telecommunication markets, there is direct competition for the consumers’ favors. Marketing tools used to convince potential customers are commercials and advertisement campaigns about the service, as well as promotional campaigns in which gifts are promised if the customer decides to accept an offer.

The introduction of marketing was one of the shocks that hit the sector after the reforms. There had never been any commercials or advertisement campaigns under the regime of the public monopolies, except to stress the blessings of having a telecommunication corporation that delivered such excellent services. Companies, both former incumbents and newcomers could therefore be expected to need some time to determine their marketing strategies. Without exception, new companies quickly decided to take an aggressive approach, focused on comparing their tariffs to those of the competitors.

In the Netherlands, comparative advertisement was still forbidden at the time that the telecommunication market was liberalized. The law prohibited “any form of comparative advertisement in which a competitor or a product or service offered by a competitor is explicitly or implicitly mentioned.”(art. 6:194a BW (Civil Code)) This situation changed in 2002 with the introduction of a Comparative Advertisement Act. This act was a continuation of the government’s aim to introduce more freedom to suppliers. Comparative advertisement had until then been treated as a possible threat to objective information on products and prices, as companies would try to manipulate the customers’ minds. The new Act, on the other hand, stressed the importance of comparative information to a properly working market. Comparative advertisement by companies was better than no comparison at all and consumers’ associations that performed objective tests could impossibly test all products, because of the high amount of different products that became available. The aim of the new law was therefore ultimately to promote consumers’ interests. In order to prevent too much manipulation, the law set a number of requirements for the comparison. The

most important requirement was that any comparative claim had to be based on objective and measurable elements.

The introduction of comparative advertisement had a significant impact on the marketing strategies of the telecommunication companies. Until 2002, the main aim had been image building. KPN launched commercials to show it had changed from a lazy state corporation into a dynamic commercial service provider. Newcomers had to build up their brand reputations, promising low tariffs (but without comparison) and excellent service. All these commercials shared something artificial, because it was difficult to provide better or worse services using the same network. Except for the helpdesks, there was little added value to providing a telephone line to make a phone call. The brand image was therefore truly not more than an image. The only real difference was made by the tariffs, but the consumers had to make comparisons themselves.

After 2002, the strategies changed radically. The possibility to make tariff comparisons was literally used from the first day it was allowed. Consumers had in the mean time discovered that the companies differed little in service and were prepared to base their decisions on prices only. During the first weeks of January 2002 they were exposed to several television commercials and advertising campaigns in which different tariffs were compared and showed that company X provided equal services at lower costs than Y and Z. The claims made in these campaigns were simple and direct, such as “Switch now, because Tele2 tariffs are lower than those of KPN.” Simple as these claims may look, a whole world of difficult calculation models lies behind them. The Comparative Advertisement Act required the claims to be based on objective and measurable elements, but tariffs depend also on individual circumstances. This gave rival companies the possibility to challenge their opponents’ claims. For example, company X could claim that its tariffs were lower, but what if Y had a special discount tariff in the evening and what if Z offered the possibility to call three friends for free without time restrictions? All these disputes ended in the courtroom, mainly because the outcome of such cases was difficult to predict. This unpredictability was the result of the high number of variables used in the calculation models. The judge had large discretion in such cases. In the law, he would find support both to allow the claim, which after all was based on measurable criteria, as well as to prohibit it, because some criteria were not mentioned in the commercial. The main task of the judge was to evaluate the criteria upon which the claim of being cheaper was made. This was not an easy task. Tariffs varied on distance, peak and discount hours, fixed and flexible packages, discount numbers, international calls, etc. Is a party right in claiming that it offers cheaper services in the evening, if their

evening starts an hour later than KPN's evening? Can one claim cheaper calling if the fixed rate is higher? Note that all commercials focus on price. Moreover, there were no precedents yet, but even if there were any, the judge faced a difficult decision. Since the chances of winning were equal, there was little reason for rivals not to complain about the statements of their competitors. They might win as well as lose. Complaining about price comparisons became a standard part of competition. Especially in a market where competition on service level is possible only to a limited degree, price comparisons are important.

Only six weeks after comparative advertisement was allowed in the Netherlands from the 1st of January 2002 onwards, the first verdict on comparative advertisement in the Dutch telecommunication sector was announced. According to the facts in (2002) *KPN v. Tele2*, Tele2 had started a large campaign consisting of frequent television commercials, newspaper advertisements, and a website. Tele2 claimed that "International calls are much cheaper with Tele2 than with KPN" and that "the starting tariff for international calls is also lower". KPN found these claims misleading, not only because Tele2 claimed that calling internationally with Tele2 is always cheaper, but also much cheaper than with KPN. According to KPN, these claims were simply wrong, because there were many circumstances under which the claim did not hold.

The debate soon ended in a technical exercise on how to make objective comparisons. According to European regulations, claims must be made with an average, reasonably well informed customer in mind. But would an average customer be informed about the difficult tariff structures of the two companies? A first complication was that Tele2 had two types of subscription: Carrier-Select and Carrier-Pre-Select. The first type required customers to dial a company code to use Tele2 services. The Pre-Select device automatically selected Tele2 as provider. The tariffs of the second type of subscription were generally lower. KPN used only one tariff structure, but provided the possibility to indicate ten discount-numbers. Calls to these numbers were made at a 25% discount on the tariff per minute. Tariffs depended in the first place on the starting tariff. Within the Netherlands, these starting tariffs differed with regard to distance and it would be difficult to make any claims, but internationally the Tele2 starting tariffs were indeed lower than KPN. Next element for comparison was the tariff per minute. This varied by country of destination and whether the receiver was a fixed or a mobile phone. There was also a balance between the starting tariff and the tariff per minute. A higher starting tariff with low costs per minute would make short calls more expensive than average, but longer calls relatively cheaper. Tele2 Carrier-Pre-Select tariffs were almost all cheaper than KPN,

even compared to the discount numbers. The same could not be said about the Carrier-Select tariffs. Tele2 used the regular tariff charged by KPN in the comparison, not the discount tariff. Furthermore, the tariff structures differed with regard to discount hours, which started one hour later with Tele2. Tele2 also charged extra costs when calling to certain countries such as Surinam. The complexity in such price comparisons becomes clear after reviewing the endless list of details that determine the final price of a phone call.

As an example of the type of arguments given in such cases, consider the ten discount numbers of KPN. KPN claimed that Tele2 should compare its tariffs to the costs of discount numbers, whereas Tele2 was of the opinion that this was a special tariff, not the regular. Market research showed that the average consumer made 35% of the calls to one number and 65% of the calls to a maximum of ten. The judge in this case was persuaded that therefore the discount tariff should be the KPN standard tariff to be used in comparisons, because the average customer only called to ten numbers. This analysis does not take into consideration that the research was done for domestic rather than international calls and that these ten people need not to be the ten people on the discount numbers. This was part of the judge's discretion. After reviewing all elements of comparison, the judge ruled that Tele2 should rectify the advertisements and change the website.

Did this case, as well as several subsequent cases, root in the regulation of comparative advertisement that KPN considered to be broken by Tele2, or did it root in the desire to harm the competition by legal means? The law changed from a prohibition of comparative advertisement to allowing such advertisement under certain conditions. This is an example of differentiation of the law that makes cases more complicated and unpredictable. There is evidence that suggests that these cases on comparative advertisement were started to exploit this unpredictability. In the first place, KPN placed extremely high demands. It wanted the judge to oblige Tele2 to broadcast rectifications on television at the same time and frequency of the original commercials and to place an equal amount of rectifications in the newspapers, all at Tele2's expenses. Awarding such claims would severely harm Tele2, possibly putting it out of business. The judge only obliged a single rectification in all newspapers where the advertisement had been placed. A second proof of fierce competition between the two firms was that Tele2 claimed it had launched the campaign out of self-defense. KPN had distributed a folder among Tele2 customers in which it attempted to convince Tele2 customers to switch back to KPN. Tele2 had filed a case and the court had ruled that KPN's folder was misleading. However, Tele2 claimed that the rectifications placed by KPN had been ineffective and that the folder still had

cost Tele2 many customers. In that light, Tele2's campaign had been launched as a defense against KPN's aggressive tactics. The picture that emerges from the case history between these two parties is therefore not one in which one company sues the other simply because it has broken the rules. The aim was in all cases to attract customers and to impose costs on the competition, in other words to use the law in the battle for survival.

An important element of court cases on advertisement, compared to many other cases in this study, is that they are all fought between companies and thus under civil law. Cases under civil law are much more expensive than administrative cases. It shows the importance of the matter that providers are willing to take the risk of losing the case and thus having to pay the costs. As price is about the only criterion on which people would decide to switch to another provider, favorable price comparisons are all-important. Almost every conflict on tariff comparisons ended in a rectification. Probably competitors knew beforehand that they ran the risk of being forced to rectify, but apparently considered this worth the money, given the number of people that switched directly after a commercial and given the image loss of the competitor. The message has already come across before the rectification would take place.

Unlike in the Netherlands, comparative advertisement was allowed in the United Kingdom at the start of liberalization of the telecommunication market. Comparative advertisement is currently regulated by s.10(6) of the 1996 Trade Mark Act. The focus of the regulation is on the honest use of the competitor's trademark, not so much on the requirements that comparative advertisements have to meet. Still, dishonest product comparisons are considered as trade mark infringements. In (1998) *Cable & Wireless v. BT*, the judge sets out the criteria to be applied: "(1) The primary objective of s.10(6) of the Trade Marks Act 1994 is to permit comparative advertising. (2) As long as the use of the competitor's mark is honest, there is nothing wrong in telling the public of the relative merits of competing goods or services and in using registered marks to identify them. (3) The onus is on the registered proprietor to show that the factors indicated in the proviso to s.10(6) exist. (4) There will be no trade mark infringement unless the use of the registered mark is not in accordance with honest practices. (5) The test is objective: would a reasonable reader be likely to say, upon being given the full facts, that the advertisement is not honest? (6) Statutory or agreed industry codes of conduct are not a helpful guide as to whether an advertisement is honest for the purposes of s.10(6). Honesty has to be gauged against what is reasonably to be expected by the relevant public of advertisements for the goods or services in issue. (Codes of conduct could surely never be a helpful guide since to proceed otherwise would effectively enable industries/economic sectors to

contract out of the comparative advertising provisions of trademark law by manufacturing their own binding-within-the-industry standards). (7) It should be borne in mind that the general public are used to the ways of advertisers and expect hyperbole. (8) The 1994 Act does not impose on the courts an obligation to try and enforce through the back door of trademark legislation a more puritanical standard than the public would expect from advertising copy. (9) An advertisement which is significantly misleading is not honest for the purposes of s.10(6). (10) The advertisement must be considered as a whole. (11) As the purpose of the 1994 Act is positively to permit comparative advertising, the court should not hold words in the advertisement to be seriously misleading for interlocutory purposes unless on a fair reading of them in their context and against the background of the advertisement as a whole they can really be said to justify that description. (12) A minute textual examination is not something upon which the reasonable reader of an advertisement would embark. (13) The courts should not encourage a microscopic approach to the construction of a comparative advertisement on a motion for interlocutory relief.” (The long quote illustrates the complex legal reasoning used in court disputes, to show that case law often complicates the interpretation of laws, rather than clarifying them.)

Some of these points deserve consideration. Whereas in the Dutch case, the aim of comparative advertisement regulation is to prevent false claims to be made, the British law places the customer more at the center of the evaluation of claims. The reasonable reader of an advertisement must, knowing the facts, believe that the claims are honest. These ‘reasonable readers’ are better defined than the Dutch ‘average consumers’: They are not only well informed about the product, but also about the marketing tools used by the advertisers. The more important the good, the more seriously they will take advertisement claims. They read advertisements fairly, but not minutely. Therefore, if false claims can only be discovered through minute textual examination, there is no dishonesty.

In the case where these requirements were mentioned, Cable & Wireless complained about a brochure issued by British Telecom in which it compared the firms’ tariff packages. BT argued that its conduct fell within the “honest practices in industrial or commercial matters,” as required by the Trademark Act. In the brochure, BT made a price comparison for small business services between several providers. Price comparisons are allowed as long as “an honest man, given the information that BT had, would be prepared to make the statements.” In case of BT, they used a statistical model, developed by Deloitte and Touche, to prove that the BT tariffs were lower. After the hearing the judge concluded that the main battle was between two

parties that each claimed their statistical model was more advanced than the other's. The question, however, was not which model was correct, but whether BT had acted honestly. Based on the information provided by the two parties, the judge decided they had acted honestly. Contrary to the Dutch evaluation, the actual correctness of the claims is of small importance. Honesty is considered more important in these cases than difficult comparisons.

What was the root cause of this conflict? The judge made some critical remarks about the behavior of telecommunication firms, in particular their way of using the law. At the beginning of his verdict he remarked: "This is yet another battle in the telephone wars. They have come about for several reasons. First, following deregulation, competition started in the telephone business. Secondly, following the passing of the Trade Marks Act 1994, the use of a rival registered trade mark has, within limits, been permitted in advertisements compared with the prior law of registered trade marks when comparative advertising was banned. Thirdly, a telephone service is essentially a telephone service. So what differentiates various providers is essentially price. Providers have been anxious to capture customers, or not to lose them. In order to do so they wish to suggest that they will provide their services cheaper than their rivals."... "Telephone companies seek to persuade customers to change to them by advertisements which make claims about pricing. Their rivals watch these claims like hawks and complain if they can." This statement needs little comments. It is clear that these cases, - there was a great number of them - were started with the aim of engaging in competition. At the end of the verdict, the judge also remarked that Cable & Wireless should have taken more consideration in starting the case: "They launched these proceedings in a tremendous hurry. I think it was inappropriate that an application was made for an ex parte injunction." ... "This is a battle between two large, reputable organizations and to seek ex parte relief on the basis that the advertisement was dishonest would require stronger material, in my view, than Cable and Wireless had. It may be that their extreme hurry led them to overlook the fact that they had in their hands access to much the most important data for challenging BT's claims." This strengthens the evidence that telecommunication companies do not even consider whether their opponents' behavior is legal or not. They complain as fast as possible in the hope that the judge, who has large discretion in determining the honesty of the claims, will rule against their opponent. It has become a customary form of competition by legal means.

Fierce competition also took place in door-to door campaigns. In (2000) *Nextcall v. BT*, the newcomer Nextcall launched a campaign in which salesmen actively attempted to convince BT customers at their homes to change to Nextcall. It

turned out that some of these salesmen had acted dishonestly by making false claims about the BT tariffs. The judge ordered Nextcall to take measures and to inform BT about the measures taken. Several salesmen were indeed fired, although the infringements continued at a smaller scale. The judge decided, however, that Nextcall had taken all possible measures to prevent this.

In recent Dutch cases on promotional campaigns, such as (2006) *Pretium v. KPN*, this principle of honesty was also applied. Pretium offered Carrier-Pre-Select (CPS) services, which until recently only worked for regular numbers. In 2004, OPTA decided that CPS services should also be facilitated for special information numbers and voicemail, the so-called CPS III decision. Tele2, another provider of CPS services and competitor of KPN and Pretium, sent a mailing to its customers in which it announced that customers could decide to use a Tele2 voicemail and did not need any KPN service anymore. KPN planned a countermove. It wanted to send a letter to all Tele2 customers, warning that their KPN voicemail would not work anymore if they did not take action. The solution was simple, namely to accept an offer to return as KPN customer. Those people who accepted would also get 500 free minutes. Another solution, far less readable in the letter, was to keep only the special services from KPN. The problem was that KPN was legally not allowed to use information about which provider its former customers had switched to. (Forbidden in the Telecommunication Act, because it would give KPN an advantage. As a network owner, it had all information about the service provider of each client, but as a service provider it was not allowed such information that other service providers did not have.) It was only allowed to send letters to all people that terminated their KPN contract, because that is information that all service providers have. Therefore, KPN sent mailings to customers of all alternative telecommunication providers in which it announced that, if the customer's provider had sent them a letter, they ran the risk of losing their KPN voicemail. Pretium sued KPN for misleading its customers. Pretium customers ran no risk of losing their KPN voicemails, but they still received a mailing warning them for the consequences and containing an offer to switch back to KPN. Of course, KPN defended by stating that the letter stated that only people that had received a letter of their providers about voicemail services, i.e. Tele2, so that Pretium had no need to worry. KPN offered to settle the dispute by sending a new letter to all Pretium customers (provided that Pretium gave their addresses), indicating that Pretium customers did not yet run the risk of their KPN voicemail being terminated and stating that KPN would not switch them to KPN, even if they had accepted the offer to switch back. Then, the offer was repeated and customers would have to accept it again in order to switch to KPN. This was considered to be an

insufficient solution, because the offer was repeated and because it misled people again by stating that the KPN voicemail would “not yet” be terminated. The judge interpreted the case from an average Pretium consumer. Only by carefully reading the letter, it could be discovered that it was not aimed at Pretium customers. He therefore ordered KPN to send a rectification to all Pretium customers and to switch back to Pretium all customers that had accepted the offer. Thus, the judge did take into account that consumers usually read but not study advertisements and brochures.

The main mechanism that returned in all these cases was that competition in the market is continued in the courtroom. The possibility of filing a court case is a strategic decision in the arsenal of competitors. Similarly, when a company planned its actions such as launching a marketing campaign, it likely took into account the possibility of having a case filed against it. In other words, litigation has almost become a form of competitive behavior.

#### **4.4 Analysis and conclusion**

In this chapter it is demonstrated that a number of new conflict types resulted from the introduction of competition as part of liberalization policies. These conflicts resulted from various strategies pursued by actors in the liberalized markets in order to cope with the increased uncertainty after the introduction of competition.

One main cause of new conflicts was the non-existence of a level playing field. In the telecommunications sectors, the existence of an essential facility led to a situation in which market parties had to compete, but on particular occasions had to cooperate with each other. This was both the case in interconnection and CPS cases. When interconnecting, the incumbent and smaller network owners have to negotiate the financial and technical terms for interconnecting their networks. These negotiations took place under asymmetrical market conditions, for which the smaller party is compensated in the sense that the incumbent should ask a fair price and is obliged to cooperate with the physical interconnection. As a result, the incumbents followed a strategy in which they attempted to comply with these regulations, but using a minimal interpretation and thereby helping the competition as little as possible. This led to conflict with both newcomers and regulators, who had an interest in interpreting the regulations in a different way. The same holds for CPS services, in which the incumbents were obliged to give competitors the chance to offer telecommunications services on the formerly public network.

In the bussing markets, there were many conflicts around information asymmetries during tendering procedures. The tension here was that the concession holder had more information available than other market parties. This could be seen as a market asymmetry as well. Regulations obliged the concession holder to offer insight in, for example, the personnel costs of the concession. The strategy followed by concession holders was to comply with these regulations in a minimal way, because the information was essentially confidential business information about the costs of operating in the tendered area, but also about the efficiency of the company operating it. This led to a reaction by other market parties demanding to specify the regulations in such a way that more information was provided, which in turn led to legal conflicts. The interesting observation is that after the rules were specified, there were two consequences. In the first place, part of the uncertainty was removed. In the second place, the regulations had become a little bit more complex. This observation is interesting because it is a general mechanism that occurred in many new legal issues concerning tendering, not only in case of information asymmetry. Every conflict about the interpretation of the tendering rules tended to remove part of the uncertainty, but also made the next procedure a bit more complex, because an extra regulation or interpretation of regulation had to be taken into account. As a result, the tendering procedures have become an increasingly complex legal game. Some would argue that this is part of the professionalization of the sector, whereas others would claim that the tendering procedures now only select the company that is best at tendering, not at providing bussing services. The juridification process, however, has clearly taken place here.

Another area of new conflict types is not related with the asymmetrical market relations but with competition itself. Sometimes, starting a legal conflict was just a strategy to outcompete others. A primary example of this were conflicts on tariff structures which both British and Dutch telecommunications companies watched each other closely and complained when they could.

These and other conflicts resulting from the introduction of competition as an element of market liberalization are summarized in the following schemes:

**Table 4.1: Actors, risks/uncertainties, strategies to reduce them and link with areas of legal conflict in the telecommunications sectors**

<i>Actors</i>	<i>Risks / uncertainties</i>	<i>Strategies</i>	<i>Area(s) of conflict</i>
Incumbent	<p><b>Cooperation with competitors</b> As a main network owner, the incumbent is obliged to make arrangements for interconnection and access with other parties. The incumbent is thereby forced to cooperate with its competitors</p>	<p>Offer minimum cooperation. The incumbent had an incentive to interpret the legal obligations in a minimal way, because it reduces costs and because there is no reason to help the competitors more than necessary.</p>	<p>The facilities / conditions for interconnection The facilities / conditions for access</p>
	<p><b>Regulatory action</b> The mission of autonomous regulatory agencies is to create a level playing field. This will in certain situations clash with the interests of the former monopolist.</p>	<p>Challenge and appeal decisions by the regulatory agency. This can sometimes turn the decision around, but another advantage is that such procedures tend to take much time, leaving the competition in uncertainty. A counter-strategy used by regulatory agencies is to involve the parties in the decision process using consultation rounds.</p>	<p>Decisions about the existence and about the use of substantial market power. Decisions about the facilitation of new technologies. Challenges against the authority of the regulatory agency itself.</p>

**Table 4.1 (cont.): Actors, risks/uncertainties, strategies to reduce them and link with areas of legal conflict in the telecommunications sectors**

<i>Actors</i>	<i>Risks / uncertainties</i>	<i>Strategies</i>	<i>Area(s) of conflict</i>
Incumbent	<p><b>Competition from pricefighters</b> The newcomers on the market can design relatively lean organizations which enables them to offer lower prices.</p>	<p>One strategy is to stress the solid reputation that the incumbent has built up in the past. Another is to adapt the tariff structure and use comparative advertisement to show how these structures are favorable under particular conditions. Since there are many variables in the tariff structures, these tend to be complicated to compare for consumers.</p>	<p>Tariff structures and marketing claims about them</p>
New entrants	<p><b>Dependency on essential facility</b> New entrants cannot choose which network they prefer to use, as they are dependent on the main fixed network and therefore have to cooperate with its owner.</p>	<p>Regulation on network access and interconnection is vital to the new entrants so they will lobby for more favorable regulation. They will also challenge alleged misuse of market power or non-cooperation by the network owner.</p>	<p>Conditions for interconnection and access Misuse of substantial market power Non-cooperation by network owner.</p>

**Table 4.2: Actors, risks/uncertainties, strategies to reduce them and link with areas of legal conflict in the bussing sectors**

<i>Actors</i>	<i>Risks / uncertainties</i>	<i>Strategies</i>	<i>Area(s) of conflict</i>
Service providers	<p><b>Limited amount of concession areas</b> A limited amount of tenders make that a few losses can lead to a very different business situation within a year. This could be considered a normal business risk, but in a market with a few large tenders per year, only a few not-wins could already threaten the existence of a company.</p>	Challenging the decisions made in tender procedures if they are negative. This could sometimes lead to a different decision or to a new tender procedure. The potential gains are high and therefore almost always outweigh the costs.	Interpretation of tender rules
	<p><b>Future market conditions</b> Companies have to prepare an offer the will be valid for several years, during which the market conditions could change. This could be considered a normal business risk, but there is no option of choosing a contract for a shorter period of time.</p>	Reconsider making an offer. The main uncertainty to service providers is to be stuck in a rigid contract for many years, so companies could also have a strategy to make an offer for more flexible contracts only.	The interpretation of (flexible) contractual terms

**Table 4.2 (cont.): Actors, risks/uncertainties, strategies to reduce them and link with areas of legal conflict in the bussing sectors**

<i>Actors</i>	<i>Risks / uncertainties</i>	<i>Strategies</i>	<i>Area(s) of conflict</i>
Concession owners	<p><b>Future market conditions</b>                      This uncertainty is similar to the uncertainty to companies. One has to draw up a contract that will be fixed for many years. Market conditions (and the public interest!) could change drastically during that time.</p>	Build in flexibility in the concession contracts.	The interpretation of (flexible) contractual terms
	<p><b>Enforcing the contractual obligations</b>                      Since most concession contracts do not give incentives to providers to earn extra income by improving their service, one of the few ways to increase profits is to interpret the contractual clauses in such a way that costs are minimal.</p>	The main strategy is to carefully design the legal clauses of the contracts so that there are no different interpretations possible.	The interpretation of (flexible) contractual terms

When comparing the consequences of the competition element for juridification in the different sectors, the first observation is that there are many similarities between them. Not only do the main conflict areas overlap, the same pattern in which companies attempt to reduce risks, either through minimal interpretation of the regulation or through continuation of competition in the courtroom, is observed in all sectors.

Sectorial differences include the observations that in the British telecommunications sector, cases resulting from asymmetrical power relations focused more often on technological cooperation. An explanation could be that these

cases took place during an earlier time period and therefore that the network was in a different, less-developed stage than nowadays. Furthermore, the issues involving tendering procedures were absent in the British bussing sector. In general, the British bussing sector had the least new legal issues as a consequence of the introduction of competition.

Part of the litigation encountered in this chapter is likely to be of temporary nature, because it consisted of typical transition problems from a public monopoly to a liberalized market. In general, it can be expected that over time the amount of uncertainty is decreased and replaced by more precise regulations and case law. New conflicts then will only occur in case of changes in the regulations.

Cases in which the issue was comparative advertisement are likely to last. They were encountered in the British telecommunications sector recently, whereas that sector has been liberalized long ago. In the first place because the prices of telecom services can differ in so many ways that such issues are often open to interpretation and will remain so as long as there is not an accepted way of comparing tariffs. In the second place, it will sometimes be profitable for a company to launch an advertisement campaign, even if that bears a risk of being brought to court. Since the quality of voice telephony is generally the same for all companies, price comparisons are the only way in which a company can distinguish itself. Therefore, the profits of building up an image of being cheaper than the competitors could lead to higher gains than the risk of having to rectify the claims made.

Apart from the introduction of competition, there is a second element of liberalization that caused an increased importance of the legal sphere in economic governance, namely the fact that services with a highly public character are now provided by commercial service providers. This is the topic of the next chapter. Instead of the clash between competing market parties, the central element of that chapter is the clash between public and private interests.



## **5 Legal conflicts over the safeguarding of the public interest**

### **5.1 Introduction**

The previous chapter dealt with legal conflicts over the creation of new markets. This chapter investigates legal conflicts due to the felt need to safeguard the public interest in newly privatized and deregulated economic sectors.

A number of risks and uncertainties, strategies and tensions were identified that could be the result of this shift from public to commercial provision of goods and services where public interests are at stake. The main expected tensions concerned the protection of interests of third parties, parties that do not take part in the main transaction. Bear in mind that in the newly liberalized bussing sectors the main transaction partners were the tendering state authorities and the bus companies. The end-users of the services were no part in this transaction.

Areas of conflict were indeed related to the interpretation of laws and contract clauses which were to protect third parties. The common theme is that the new market structure either does not take into account the interest of a large social group, or that this influence is organized in a very formal way that can easily be challenged in court. A primary example is the group of residents. Many people and companies have an interest in having a bus stop close by in order to be reachable, but for various reasons they have far less influence on the bussing routes and schedules after liberalization.

Also, local or regional levels of government sometimes loose their influence on the transaction apart from formal-legal possibilities. They have lost out in the inter-governmental negotiations and see no other option but to turn to the court.

Employees are also part of this public interest protection. One reason is that the loss of public status of their corporations certainly has influenced their interests, and this too led to legal disputes. However, the position of employees can be seen as a public interest in the sense that they are responsible for continuity of the service. This is one of the reasons why Dutch bussing companies have to take over personnel of the previous concession owner.

The sections are ordered according to the type of party whose interests were harmed by the commercial provision of a public service. These are in the first section the residents, in the second section public institutions such as lower levels of government, and in the third section the employees. In the final section, these conflicts are related to the mechanisms identified before in chapters 2 and 3.

## 5.2 Conflicts involving residents

The category of residents is very broad. It consists of all people that are in some way affected by the presence (or non-presence) of the networks in the sectors. In the telecommunications sector, court cases emerged about the tensions between the public and private interests around network construction and maintenance. In the bussing sectors, they were about the routes and schedules to be followed by bussing companies.

### 5.2.1 Network construction and maintenance

The construction and maintenance of networks is another subject about which several disputes were brought to the court. Sitompoel (2007) describes how in the installation of public networks different public and private interests must be served, that these interests could conflict with one another, and that the liberalization of the telecommunications market initially caused an imbalance between public interests and the private interests of those under an obligation to tolerate. At issue is whether it is this imbalance after liberalization that caused the conflicts.

It depends on one's perspective whether the law has expanded horizontally to regulate the area of network maintenance and excavation rights in the United Kingdom and the Netherlands. On the one side it has not, because regulation existed before the economic reforms took place, in both countries. It was stated already under public law that everybody should allow the placement and maintenance of telecommunication cables in public soil. This so-called right-of-way has not changed with the economic reforms. Governments are still required to allow the placement and maintenance of network cables of a public network. Two market developments could be said, however, to have given a new interpretation to these regulations. In the first place, the network owners are currently commercial companies that aim at making profits. The regulations paid little attention to issues such as costs of replacing cables and liability after damage had been done to cables or to buildings in the process of constructing or maintaining cables. In both new Telecommunication Acts, there was a strong emphasis on negotiations between the network owner and the government responsible for the public ground in which the cables were placed. The regulations were meant to govern the relationship, and therefore the negotiations, between public organizations. Needless to say, negotiations between two public bodies have a different, less adversarial character than negotiations involving a private party that

aims at minimizing the construction and maintenance costs. Therefore the law's application to public-private relationships gave rise to disputes over their interpretation. The second change was that in the reformed telecommunication markets, other companies than the former incumbents were allowed to construct telecommunication networks. The right-of-way also applied to these new providers. It would not be logical to mark these developments as expansion of the law, but it certainly meant that the scope of activities to which the existing law would be applied expanded. From governing the relationship between two public organizations it expanded to governing all relationships between public and private organizations, as well as between private organizations respectively.

In the UK, city governments have been involved in conflicts with the public networks. In (2004) *Gwynedd v. BT* the central question was whether or not utility undertakers such as BT are entitled to charge for the preparation of a detailed estimate and specification relating to measures for the diversion or protection of their network, that may be required during major road works carried out by the local highway authority. The total amount of money at stake in this appeal was £684.14, which the judge referred to as a "princely sum." The answer to the main issue was difficult as several sources of law were relevant. Without going into the legal details, it suffices to cite the judge who stated: "As I indicated at the outset of this judgment, and like the judge, I do not find the construction of the Act and the Regulations easy. I readily acknowledge that my mind vacillated during the course of the able oral arguments presented to us. In particular, and despite Mr. Mayes' reassuring submissions, I detected a possible tension between the strict meaning of the statutory language, and the pragmatic manner in which it had been interpreted in practice on the ground." ... "The explanation in the instant case may lie in the fact that the Code of Practice, which was approved by the three relevant Secretaries of State in June 1992, appears to pre-date the Regulations, and was the product of a Committee (the Highway Authority & Utilities Committee). Whether or not the cart preceded the horse, the committee ought to have had access to the draft Regulations, which were made on 15 July 1992. The use of different language is unfortunate and appears to demonstrate a lack of sensible coordination." Lord Wall thereby clearly indicated the complexity of the law due to the lack of coordination between the organizations responsible for regulating the telecommunication market. The fact that this dispute only involved less than 700 Pounds indicated that both parties were more interested in solving this uncertainty than in actually winning the case. The case resulted from maintenance works by Gwynedd on a highway that could possibly involve the damaging of BT's network. It sent a letter to BT that BT itself should determine whether the

construction works would damage its network. BT carried out a study and concluded that the network cables, especially the fiber optic cables, needed protection during the works and that this could not be left to Gwynedd's contractors. Later investigations led BT to a different conclusion. There was little risk of damaging the cables and the protection could be left to the contractors. Gwynedd refused to pay for the expenses made in the original calculation. It argued that it was only obliged to pay for any measures to be taken by BT, not for the preparation of these measures. It regarded the calculations as taking place in the initial phase of planning. In the first case of appeal, the judge had noted that "I do not find my task particularly easy. As is not uncommon, the Regulations and Code of Practice are not a model of clarity." He decided to use a "common sense, everyday approach to the word 'initial.'" The tension that existed between the literal and practical interpretation of the law was that between the detailed steps that were differentiated in the law and the practical way of progressing with works in which such steps are usually difficult to distinguish. The judge found that 'initial' was clearly not the end of the process, but also not before the implementation of measures. Therefore, BT's appeal was accepted. The challenge in the High Court also failed.

As was indicated in Chapter 2, a particular feature of the British legal system is the existence of private local acts. These could be analyzed as further differentiations of the generally applicable acts. In relation to the construction of telecommunication networks, there were several disputes over the exact interpretation of these particular local acts. An example is (2000) *BT v. Humber Bridge Board*. In a private local act called the Humber Bridge Act 1959, the British Parliament installed a board that oversaw the construction, operation and maintenance of a bridge over the River Humber between Barton in Lincolnshire and Hessle in South Yorkshire. The local act allowed this board to charge a fee if any company was to place telegraph wires on the bridge. In a modern interpretation, these telegraph wires were the ancient equivalent of optic fiber cables. Fact is that BT's predecessor, the Post Office, had an agreement with the board that it was allowed to place one cable without paying a fee, but BT now wanted to install a second cable. The board now demanded a fee, as BT was regarded as a commercial company, rather than a public utilities provider. The changed status of BT was clearly expressed by BT's representative in court: "Mr Edelman said that BT was to be put in the shoes of its statutory predecessors, inherit both their rights and their liabilities. He said that it would be surprising for Parliament, having before 1984 decided that the national telecommunication provider should be entitled to undertake necessary works in effect as of right and without royalty or license payment, thereafter to change the position and deprive BT -- which

remained under a statutory duty to provide a national telecommunication highway network -- of such entitlement.”

The High Court Judge agreed with BT that agreements made between BT’s predecessor and the board were still binding today, also in the more commercial environment. Interesting to note on the side is of course how the old language was translated into modern law. The judge reaffirmed that telegraph wires ought to be considered equivalent to optic fiber cables, and that BT was the modern legal equivalent of the Postmaster General. Of more central importance is, however, that the private local acts add a further differentiation to the already complicated laws and regulations on the construction and maintenance of networks. The more differentiated they become, the more likely that disputes will arise over the interpretation in specific cases. Also in this case, as the previous one, it is more a matter of providing clarity and certainty to the industry than of winning.

The sector regulator is responsible for taking the initial decisions on disputes over excavation, maintenance, and removal of telecommunication cables. Appeals against such decisions therefore have to be filed against the regulator. Such happened in (2002) *Westland v. OPTA*. Westland is a town in the Netherlands where the local government had decided to provide public land to a school. KPN had cables of its network running under this soil, at the place where the school’s main square would be situated. Westland then notified KPN that the cables should be removed and proposed to combine this operation with maintenance of the sewage system that was due in three months. According to the law, the network owner has to remove telecommunication cables “if this is necessary for the construction of buildings or the carrying out of works by or at the orders of the party that bears the right-of-way (Art 5(7) Telecommunication Act).” Westland and KPN differed on the issue who should bear the costs of the removal of the cables or the installation of safety measures so that the cables could remain in place. OPTA determined that “necessary” in the law should be interpreted as necessary to carry out the work without running the risk of damaging the cables. Westland had two reasons why it ran the risk of damaging the cables. There would be much traffic by heavy machines during the construction works and there would be a playground on the main square. OPTA in the first instance determined that KPN should remove the cables at its own expenses.

After an appeal by KPN, it refined this decision by stating that KPN should apply safety measures because of the construction traffic. However, there was no certainty as to where the playthings would be situated, so that KPN refused to bear the costs of that operation. The court case was an appeal by Westland against this last part of the OPTA decision. The local government first argued that it had no right-of-way,

because the grounds had been transferred to the school and were therefore to be considered private grounds. This argument failed because at the moment of the notification, the grounds were still public and it was unclear whether this would also be the case at the time of the maintenance to the sewage system. Furthermore, the court ruled that the government had inadequately provided information as to where exactly the playground would be situated, so that there was no need for KPN to move the cables. The judge thereby confirmed the OPTA decision. The judge furthermore commented on the importance of coordination between government and network owner and the importance of certainty about who would be responsible for paying the costs. According to Westland, OPTA had been negligent in fulfilling its obligation to gather information about this situation. The judge was of the opposite opinion, namely that Westland itself had been negligent in providing enough information to KPN. OPTA even confirmed that if Westland had provided the same information it provided to the court in this case beforehand, it would almost certainly have concluded that KPN would have to remove the cables at its own costs. However, apparently there had been little cooperation or even coordination between the local government and KPN. This also became clear when KPN refused to use the opportunity of the sewage maintenance to replace the cables. Under the former governance system, this would almost certainly have been the solution, because it would save costs at a societal level. However, as a commercial company KPN had more incentives to decrease its own costs rather than complying with the governmental orders and accepting its solution. On the same basis, Westland apparently found it unnecessary to supply specific information, whereas KPN and OPTA had all the interest in having it.

(2006) *KPN v. Rotterdam* offers a further insight in the legal definition of coordination. The city of Rotterdam had planned to start developing a major construction project in 2002 and had notified KPN of these works. KPN indicated that, as a consequence of these works, it would have to make adjustments to its telecommunication network and proposed to contact the government about a convenient time. However, Rotterdam discovered that KPN has started its work without contact with, let alone permission by, the government. The explanatory memorandum to article 5(2) of the Telecommunication Act explicitly gave the responsibility for the coordination of underground works to the local government, which means that no party was allowed to execute its tasks without written permission. KPN disagreed, however, that such written permission was necessary in this case. The new Telecommunication Act differentiated between installation and maintenance of the telecommunication network on the one hand, and transferring of

cables on the other. With installation or maintenance of the network, the initiative was with the network owner who has an interest in expanding and maintaining its network. The government in those cases had a right-of-way. The transfer of cables, on the other hand, was the reverse of this right-of-way, according to KPN. Here the initiative was with the government who decided to develop public grounds. According to KPN, the only legitimation why written permission could be demanded by the government for carrying out work that the government ordered itself would be to collect fees. The judge, however, refused to follow this interpretation, because the transfer of cables was a project of a nature similar to the construction or maintenance of cables. The law specifically placed coordination of such works in the hands of the government in the public interest. The public interest in this case was defined as minimizing disturbance, ensuring safety, accessibility, and maintaining order in the underground cable system. Still, the conflict was a logical consequence of the apparent differentiation of different works to the telecommunication network. The judge also considered this differentiation and agreed that the law distinguished between different types. However, a literal interpretation of the law would lead to impractical situations that would go against the spirit of the law. Following KPN's interpretation would, for example, imply that network owners would also not require governmental permission to transfer cables if a different party than a government would order it to transfer its cables due to construction projects. This was certainly not in line with the idea behind the law to place the coordination of such works in the hands of the (local) government.

Local regulations often complicated the market. As indicated in the introduction of this section, a main difference between the situation before and after the economic reforms in the telecommunication sector was that new providers also had rights to construct networks and that local government had to recognize right-of-way of these newcomers as well. This expansion of the legal definition caused disputes such as (2005) *Lijbrandt v. Haarlem*. A small company wanted to construct a public telecommunication network in the city of Haarlem and asked the local government for permission. The city gave this permission, but pointed at local regulations. One of these regulations stated that after the cables had been laid, the city would restore the street to its original condition at a tariff to be determined by Haarlem. Lijbrandt refused to accept this tariff. According to Lijbrandt, the right-of-way gave the company the right to excavate and also to restore the environment itself. The national Telecommunication Act supported this argument in the explanatory memorandum. It was also supported by recent OPTA decisions. Furthermore, common sense would lead to the conclusion that Lijbrandt could restore the street.

The regulations indicated that it had to place the stones upside down so that the government could see which stones had been moved. The government would then turn all stones around and charge the costs plus a premium to Lijbrandt. The judge did not follow Lijbrandt's reasoning in the sense that it was supposed to have a restoration right in addition to excavation rights. However, he ruled that the government in this particular case had insufficiently motivated that the restoration should be done by the government. The only reason for this demand could be the need for coordination by the government, but the judge failed to see how restoration by Lijbrandt could lead to problems in that respect. As with the British cases, the judge interpreted the complex regulations in a practical way, whereas the cause of the conflict had been indeed the complexity due to (local) differentiation of the law.

The previous cases on damage to telecommunication networks were on potential damages. The case (2005) *Northumbrian Water v. BT* was related to actual damage done by a water main burst to a BT telephone cable. The water company had paid damages to BT, but later discovered that BT itself had been digging a tunnel which could have had the damage done. The water provider therefore started this case on liability. In order to prepare their case against BT, Northumbrian Water demanded information from BT on the tunnel they had dug. BT's lawyers responded that they required time, but that all information would be supplied. After more than half a year, Northumbrian filed a case on the issue, whereupon BT supplied a number of documents. This information was deemed insufficient by the water company, which continued the case in order to finally receive the information required to build their main case. They demanded: Site investigation reports, settlement analyses, communications, designs, safety and health plans, face logs with daily record sheets, and the contract for the tunnel. BT either did not have this information, even after half a year of investigation, or was not willing to share it. The case also gives some insight in how judicial procedures can become so costly. Imagine that the main case has been delayed for at least half a year, in which one party's lawyers have been searching for information, while the other side was busy sending reminders, reading through the supplied information, and filing this application for the court. The judge then ruled that the materials demanded in four of the seven categories were peripheral documents that would not help Northumbrian Water in their case. Only three types of documents were insufficiently provided and had to be supplied by BT, namely the design, the health and safety plan, and the contract. Note furthermore that both companies were public utilities providers that, as privatized companies, aimed to reduce costs in adversarial style.

The conclusion from this section is similar to that of the section on access: The same mechanism applies. The creation of a level playing field is an extra source of legal conflicts that exists in the telecommunication sectors, but not in the bussing sectors.

### 5.2.2 Residents and bussing routes

In the bussing sectors, a distinct interest group at the sidelines is that of residents affected by bus services. Their objective is to change the routes of busses or the place of bus-stops. There are two types of possible disputes between residents and those responsible for determining the busses' routes and schedules. Some residents or organizations would like to have a bus-stop close to their door. In some cases, residents may need public transport because they have no other means of transportation. If the bus stops too far away from their homes, they are effectively rendered immobile. Organizations want to be reachable by public transport. A bus stop close to their premises is important for both employees and potential customers. The first type of conflict therefore occurs if the transport policy makers refuse to serve certain neighborhoods. On the other hand, many residents do not like busses in their neighborhood at all. Busses cause several types of inconveniences. Most importantly, the vibrations that the heavy busses, especially the modern low-floor types, cause are sometimes said to cause damage to buildings. Of smaller importance, but still reason enough to file court cases about, are troubles such as noise and smell. In areas with many children or bikers, the presence of many busses could also endanger road safety. The second type of dispute arises when policymakers refuse to accept demands on fewer or no busses or bus-stops in a certain area.

Disputes between residents and the regional government about routes and schedules already existed before liberalization of the market. This type of dispute is therefore not new. What is new, however, is that due to the introduction of competition, service providers no longer have a direct interest in taking notice of these complaints by residents. In the competitive struggle, their main interest is to carry out services at the lowest possible cost while fulfilling all obligations stated in the concession contract. Whereas previously complaints filed against the government could be passed on directly to the service provider (which was part of the public administration), the government under the new system has no possibilities to force changes for the duration of the concession contract. Therefore residents lacked a voice option and had to search for alternative strategies to influence policies.

There is a certain tension in the concession system about disputes of these two types. Public transport policy is designed for the benefit of the general public and the routes and schedules are usually designed with the idea in mind of improving efficiency. This means that aggregate benefits must outweigh aggregate losses. In order to achieve this, the routes and schedules of busses are discussed in platforms with the various stakeholders, including transport companies, travellers' associations, and residents. Problem is that the losses sometimes have to be carried by a very small group. Therefore, a certain route or bus stop may be efficient at an aggregate level, but cause trouble to a small group of residents. Since the policy making process is largely based on efficiency, residents that do not want a bus route through their back yard often have a minor interest and will lose out in the process if a greater interest is served by that particular route. The same holds for those residents that really want a bus stop close by their home or store, while it is inefficient to alter a route to serve that particular spot. The first option then is to appeal against the decision, but such appeals will often fail simply because the benefits of the decision are much higher. The 'losers' of the decision making process may then turn to the court in order to challenge the decision.

Such procedures are often of predictable nature. There are very few legal grounds to challenge decisions on public bus transport policy in the Netherlands as long as the government has followed the proper procedures. In the first place, as was already mentioned, the Passenger Transport Law was specifically designed to create cheaper services. There is therefore little basis for allowing a complaint that would decrease efficiency in the interest of one plaintiff or a small group. Secondly, it is often unclear to the plaintiffs whom they should challenge. The government sets out the requirements in the program of requirements, but may determine itself how precise these requirements are specified. After the contract is tendered, the transport company may do as it pleases within the boundaries of the law and within the terms of the contract. This means that, to residents, there is often no real possibility to appeal, because they are no party in the contract between government and service providers. Many of these cases can therefore be viewed as attempts to show disagreement over the taken decision, rather than complaints against legal wrongdoings. A number of the cases that will be discussed in this section are not filed on the basis of legal arguments and therefore fail before the court. This is an indication that the plaintiffs attempted to pursue a legal strategy, even though they were unaware of the 'rules of the game.'

(2001) *A.-C. v. Drenthe* was an example of the case of the first type in which the tensions between public and private interest became clear. A group of three residents

complained that due to a change in driving routes, they now had to walk 300 instead of 50 meters to the most convenient bus stop. The government reacted that the new driving route provided large advantages because it now served a nearby industrial park. Moreover, it was the transport company that changed the driving route. 300 Meters was still within the legal boundaries of the concession contract, so the company was allowed to do so. One can see that the government acted as setter of the boundaries within which companies are free to do business. The residents, all elderly people, were heavily dependent on the bus as it went to the shopping center where the pharmacy and dental services are located. The more distant bus stop was difficult for them to reach. The judge in his verdict compared the old and the new transportation acts and noted that under the old rules the individuals would have had a point. One specific objective of the new law, however, is the introduction of freedom to the service provider. As the change falls within the boundaries of the contract, there is no reason for the judge to allow the appeal.

A different situation occurs if indeed the public interest is harmed by not placing a bus stop. In (2002) *Deventer Ziekenhuis v. Overijssel*, a hospital complained against the government of Overijssel about the removal of the bus stop closest to its premises. The regional government did not recognize the complaint by the hospital. It argued that only organizations that had a direct interest in securing good public transport (such as passengers' associations) could claim to have an interest in the placement of a bus stop. The hospital was supposed not to have such a direct interest. Its mission was the provision of medical care. The fact that public transport played a role in providing such care was not considered enough interest. The judge clearly opposed this idea in his verdict. The number of travellers to the hospital was large, including more than 2000 employees, more than 250.000 patients, and over 40.000 visitors to admitted patients. Especially the traveling of visitors was deemed important, because one of the statutory aims of the hospital was to take care of the accessibility to visitors of its patients because that would improve the health care process. The judge ruled that the hospital clearly had an interest in good public transport. However, since the concession was already granted, the government could not influence the place of bus stops in any way, so that the whole point of the dispute, the reinstallation of the bus-stop, could not be achieved.

A case of the second type was (2000) *A.-C. v. Nijefurd*. The three plaintiffs represent a group of more than fifty residents of Nijefurd that protested against a temporary bus route through their neighborhood. The busses were responsible for unsafe situations. Moreover, the temporary route exceeded the period that was indicated beforehand. The problem that the judge identified in the appeal to the

decision to have the busses drive through the neighborhood was that no such decision was taken. The residents claimed that the fact that the government had placed a traffic sign indicating a bus-stop and had notified this action in the local newspaper. Still, the placement of a sign did not automatically imply that bus companies should take it up in their schedules and take the route through the neighborhood (although in this case the company did take it up in the schedule.) The government in fact lacked the discretion of determining bus routes. The appeal was therefore judged to be inadmissible.

What has become clear from some of the above cases is that appeals of individual citizens have little chance to succeed. In (2003) *A. v. SRE*, A. complained against two parts in this procedure. In the first place she complains about the decrease of quality of the bus services. Due to the decreasing number of passengers from and to the town of Helmond, the authority had decided to switch to collective bus services on demand. A.'s second complaint was that individuals were not allowed to participate in the procedure of drawing up the concession contract. Only the passenger association ROVER was invited. (ROVER was invited to all the negotiations in this sector. This institutionalization apparently works in the sense that ROVER never took legal action against any tender decision). The judge ruled that it is in general impossible for an individual passenger to be considered so important compared to the collective interest that the government and the passenger association serve. As the individual has no clear interests that go over his personal complaints, the judge did not accept her appeal. In fact, the government should not even have treated her as a stakeholder, whereas it did so in the first instance.

Having learned that bringing in private arguments against public transport decisions that were taken after careful procedures was often unsuccessful, the plaintiffs in (2003) *A. v. Haaglanden* pursued a different strategy. It was clear that Haaglanden had followed the correct procedures in determining the new routes and schedules of several bus services. It had published the intentions and decisions, and had invited and processed visions and complaints from passengers' interest groups. However, a number of residents were dissatisfied after the decision was made and filed a case. The new strategy was to not only complain in their private interest, but also to challenge the public interest character of the decision. They complained in the first place about poor traffic safety and vibrations in their street. In the second place, they 'aided' the government by indicating a number of inefficiencies in the new services. The particular service that went through their street could take a short-cut, decreasing its travel time. The places where it could not stop were already served by other busses. Also, the service through their street was far from cost-effective. At all

hours of the day, only very few people took this service. The particular service had replaced another service that operated cost-ineffectively. The residents claimed that if the previous service was abolished for that reason, the government should follow a similar logic here, in the public interest. Their protest to Haaglanden was rejected, because they had not used all possibilities for participation and because they had never protested before against bus routes through their streets. The judge disapproved of this way of reasoning, because Haaglanden should have evaluated the contents of the complaint. He thereby nullified the governmental decision, but refused to have the court take a decision instead, because the government should first evaluate the complaint itself.

Plaintiffs to governmental decisions on public transport policy were sometimes not aware of the fact that the court would only check the legality of the procedures. For example in (2002) *A. v. Zeeland*, a resident claimed that the new schedule had increased the amount of bus traffic that drives close to his house. The complaints were noise, smell, and damage to his house due to vibrations. The governmental representative argued successfully that the traffic had declined instead of increased. According to the schedule, there were indeed fewer busses passing the house of the plaintiff. The plaintiff was, however, right in his observation that more busses passed his house, but the extra busses were not busses that drove according to a schedule, but were on their way back to the remise. Since these busses are not scheduled, they are also not part of public transport. The judge had no option but to refuse the appeal. The fact that the resident may have been correct in the damage done to his house was in this case irrelevant, which illustrated the limited check that the court will make on administrative procedures. A similar verdict was reached in (2000) *A.-C. v. Leiden*. The responsible government had set the schedules for the year 1999-2000, against which a number of residents complained. Their complaints were not granted and therefore they filed a case at the court. The case was held in 2000, after the new schedule had been in place. The judge could not identify why the residents would have an interest anymore. It was, however, also not possible for them to complain against the schedule for 2000-2001, even though the particular route against which they complained remained unchanged. The entire schedule had remained similar, so that Leiden had not found it necessary to take a new decision. Since no new decision was taken, there was also no possibility to complain. The residents argued that their complaints against the 1999-2000 service remained the same, so that these complaints were still valid. However, the judge determined that this complaint had been filed against the 1999-2000 schedule, not against the new one, even if the schedules

remained the same. A typical legal assessment of procedures, since in practice the situation remained unchanged.

Finally, of interest to this study on juridification are (2003) *A. v. Amersfoort* and (2004) *King and Queen v. ROA*. Not so much because of their contents, as they are about quite similar problems that were encountered before, but because the judge explicitly cites the text from the explanation of the Public Transport Act that the liberalization would lead to a decrease in the number of legal procedures. Literally, the text of this explanation is “The cancellation of the governmental responsibility to set driving schedules could also lead to a lower pressure on the judiciary.” This shows how the expectations beforehand were contrary to the hypotheses adopted in this thesis.

A general observation that can be made about these cases is that liberalization has limited the voice options for residents. While the aim was to improve the influence of passengers on public transport services, third parties now have fewer options to exert influence. They attempted to regain this influence via the court, but very few of these attempts succeeded.

### **5.3 Conflicts involving different levels of government**

The introduction of competition in utilities sectors was of course primarily aimed at business firms. However, the differentiation of regional markets in the bussing sectors also led to a risk in the relationship between governments. Local governments are afraid to loose high service levels and lobby for favorable routes and schedules with the responsible Public Transport Authorities. Since there is only a limited amount of resources, represented by a limited budget or by the total number of hours to be scheduled, these governments are in a certain way competing with each other. Although loosing out in this competition may not result in poor financial results or even bankruptcy, the local government does run a political risk if it fails to supply its citizens with adequate public transport services. If a local government is threatened by loosing the administrative competition, it may also attempt to reduce this risk by legal means.

In the UK bussing sector, the case (1983) *Bromley v. GLC* was a landmark case directly after the initial steps toward liberalization of the sector. Transport in the London area was governed by the Greater London Council (GLC). In 1981, the Labour Party was victorious in the GLC elections, after having promised that it would lower the tariffs of public transport by 25%. This reduction was indeed implemented.

In a reaction, the conservative national government decides to cut the entire subsidy for public transport in the London area. In order to pay for the tariff reduction, GLC had to increase taxes by a substantially higher amount than promised during the elections. The conservative government of one neighborhood in London, Bromley, objected to these proceedings. Bromley was of the opinion that it is unfair to raise taxes for the entire population in order to subsidize what it sees as a political project. The objection is initially dismissed, but later accepted by the Court of Appeal. The case is a clear example of continuation of a political battle in the courtroom.

The question at stake was whether GLC had the right to order a 25% reduction in tariffs to Transport for London. In the Transport Act, it was stated that GLC must provide for “integrated, efficient, and economic transport facilities and services” Furthermore, it is stated that GLC must take into account “economy, efficiency, and safety of operation to provide or secure the provision of such public passenger transport services as best meet the needs for the time being of Greater London.”

This battle was continued up to the highest judicial level. The five High Court judges each reached the conclusion that GLC was not allowed to order the tariff reduction to Transport for London, yet each on different grounds. The challenge to the judges was to interpret the term ‘economic’ in this respect. All of the Lords interpreted the terms ‘economic’ and ‘economically’ in previously mentioned clauses in different ways. Some of the judges did so from a more political than legal viewpoint. Lord Watkins, for example, stated that: “Those who come newly to govern people and who act in haste in wielding power to which they are unaccustomed would do well to heed the words of Gladstone. He knew a great deal about power and in 1890 he said of it: “The true test of a man, the test of a class, the test of a people is power. It is when power is given into their hands that the trial comes.” This rather unorthodox style of reasoning has little connection to legal reasoning. The judge openly exposes his antipathy for the new government and therefore ruled in favor of Bromley. Lord Denning had a similar opinion, yet articulated it in a more subtle way: “It seems to me that no party can or should claim a mandate or commitment for any one item in a long manifesto. When the party gets into power, it should consider any proposal or promise afresh, on its merits, without any feelings of being obliged to honor it or being committed to it. It should then consider what is best to do in the circumstances of the case and then do it if it is practical and fair.” Here, too, there is little legal reasoning to the verdict of the judge. Although the third judge in the Court of Appeal followed a far more orthodox legal reasoning, this case certainly fits the picture of it being started out of competition between political parties and then continued in the courtroom. Lord Wilberforce referred to it as cost-effectiveness. Lord

Keith of Kinkel defined it as the careful use of available resources and found it uneconomic that GLC has forfeited the national subsidy, which in other words means that GLC had not acted in its people's interest while engaging in political competition. Both he and Lord Brandon found that the transport company should operate on "ordinary business principles." None of these Lords indicate how they reached this interpretation. Their statements are more politically motivated than based on legal reasoning. Lord Brandon also reprimanded GLC for keeping to its election promises: "It is entirely wrong for a majority to regard themselves as bound to exercise their discretion." Lord Scarman argued that GLC has harmed the fiduciary duty toward its taxpayers and stated that governments such as the GLC have a duty in considering the costs and benefits to all people that fall under its government. Only Lord Diplock seemed to refrain from interfering in political competition. Since the statutes were not well defined, reasoning must follow the purposive construction of the law. In the end, he too ruled against GLC, leaving GLC in uncertainty about its powers. The strange situation occurred that a matter between two political principles, namely honoring election promises and the duty to care for all taxpayers, who were clearly in competition with each other, were determined by judges rather than political bodies.

In the Netherlands, regional governments are obliged to ask local governments for advice about the routes and schedules to be tendered. After all advices have been made, the regional government will decide upon the contents of the program of requirements. In practice, there are negotiations between the regional and local authorities on this program of requirements. The purpose of these negotiations, in effect a competition for regional resources, is to come to a generally accepted public transport policy for the entire region. However, it could also be that certain parties come out on top. A common scenario is that one or more local governments completely agree with the regional government's initial proposals. Aided by this support, only few changes are made to the proposal, whereas another local government may clearly lose the administrative battle. The only possibility to counter this scenario is to file a court case.

Such happened in (2003) *Purmerend v. ROA*. ROA (Regionaal Orgaan Amsterdam) is the Public Transport Authority of the region around Amsterdam. Usually, concessions are tendered by the provincial government, but in some important areas that overlap provincial borders, a regional authority is made responsible. The board of this 'Regionaal Orgaan' is composed of provincial and local executives. The local government of Purmerend is also represented in ROA. Purmerend complained in this case that ROA had not taken into account the local

interests of Purmerend in determining the program of requirements for the concession area called Waterland. The new concession contract provided for 2.5% less service hours than the year before. This was a higher percentage than the 2% reduction of service hours per concession area that ROA had agreed with the transport company. This was the first 'loss' in the administrative battle. ROA is responsible for the tendering of three concession areas. The reduction of service hours is higher in the Waterland area than in the other concession areas. A second complaint was aimed at this general reduction of 2% per concession area. Purmerend was of the opinion that this reduction could not be justified for the Waterland concession area. Public transport by bus had a high cost-effectiveness ratio in Waterland compared to the other areas. According to Purmerend, ROA should have cut the cost-ineffective services in the other concession areas, whereas Waterland would have deserved extra service hours rather than a reduction. This was the second 'loss,' as ROA has discarded this cost-effectiveness argument. The third complaint by Purmerend was that ROA had included in the program of requirements that all busses in its concession areas must have a low floor. This increased accessibility, but raised the price per vehicle. The cutbacks on the number of service hours could be undone if the requirement of low floor busses would be scratched. ROA claimed that the legal requirement to take up provisions on accessibility in the program of requirements implied that all busses must have a low floor. The third loss was thereby that ROA did not want to compromise on accessibility in order to grant more service hours to the Waterland area. Fourthly, ROA had installed an advisory committee for Waterland, whose advice had been to include a number of mandatory routes in the program of requirements. ROA had not taken one of these recommended routes to the town of Purmerend. Finally, the town complained that ROA and the city of Amsterdam had the right to decide which busses would stop at Amsterdam central station, without having heard the advisory committee. The ROA defense replied to each of these complaints that the correct procedures had been followed. The complaints against the cutbacks had already been noted, but dismissed in the decision-making process. The extra cutbacks of 0.5% for Waterland had been necessary due to high financial needs but were at that time still to be negotiated.

The case has little in common with standard litigation. The main arguments all focused on tension between different political agendas. The local government of Purmerend did not consider the decisions made by the regional authority to be fair, but had little possibilities to object. With the introduction of the Passenger Transport Act 2000, local governments have no veto over routes and schedules as taken up in the program of requirements. In search for a method of continuing the administrative

battle, it filed a case before the court, despite the weak legal basis and despite the fact that negotiations about the 0.5% extra reduction in service hours, as well as the requirement of low floor busses, were still to be negotiated for the next years. The judge's verdict leaves little room for a different interpretation: "The court points out that the procedure of appeal under the Passenger Transport Act 2000 is neither intended nor suitable to give local governments, participating in an administrative body such as ROA, the opportunity to continue the exchange of arguments over the governance of –in this case public transport – policy by different means." The court furthermore indicated that it is not in a position to determine the possibility or desirability of policy decisions, but only tests whether such decisions breach written or unwritten laws or legal principles. As the complaints were not aimed at such breaches, the appeal by Purmerend failed. This case is one example of continuation of competition by local governments by legal means. The arguments were clearly not based on legal grounds, but aimed to get more service hours in Waterland than nearby concession areas.

(2004) *Geldrop-Mierlo v. SRE* was a similar case in which the plaintiff was a municipality. Also in the region of Eindhoven, municipalities were consulted beforehand about changes in routes and schedules that affect their territory, but in this case the outcome was not satisfactory to Geldrop. It considered the bus services within the town of lower quality than before. The dispute shows a typical trade-off to be made by the regional government: In how far should the route and schedule be regulated. In this case, Eindhoven had only laid down the requirement to connect the different cores of the area, without specifications of the route and stops within those cores. Subsequently it was up to the transport company to fill in the route. The judge ruled against the municipality, for the simple fact that they sued the wrong party. The decision taken by Eindhoven concerned the rough schedule, not the specific routes. Specific routes are left open to the concession holder to determine. Geldrop had been pursuing a strategy of reducing the risk to loose out in the political process, but it had lost the administrative competition already in an earlier stage, namely when SRE determined that it would not include specific clauses in the concession contract that guaranteed an equal level of service provision in Geldrop. The case is therefore also an example of risk-reducing strategies that were continued in court. In fact, after that the concession had been tendered, there were no legal grounds to be found on which either the government or the transport company could be challenged. Moreover, years before this decision there had been a similar complaint by a resident in the same area. In (2001) *A. v. SRE*, the resident complained that his appeal against a decision to place a bus-stop close to his house has not been accepted by SRE. The problems involve

noise and smell. The judge interpreted the contract as such that a schedule needs not to specify exactly where bus-stops are placed. The contract with the transport company only specified the route, number of stops, and the areas where a stop has to be made. The exact place of bus-stops is up to the road administrator, which is the Ministry of Transport and Waterworks. The complaint was therefore not accepted by the judge, as it was not a complaint against the schedule set by SRE.

These conflicts between different levels of government could be seen as a form of ‘political competition’ that is continued in court.

## **5.4 Conflicts about labor relations**

Risks increased to a large degree on the markets for supplies to the public service providers. The main risk would be that service providers attempted to bargain for better deals in order to lower their costs to achieve competitive advantage. This links the introduction of competition to conflicts between the service providers and the suppliers of inputs for these services. In practice, conflicts only took place on a very particular input market, namely the labor market. The tension on this market is that the tendering system makes the sector less flexible. Service providers are bound by the concession contracts signed for a number of years. These contracts also specify the amount of subsidy required. If workers demand higher wages, service providers often do not have the possibility to offer these wages, because their revenues are fixed. They cannot raise the subsidy and they cannot raise the ticket prices (De Vries, 2008).

### **5.4.1 Job protection**

Employees sometimes challenged decisions by their employers, the public service providers. In the majority of these disputes, employees acted as a group united in a union. Also employers sometimes acted collectively in employers’ associations. Particularly in the Netherlands, these two types of interest groups are highly institutionalized and meet at various official negotiation tables. Their purpose is thereby not only to represent their members’ interests, but also to maintain stability in the sectors.

In liberalized sectors, this balance was severely disturbed by the introduction of competition. These utility sectors were traditionally characterized by the presence of strong trade unions. Almost all employees were members of a union. One possible

way for newcomers to outcompete their rivals was of course by saving costs on personnel. Thus the unions feared a degradation of what were hitherto jobs in the public service with a certain status. Competition would decrease the quality level of public services in general and the perfection by which civil servants could carry out their important task in serving society. Less clearly spelled out by the unions was their fear of losing influence. The entrance of new companies would bring in new personnel and staff from the former incumbents would also switch to new providers. Employees of the new providers would have clearly different interests than the union's members, such as a weakened position of the former incumbents. The new companies might also bring in staff that might not be member of a trade union. This would clearly weaken the union's positions. In other words, the unions wanted to retain the status quo as existed before the economic reforms, on the one side because they feared direct threats to their member's position, but also because they were concerned with the unions' positions in a competitive market. As a result, disputes erupted between the trade unions and the employers who welcomed the liberalization of the market, including the former state incumbents. Such disputes were not seldomly continued in court, if only for the fact that they were difficult to settle. After all, the unions opposed the idea of liberalization, which was to happen anyway.

The question is of course why the labor unions turned to the court rather than pursuing other strategies, such as strikes. Especially in the labor unions there was a strong tradition to take action in the form of strikes and other actions during work rather than to take legal action. The reason is partly that not the labor unions, but the employers juridified the dispute by filing complaints against the workers' actions.

The clearest resistance was in the British telecommunication sector in 1983. The Post Office Engineering Union (POEU) took actions after the British government had supplied a license to operate a second telecommunication network to Cable & Wireless, which intended to supply telecommunication services under the name of Mercury. The union also opposed the proposal for privatization of British Telecommunication, which was at that time a decision to be voted upon in parliament. POEU instructed its 130.000 members, consisting of virtually all engineers of the former Post Office, not to establish interconnection between the two networks, effectively putting Mercury out of service as a far smaller party. When BT managers established some interconnections themselves, POEU ordered its members to black out any mercury premises from telecommunication and threatened to black out any Mercury customers. In (1984) *Mercury v. Scott-Garner*, this dispute was continued in court. Mercury filed a court case against the union, because it suffered severe damages from the union's actions. The union claimed that it was in a trade dispute

with BT over the two linked issues: privatization and interconnection. In such trade disputes it would be allowed to the union to instruct its members to take action against their employers, if there is a relationship between actions and their purpose and as long as the actions are proportionate to the purpose. The root cause of this assumed trade dispute between BT and the POUE was that the order to interconnect would mean that Mercury could compete with BT, which would according to the union be the first step toward job losses. The dispute was therefore between BT and its engineers over the risk of losing jobs. The judge accepted this line of reasoning in the first instance. Although Mercury clearly suffered from the actions, the union had the right to take action in a trade dispute over job losses. Based on the evidence presented to him, he did not believe that Mercury had a chance of winning the trial.

Mercury appealed to this decision on several points. The point of interest to this study is that, according to Mercury, the union was not at all concerned about job losses. Instead, its actions were aimed at damaging Mercury and preventing privatization. This places the case in a new light, because rather than a trade dispute, this would turn the case into a dispute over influence in the sector. Mercury's evidence was a Job Security Agreement between BT and POUE, meaning that job security could not be the main issue. POUE argued that the agreement contained a clause that the Post Office could withdraw from the agreement in case of external events beyond its control and that the union feared that the competition from Mercury would be presented as such an event. However, this argument failed on many grounds. In the first place, Mercury could not be considered to be a real competitor, as it was legally obliged to remain below a market share of 3%. Perhaps more importantly for the trial, POUE had failed to provide the agreement during the first trial, despite its importance to the case. The defense claimed that it had not realized the importance of the document. However, if job security were really the objective of the actions, then certainly the union would have realized that an agreement on exactly that matter that had been negotiated for months would have been by far the most important piece of material for evaluating the case. The fact that POUE did not supply this vital document to the case ultimately worked to their disadvantage. Moreover, if the union feared that the former incumbent might want to use the escape clause, then why did it not negotiate for a better agreement on job security rather than taking actions that damaged Mercury far more than their own employer? In the words of Sir Donaldson, one of the Lords Justices in this case: "...but I find it impossible to conclude on the basis of the evidence as present available that the risk to jobs was a major part of what the dispute was about. I say that because I find it inconceivable that if the dispute was wholly or mainly about jobs, the union would not have

approached BT asking for a guarantee of job security or a strengthening of the job security agreement. Yet nothing of the sort appears to have happened and the union did not even think that this agreement was relevant to the present proceedings. On the other hand, there is massive evidence that the union was waging a campaign against the political decisions to liberalize the industry and to privatize BT.” The words of Lord Dillon, another Lord Justice in the case, further clarify that this case resulted in effect from competition about influence or, in other words, a continuation of the negotiations by legal means: “The union pressed for a job security agreement even though the union knew that it would not constitute a binding contract, and the union was overall well content to have the job security agreement with paragraph 5 (-the escape clause-) in it, rather than nothing, when it became clear that it was not possible to negotiate a formula more favorable to the union than paragraph 5.”

The Lords in the previous case were very well aware that they were deciding upon a politically sensitive issue that resulted from the competition for influence. Sir Donaldson even introduces his verdict by spelling out this tension and the role of the court in such disputes: “Disputes of this nature give rise to strong, and indeed passionate, feelings on each side. ... It is for Parliament and not for courts to make the rules what action is and what is not permissible in the course of an industrial dispute. It is for the courts, and not for Parliament, to interpret those rules and to uphold the freedom of both sides to take whatever action they consider appropriate within those rules, whilst restraining both sides from taking action which, however inappropriate it might otherwise be, is outside those rules. ... Mervyn Davies J. (the judge that judged the earlier case) approached his task upon this basis and this court will do the same.” Obvious as such statements may be, it is interesting to note that the parties need indeed to be assured at the beginning of the trial that their rights will be treated fairly and that the court only applies legal reasoning in interpreting the case. Apparently the disputants were not convinced that such a sensitive issue would be treated on a politically neutral basis. They were aware of the fact that the legal dispute was only part or a far larger competition for a leading position at the negotiation tables.

The case above was a case that originated in the actions of employees of the former incumbent. Their strategy to reduce the risk to employees was motivated by the fact that new companies could put the former incumbent out of business. Employees of the newcomers were also concerned about the working conditions in the reformed markets. To these newcomers, there were only few ways to compete with the former incumbent. Competition on quality of service was pointless, either because the quality was similar (telecommunication, gas, electricity, water) or because market regulations gave incentives to focus on efficiency rather than quality

(public transport.) The only feasible way of competing with the larger market party was therefore to provide services more efficiently. Disputes occurred between employers and employees over the question how far this aim for efficiency could go. Such disputes were sometimes more a matter of competition than of legal arguments.

An example is (2001) *Yorkshire Traction Company v. Vehicle Inspectorate*. The plaintiff, which was a transport company providing bus services in the South of England, was convicted by the vehicle inspectorate because it had permitted numerous drivers to drive for a longer period than was allowed. After 4.5 hours, all bus drivers were obliged to take a break. The inspectorate concluded that 19 drivers failed to do so on a total of 33 occasions and therefore sued the company in an earlier case to which this case was the appeal. Two related points for conviction were given. In the first place, the schedules of driving were extremely tight, so that even a small problem could have consequences for the time schedule. This made that drivers would often have to sacrifice their breaks. Secondly, the system of monitoring the drivers' observance of the limits was insufficient. This system consisted, according to the inspectorate, consisted only of a weekly check of the tachographs. The appeal against this decision failed, because the magistrates found that these claims were sufficient to conclude that the company had been reckless in taking care of its personnel and the safety of the passengers. The company challenged the decision in the High Court of Justice. It was argued there that the magistrates had never made a connection between the 'hands' of the company, the drivers that breached the law, and the 'brains,' its officers. The inspectorate simply concluded that the officers should have been aware of the misconduct of its drivers on the basis of misconducting behavior over a period of three weeks. The inspectorate failed to investigate whether the company had taken any steps to prevent the misconduct. The same inspectorate had not even taken the effort of checking whether a weekly tachograph check was actually considered sufficient by the law. In fact, the drivers were obliged to keep their tachograph sheets for three weeks, so that the inspectorate could never conclude from a three-week period that the system had been insufficient. The inspectorate clearly launched the case far too soon and without any plausible evidence. The company's lawyer even asks for the inspectorate to pay the costs of the case, whereas normally these would be paid out of central funds, because the inspectorate had simply started the case without any consideration: "on a correct analysis of the law, this was a case which, on the evidence available to the prosecution, never had any sensible prospect of succeeding. ... When the vehicle inspectorate looked at their evidence and decided to issue the summonses, they had to take a qualitative view on as to whether they had a reasonable prospect of getting past half time. They ought to have come to the

conclusion that they did not have on the evidence available to them. ... They could, of course, have changed their position by, for example, attempting to call drivers to give evidence, or conducting a further interview if they were within the time to do so. But they took none of these steps. They simply launched 33 informations and prosecuted the company.”

#### 5.4.2 Indirect personnel

In the Dutch bussing sector, the legal position of employees has been one of their major battlegrounds. This is the consequence of the tension between employees' rights and the concession system. In the Passenger Transport Law, clauses are taken up that protect the security of jobs (compare this to the Mercury dispute a few pages ago. In the UK, job security is left to private agreement.) As a result, if a concession area is won by another company than the current concession holder, the new owner is obliged to employ all personnel that worked for that particular concession. This also means that there can be no competition on the basis of employing cheaper (read: younger or underqualified) personnel. There are generally no problems in taking over bus personnel and staff directly working for the particular concession. Personnel working indirectly for the concession are a more difficult challenge. Certain staff members simply cannot be assigned to a certain concession, for example because they deliver general services (administrators, secretaries, maintenance staff, and legal counsels) or because their job includes multiple areas (directors.) In such instances, two problems arise: The companies must agree which staff should be taken over from the general services staff and the companies must find a solution to transfer 0.2 directors to the other company. This is precisely an area where competition over personnel is still possible. The company that lost the concession will of course try to make its worse performing staff move to the other service provider, thereby gaining a competitive advantage on a national level. The new company will try to prevent this from happening. This is a matter of negotiations. The interest group that has lost some of its influence is the trade unions. The negotiations are basically a private matter between the two companies. However, the unions have found legal means to represent their members' interests.

A first example is (2002) *FNV and CNV v. Arriva*. FNV and CNV are the two main central unions of the Netherlands, which are present in virtually all sectors of the economy. Arriva had won two concession contracts starting on January 1st 2003, namely 'Rivierenland' and 'DAV-Gebied.' It was under the legal obligation to take

over all personnel and agreed to do so. However, it refused to respect two employees' contracts. The first was the contractual clause on a location where the work had to be carried out. The new concession holder had its offices and shelters at a different location and wanted the new personnel to travel to those locations. The second point was that Arriva did not want to honor the individual leave conditions of staff members. The first issue may be something for legal consideration. The judge clarified that with the switch from one company to another, the employees get a new employer, but not a new labor agreement. The company must therefore respect the right of working from a particular location. The second point is completely pointless. The collective labor agreement (CAO) that governs the sector states that leaves cannot be saved for a next year and that these years are calendar years. Since there were no individual leave conditions that were not in line with the collective agreements, it is logically impossible that any employee had extra leave rights at the moment he would become an Arriva employee. This last matter perfectly illustrates the point that such cases are simply started out of rivalry between employers and unions. Both parties failed to see that the leave rights were in fact not an issue, Arriva when deciding that employees could not transfer these rights, and the unions when complaining against it.

Case (2005) *A. and B. v. Arriva* was a further example of conflict between employers' organizations and labor unions over the question of indirect personnel. A and B were both employed by Arriva, both as indirect staff members. When Arriva lost the concession area called IJsselmond to Connexxion, A and B were notified that they would move to Connexxion per the 5th of September 2005. Connexxion had, however, no suitable function available. This was not a problem, as Connexxion happened to have lost the concession area of Waterland to Arriva and notified A and B that they would be employed by Connexxion between the 5th of November to the 11th of December and then move back again to Arriva. A and B wanted to remain employed by Arriva without being transferred to Connexxion, because their jobs would be taken over by other staff. Connexxion had ordered the accounting office Deloitte to execute a research project into the moving of personnel after this specific switch of concession owners. Deloitte concluded that there were no problems in this case on legal grounds. Still, the matter was brought to court. A and B argued that even if their transfer from Arriva to Connexxion is legally correct under the law valid at that time, employers and trade unions agreed with each other that indirect personnel should no longer automatically switch to the new concession owner and had advised the Minister of Transport to scratch this clause in the law. The judge came to the same conclusion as Deloitte had reached and obviously could not take into consideration that interest groups at that time had advised the minister to change the relevant law.

This was therefore another case started without legal reasoning behind it. The employees turned to the court not because they had a legal point, but because a court case was viewed as the best strategy in the light of a broader strategy to reduce risks to employees in the sector.

Just as after the telecommunication liberalization, the unions called for industrial actions after the liberalization of the Dutch bussing sector. The employers' association, of which all three large service providers were a member, filed a case before the court because the unions had ordered to carry out services but not to charge the passengers. The resulting case, (2002) *Werkgevers OV v. CNV and FNV*, follows more or less the same line as the British case. There must be a demonstrated relationship between the actions and a trade dispute and the actions must be proportionate to the aims. At the time of the actions, the employers' and employees' organizations were in negotiations over a new collective labor agreement. Of course, this agreement was heavily influenced by the upcoming tender system. The labor unions demanded safeguards for the personnel working in the sector. Still, influencing these negotiations was considered to be sufficiently related to a trade dispute between employers and employees and therefore allowed by the judge. It was also considered to be an appropriate tool, at least for two days of action. To determine the proportionality of an action, the judge must weigh the costs to employer and society against the possible benefits to the employees. Interestingly, the employers' associations had asked the judge not to take into account the salaries that they had to pay, despite the fact that the employees refused to carry out their task. The case could therefore serve as a counter-example to the Mercury case. The degree of institutionalization was still so large in the Dutch bussing sector, that the two interest groups still not sued each other to the extreme.

#### 5.4.3 Influence of employees

As stated before, labor relations in the Netherlands are highly institutionalized. Works Councils, for example, have a powerful position in companies. Employers are obliged to discuss and seek agreement on major decisions that could affect the staff. The case (2001) *OR BBA v. BBA* was the result of a conflict between the transport company BBA and its Works Council about this obligation. BBA participated in a tender for a certain concession area without consulting the Works Council. The council complained that the decision to participate in a tender by making an offer has a significant impact on the company and that BBA should therefore have informed the

council and should have asked its permission. BBA was of a different opinion. It considered participating in public tenders as a standard operation of the company for which it did not need permission. It had planned to consult the council in case it won the concession. Only after the concession would be won, issues of interest to the Works Council would need to be discussed, such as the discussion about the specific schedule of operations in the new concession area. The judge, however, disapproved of this way of working. By placing a bid, BBA already put itself under the contractual obligation to carry out the specific tasks as laid down in the specifications scheme, should it win the concession. Therefore, the OR should have been consulted beforehand.

Recently, the strategies to reduce employees' risks even divided Works Councils of different companies. Following the regionalization of the bus transport market, BBA/Veolia had decided to adopt a decentralized model of employees' representation. One of the new Works Councils was installed in the concession areas De Meierei and Brabant Oost. The council was installed for four years at the 6th of December 2006. Agreements were made on how council and company would cooperate. However, at the 31st of October 2006, the decision was taken that from the 1st of January 2007, Arriva would become the new concession owner. Arriva did not have a decentralized representation structure and refused to accept the regional Works Council as partner. In (2007) *OR De Meierei / Brabant Oost v. Arriva and OR Arriva*, the regional Works Council filed a case against Arriva. It demanded that Arriva should provide time and facilities for its representatives to meet, that the obligation would be posed on Arriva to ask permission for actions that had a significant impact on the company, that Arriva accepted it as the negotiation partner on social security, and that Arriva should pay the costs of mediation and legal assistance, starting by paying the costs of this particular procedure. Of course, these regional arrangements made by BBA in the first place went against Arriva's interests, which had invested in the relationship with its own Works Council and was now confronted with a strange new body of representation. But in the second place, the employees' council of Arriva was also harmed in its interests. This council was still a centralized body that claimed to represent the interests of all employees of Arriva. It therefore sided with Arriva in this particular case against the regional Works Council. In first instance, the judge ruled that the transfer of the concession area, including the staff, did not have the same implications of a take-over. If that were the case, the regional Works Council could have claimed that the former agreements should remain in place. However, Arriva had not taken over materials and customers of BBA, it only owned the right to let busses drive and had been legally obliged to take over the staff. It did so from a

different organization than BBA did. Therefore, it could not be expected that the regional council would maintain the same position in the company.

The position of workers was one of the most sensitive issues following bus liberalization. In the first place, many workers consider themselves to be the losers of the liberalization, because governments, service providers and passengers were expected to profit from this policy, whereas they were threatened to lose their job security. In the first place, they were generally concerned about the introduction of market competition in a sector that they see as a service to society, not as a commercial enterprise. Job protection will likely to be an issue that causes dispute from time to time in the future, but given the British experience over time, the problems that workers have with commercialization will disappear after a number of years.

## **5.5 Analysis and conclusion**

All legal conflicts discussed in this chapter were in some way related to the shift toward private provision of a service, that were formerly provided by public organizations because of the presence of large public interests. These public interests remained to some extent in place after privatization: public access for everyone, stability of service provision, including provision of services that might not be economically efficient (such as routes and frequencies of certain bus services) and more in general a concern for the interests of consumers, residents and workers who were formerly civil servants. Uprooting their rights could cause social unrest - also given that unions in these sectors are among the most radical and vocal ones - and it is also a public interest to minimize this.

Such public interests were in the first place safeguarded in the licenses and contracts given by governments to telecom and bus companies. Subsequently, these needed further elaboration in case law, produced by the legal conflicts discussed in this chapter. They often involved third parties: consumers or employees who were no direct party in the contracts concluded between national or regional governments and the commercial service providers.

Several groups were active as litigants in these conflicts, but the clearest case to demonstrate the mechanism was the position of residents in the Dutch bussing sector. Formerly these people could file complaints against routes or schedules to the local or regional government. That is, they had a political 'voice option'. The new commercial service providers were not directly accountable to users and residents, but only to the

government agency which had been their contract partner. However, the latter could not pass on the complaints or requests of residents in the form of new performance requirements to the service providers on top of those already agreed in the long-term contracts. Even in cases where safety was clearly endangered or where residents had found a clearly more efficient transport solution that was better for all parties (passengers, service providers and residents), there was no legal option to alter the contract. These and other new types of conflicts in the sectors are summarized in tables 5.1 and 5.2.

**Table 5.1: Actors, risks/uncertainties, strategies to reduce them and link with areas of legal conflict in the telecommunications sectors**

<i>Actors</i>	<i>Risks / uncertainties</i>	<i>Strategies</i>	<i>Area(s) of conflict</i>
Employees	<p><b>Switch to commercial status</b></p> <p>The privatization of the public service providers meant that the employees lost their civil servant status. Furthermore, the introduction of competition necessitated re-organization in order to turn public corporations into competitive companies.</p>	<p>Securing certainties.</p> <p>Employees, often united in sector-specific unions, demanded job certainty for the workers at the incumbent.</p>	Employment
Other	<p><b>Conditions for installation</b></p> <p>Due to the shift from public to private legal status of the network owners and due to the entrance of new firms that could want to construct their own network, there could be clashes between the interests of the companies, the landowners and the general interest.</p>	<p>The main strategies for all parties involved lobbying, negotiating, and challenging non-cooperation.</p>	The conditions of network installation and maintenance

The cases in the telecommunication sectors that concern safeguarding something like the public interest were on various unrelated topics. The common variable was that all cases involved the interpretation of rules regarding the protection of third parties whose interests can be considered related to the public interest.

**Table 5.2: Actors, risks/uncertainties, strategies to reduce them and link with areas of legal conflict in the bussing sectors**

<i>Actors</i>	<i>Risks / uncertainties</i>	<i>Strategies</i>	<i>Area(s) of conflict</i>
Service providers	<p><b>Taking over of personnel</b>            New concession holders are obliged to take over the personnel from the former concession holder. However, they often have not all information available about the status of this personnel.</p>	<p>The potential bidders could request extra information from the tender organizer. The tender organizer in turn will turn to the concession holder, who may or may not want to provide this sensitive information. After the procedure is finished, complaint can be filed about the obligation to take over particular employees.</p>	Indirect personnel
Consumers	<p><b>Loss of influence on the quality of service</b>            Although in most cases of liberalization the consumers gain power, in this case they run the risk of decreasing quality. They have less influence as their opinion is only indirectly relevant during tender procedures, whereas there is still no alternative provider of similar services.</p>	<p>Consumers unite in associations and attempt to increase the influence before and during tender procedures.</p>	Quality of service, mainly in the form of availability of public transport (routes and schedules)

**Table 5.2 (cont.): Actors, risks/uncertainties, strategies to reduce them and link with areas of legal conflict in the bussing sectors**

<i>Actors</i>	<i>Risks / uncertainties</i>	<i>Strategies</i>	<i>Area(s) of conflict</i>
Residents	<p><b>Loss of influence on the routes and schedules</b> Residents that have an interest in the existence (or non-existence) of particular stops, routes or schedules have fewer possibilities to exercise influence, because the transport company is free to act within contractual clauses.</p>	Influencing the concession contract in such a way that the desired stop, route or schedule is taken up as a contractual obligation to the transport company.	Routes and schedules
Concessions owners	<p><b>Translation of policy aims into tender criteria</b> The tender documents will have to reflect the policy aims of the concession owner, but it is a legal exercise to rule out different interpretations of the contractual clauses that could go against policy aims.</p>	Drawing up well designed contracts with the assistance of (external) legal experts.	The interpretation of contractual terms

<b>Table 5.2 (cont.): Actors, risks/uncertainties, strategies to reduce them and link with areas of legal conflict in the bussing sectors</b>			
<i>Actors</i>	<i>Risks / uncertainties</i>	<i>Strategies</i>	<i>Area(s) of conflict</i>
Employees	<p><b>Switch to commercial status</b></p> <p>The privatization of the public service providers meant that the employees lost their civil servant status. Furthermore, the introduction of competition necessitated re-organization in order to turn public corporations into competitive companies.</p>	<p>Securing certainties. Employees, often united in sector-specific unions, demanded job certainty for the workers at the incumbent.</p>	Employment
Other governments	<p><b>Interest conflicts between local/regional governments</b></p> <p>Different governments could have different interests in case of a tender. Within a concession area, local governmental interests could clash with other local interests or with regional ones. Between concession areas, there could be clashing interests between the two neighboring concession owners.</p>	<p>Attempt to influence the decisions of the concession owner when designing the tender and the contract. Discussions and negotiations beforehand could be organized by the concession owner.</p>	<p>The authority of concession owners versus the authority of other governments</p>

In many respects, the mechanisms worked similarly across the sectors: The interests of a particular party, which took no part in the main transaction, were harmed because the commercial provider had no ‘natural’ (incentives from the market) or artificial (incentives created by regulations or contractual agreements) interest to take the wishes of that particular party into account. Therefore, these parties filed legal complaints. In some cases, this led to formal arrangements in which their interests were further protected. This could be viewed positively and negatively. Positively because general interests were taken increasingly into account, negatively because it complicated the regulatory framework and led to less freedom for entrepreneurs. For example, the rights of personnel were formally protected in all sectors, but this limited the opportunities for companies to select cheaper staff.

However, there are also large differences between the sectors. The liberalization of the telecom markets was less of a threat to public interests. The level of service remained at a stable level, prices even decreased and innovations happened, though this was of course mainly a result of technological advances. In the bussing markets, on the other hand, more public and third parties were affected by the shift to commercial providers. Thus the level of services was more affected by the liberalization. This was not necessarily a negative development seen from the viewpoint of the general interest, as cost-ineffective lines were cut and more services were offered on busy tracks, but it did mean that the service level for some customer groups was negatively affected. Furthermore, the opinion of residents was important for the former public providers but of little interest to the new commercial providers. Finally, different local and regional governments representing the interests of their citizens sometimes had conflicts of interest that were brought to the courtroom. These conflicts often resulted from the fact that the tendering government judged the bids on the viewpoint of price/efficiency, meaning that certain local governments or adjacent regions could see the service level decline. Under the previous system, they could negotiate with the public service provider at any time. Under the new situation, this was no longer possible.

What became clear from the legal conflicts is that these various groups (passengers, residents, governments) have limited chances to win a legal conflict during a concession period. They could only have their opinion expressed in a formal way during the design of the tender. This results in a very complex tendering phase in which all interests must be matched and then translated in a legal document. After the closing of the tender, there is no chance to influence the outcome anymore, except by challenging the tendering procedure itself. As a result, the focus in the sector has

shifted from interests to procedures, which could also be seen as a form of juridification.

These conflicts resulting from the commercial provision of services involving public interests are likely to remain in the medium run, because third party interests are likely to be permanently affected. There are only two ways in which they might disappear: 1) If the system is re-designed in such a way that the aims of the commercial service provider match all relevant interests; or 2) following a cultural change in which these services are no longer viewed as involving public interests but merely private commercial ones.



## 6 Internationalization

### 6.1 Introduction

Apart from the increase of risk and uncertainty in general, there is another, specific way in which liberalization could increase juridification, namely through internationalization. This short chapter focuses on the theoretical influence of the entrance of foreign service providers and lawyers on juridification and describes internationalization and its possible influence on juridification in the studied sectors.

Internationalization is taken as part of the liberalization policy, the independent variable of this study, because the opening of markets automatically implied that also foreign parties could compete on these markets. Liberalization here takes the meaning of free trade, the internationalization of formerly closed domestic markets. Indeed, the hope of many policymakers was that established international companies would engage in competition, because domestic start-ups would not be able to compete with the powerful firms of the pre-liberalization period.

It is hypothesized that internationalization could lead to juridification, in the form of conflicts and gradually also in the form of new rules. Both foreign firms that plan to conquer the market and law firms that come from a different legal culture could play a role. This chapter looks whether these claims on internationalization are true for the Dutch and British telecommunication, bussing, and legal services markets.

### 6.2 Internationalization and conflicts

Internationalization could lead to juridification in several ways. In the first place, internationalization influences the economic relationships between firms. The entrance of foreign firms in a domestic market could upset the balance that existed in a market. The keyword here is trust: Domestic firms may see the newcomers as ‘intruders’ in their kingdom and are less likely to negotiate with them on an informal basis. For their part, the foreign companies have reason to distrust domestic firms. Being disadvantaged due to a lack of subtle market knowledge and a lack of brand familiarity in the new country, they have no option but to take a hostile stance against the traditional market parties.

The second type of influence may be the result of differences of *economic* cultures. Particularly in public service sectors such as utilities, domestic companies

have for decades focused on reliable service provision in the public interest and enjoyed a statutory monopoly. However, not all economies shared these values on the protection of the public interest. Service providers that come from other economic cultures that are much more based on the free market provision of services may enter the domestic markets. Customers and regulators that are not used to their more competitive approach may get in conflict with such foreign companies. This line of argumentation of course only applies if these companies indeed come from a radically different economic tradition.

A third type of influence may result from the different *legal* cultures that meet through internationalization. Some legal cultures are much more adversarial or make an activist use of the law than others. If companies from such an adversarial culture enter the more informal legal cultures, there could be a clash between them. In such a clash, it is likely that the informal domestic culture shifts toward a more adversarial one. After all, if one party starts a formal dispute, the other party has no option but to engage. The alternative scenario, that the adversarial party is becoming part of the informal culture, is less likely. As was mentioned, the foreign market parties have little interest in cooperating with domestic firms (except by taking them over). This third influence of internationalization may be enhanced by the entrance of foreign law firms that could bring a more adversarial approach to markets that were formerly more based on informal regulation and dispute resolution.

In short, the assumption is that internationalization has led to more conflicts in the liberalized markets.

### 6.2.1 The entrance of foreign firms

In the Dutch bussing sector, the market is characterized as a trio-poly consisting of one domestic company and two foreign parties. Connexxion is the domestic party, consisting of a large number of merged regional companies. The two foreign parties, Arriva and Veolia, have followed different strategies in entering the market. The British company Arriva has entered the market under its own name and actively promoted itself as different from the domestic supplier. Having experience with bus service provision in a free market, Arriva claimed it could provide services more efficiently, also because it made use of the transport development division of the home corporation in the UK. Veolia followed a different strategy. It took over one of the large domestic service providers, the BBA. Initially, it continued to operate under that name, later switching to BBA/Veolia and ultimately to Veolia. This difference in

market entrance was undoubtedly based on marketing considerations, but could also be explained from a cultural difference. Veolia, a France based company, comes from a culture of integration and cooperation between service providers and public institutions. It also profiles itself as cooperative with the public sphere. Arriva, coming from the British market, rather profiles itself as the cheapest and most efficient provider if governments let it the freedom to develop its own solutions. In the bidding procedure, such differences do not become readily apparent, as the companies will base their offer on the requirements set by the government, rather than their own ideas about service provision.

Such cultural differences are difficult to prove. Arriva, the only company that came from a country with a more adversarial culture, was relatively often involved in court cases, but no statistical conclusions can be drawn from that. In particular situations, Veolia took a more cooperative approach. For example during the threat of strikes in 2007, Veolia was the first company to give in to the employees' demands, whereas Connexxion, the domestic bus company, and Arriva had planned not to give in. There is certainly a case to be made for the influence of cultural differences on conflicts in the Dutch bus sector.

One other reason why the entrance of foreign firms could lead to conflicts in this particular tendering system is that these firms companies might be more used to operate in a competitive environment and deliberately take the risk of ending up in a conflict with the concession owner. For example, consider a company from a competitive environment that wins a concession contract based on very low costs and deliberately takes into account that conflicts may arise over the actual performance (which is likely because they have to cut on the service level in order to be able to reduce costs). Domestic companies that are used to a non-competitive environment would normally not act in this way, because in the pre-liberalization period, they have built up a reputation based on delivering quality. However, if the strategy followed by foreign service providers is successful, it will quickly be adopted by the other market parties. Reputation is not part of the tendering procedure, so domestic companies are quickly forced to adopt the same way of operating and thereby run the same risk of ending up in conflicts about performance.

The practical consequence is that a relationship between internationalization and juridification is almost impossible to prove: If the strategy pursued by a foreign firm that leads to more conflicts is successful from a business perspective, then other market parties including the domestic ones will quickly adopt the same strategy so they end up in the same type of conflicts as the foreign market parties. This holds for the other sectors as well.

The British bus sector is dominated by five franchises: First, National Express, Stagecoach, Arriva, and Go-Ahead. All of these firms are of British origin; therefore there are no measurable effects of foreign competitors on disputes. It also seems that the early privatizations in the United Kingdom have opened the possibilities for these firms to expand internationally, notably to other European countries and to North America.

The telecommunication sectors have a different market structure than public bussing and foreign companies play a different role. Generally, there are several foreign market parties competing in a telecommunication market that is dominated by a domestic party. Contrary to bus services, these foreign companies are often specialized in offering low-priced services in foreign markets. There is a balance between former incumbents that serve the majority of customers, but only in their home country, and price-fighters that serve small percentages of customers in all countries. These price-fighters are aware of the importance to hold a stance in each market. They can do so by complaining to the sector regulator and by challenging regulatory decisions in order to alter them in their favor. Therefore it is here that one would expect many conflicts between domestic parties (former incumbent and regulator) and foreign companies. In both the Netherlands and the United Kingdom, it is possible for foreign parties to challenge regulatory decisions if they are directly affected.

In the Netherlands, several foreign telecom operators are active on the market. Examples are Tele2, Pretium, and BT. The large majority of conflicts is, however, filed by the domestic market party, so the thesis finds no support in this market. The same holds for the United Kingdom. The main challenger of BT, the US based company Virgin, does not appear more frequently in the courts' registers. The reason why the effect of foreign companies in these markets cannot be measured is because of the market structure. Regulatory decisions are the main source of dispute, but these decisions are often affecting the former incumbents. Another possibility for dispute would be the access agreements. Indeed, there is a number of conflicts between former incumbents and foreign parties on this issue, but there is no reason to assume that the absence of international firms would have shown a different picture. There are just as many conflicts between former incumbents and domestic price-fighters. Finally, there are not relatively more civil cases that are started by foreign price-fighters.

## 6.2.2 The entrance of foreign lawyers

The only sector in the study where foreign law firms played an important role was the Dutch telecommunication sector.

The main reason is that KPN has its main specialist representative working in a British law firm. The history of foreign law firms in the Netherlands is a separate story. During the 1990's, foreign law firms were highly interested in taking over Dutch firms. The latter, however, refused to give up their full-services package, whereas the foreign firms were mainly interested in the profitable parts of the firms. The larger Dutch firms have therefore successfully resisted foreign partnerships. A number of British firms have then founded their own Dutch offices. Almost all legal experts working in those offices are Dutch, but are managed by the British main office.

The high number of cases in Dutch telecommunication, certainly compared to the other three sectors, looks impressive. However, KPN have not hired their specialist with the particular reason that he works for a British firm, nor are there reasons to assume that the high number of KPN appeals is the result from a push by the British law firm. No conclusive evidence for a 'clash of legal cultures' can be found with regard to the entrance of foreign law firms.

## **6.3 Analysis and conclusion**

This chapter aimed to answer the question whether internationalization influenced juridification. The influence of internationalization depended strongly on the particular sectors. In Dutch bussing there is a relatively high amount of conflicts with foreign market parties involved. Compared to the other sectors, this is logical. In British bussing there are no major international parties. The telecommunication sectors have their national former incumbents that maintain a powerful position. Only in Dutch bussing, two of the three major parties are owned by foreign corporations. However, given this fact, it is still interesting to see that the high amount of appeals filed by Arriva, the only company of the three that comes from a more adversarial culture, confirms the hypothesis. The Dutch telecommunication sector stands out because of the high number of cases where a foreign law office was involved in cases. This could well rest on the coincidence of a specialist lawyer who happens to work for a British law firm. In general, it can be concluded that the British sectors are immune from clashes with legal cultures, because they were the first to liberalize and

are partly used to adversarialism. In fact, the British export much of their legal culture to other European states. In the Netherlands, the consensual legal culture is partly fading because of the entrance of foreign market parties.

In short, the research question whether internationalization has an impact must be answered affirmative. How this influence has taken shape depends on the country. Internationalization had a particular impact on the Dutch sectors, which can be largely explained by the low degree of adversarialism, at least before the liberalization.

## **7 An intervening variable: The supply side of the legal system**

### **7.1 Introduction**

In the previous two chapters, it was discussed how elements of liberalization cause legal conflicts. In other words, certain elements of liberalization lead to an element of juridification. It may be assumed that the legal system influences this causal relationship. The central question of this chapter is whether and how the legal system influences the relationship between liberalization and juridification.

The legal system is defined here as the institutions that govern an economic sector through formal legal arrangements. There are four of such institutions. The first is the legislature, the institution that enacts the formal statutes determining the rules of the game in any regulated market. The second institution is the regulatory state authority. In many economic sectors, these regulators are part of a national, regional, or local administration. Many liberalized sectors are, however, regulated by more or less autonomous agencies, placed at some distance from the ministerial hierarchy. In all cases, the regulators perform a number of legal functions. Enforcing regulation in the first place, but also creating new norms and developing existing doctrines within the legal framework is a legal task that all regulators take up to some degree. The third institution is the judiciary. Courts settle disputes by interpreting the law in specific cases. At the same time, they may produce new norms if the law leaves much room for interpretation or is in contradiction with another law. The fourth institution is that of commercial providers of law: Lawyers, legal advisers, and legal counsels. They assist market parties in understanding, interpreting, and using the law. This may be done by defending their case in court or by advising on actions to be taken.

What role does each of these institutions play in the process of juridification? Regulatory agencies are responsible for enforcing the new market regulations. In fact, the agencies are forced into active enforcement by European Community law (Ottow 2006). However, their expertise often puts regulators in a position as policymakers. Their style of enforcement, their independence from the central government, and their expertise in law could influence the relationship between liberalization and juridification. They can do so in both ways: reinforcing juridification or containing it.

Judges and commercial legal services can be seen as the supply side of juridification, with market parties as the demanders for their services. The increased use of their services is an increase in the dependent variable of this study:

juridification. Yet, courts and legal advisers also influence the relationship between liberalization and conflicts. Judges do so mainly through their way of reaching decisions. Their interpretation of the law determines how market parties will follow the law in the future: According to the book and procedures, or more based on principles.

Commercial legal services are increasingly being called on in all studied sectors. Their aim is partly to guide their clients in complex legal matters. The methods employed by the legal specialists, increasing the amount of contracts and the implementation of procedures that have to be followed precisely, could easily lead to more conflicts.

## **7.2 Legal tasks of autonomous regulatory agencies**

At the introduction of competition and the enactment of new market regulations, the responsibility for regulating this new competition was delegated to sector-specific regulatory agencies. The shift of responsibilities from ‘bureaus’ integrated in the ministerial hierarchy of the central government to more or less autonomous sector-regulatory agencies fits the picture of shifts in governance away from the central state. As was described in the theoretical framework, there are several explanations for the autonomization of these agencies. It could be that more than one explanation applies to the agencies relevant to this study. However, the purpose in this section is not to find such an explanation, but to investigate the influence of this autonomy on juridification.

One consequence of the introduction of regulatory agencies is that the market parties, both old and new, are confronted with a specialized organization that is allowed to focus exclusively on their sector. These regulatory agencies have a number of formal responsibilities. However, just as important as their formal power is the style of regulating and enforcement that the agencies adopt, as well as the response of the regulatees (those that are regulated) to the approach taken by the regulator.

The autonomous regulators themselves are confronted with a complex field with actors that have conflicting interests. Although the responsible Minister can determine the general policy direction, the regulators are autonomous in the sense that they have a relatively high amount of freedom in interpreting regulations in individual cases. In that sense, autonomous regulatory agencies combine all functions of the *trias politica*, namely regulation, implementation and dispute resolution. (Lavrijssen, 2006)

The incidence of conflict will partly depend on how this freedom is used by the particular agencies.

The research design presents us with a naturally occurring experiment, as two of the four markets are governed by such independent regulatory agencies, whereas two others are still controlled by government bureaucracies. The telecommunication markets in both the Netherlands and the United Kingdom have autonomous regulators. Both OPTA and Oftel were meant to be independent organizations that controlled the market at arm's length of the government. The bussing markets in both countries, on the other hand, are still mainly regulated by "traditional" governments, albeit mostly regional and local ones. In the Netherlands, most regulation is done by the traffic and transport departments of the regional governments. Some central tasks, such as licensing, are carried out by ministerial departments, while the Transport Chamber of the competition authority has only temporary powers in ensuring competition in local transport. In the United Kingdom, the Passenger Transport Authorities are composed of elected representatives from the local areas that fall under the PTA. Their structure is somewhat similar to the regional authorities that regulate passenger transport in areas in the Netherlands that overlap provincial borders.

This design allows for studying some of the roles that independent regulatory agencies play in the juridification of the sector. This role may involve the triggering of conflicts, but need not be confined to that. First, attention is paid to the formal responsibilities and missions of the agencies, as well as to the practical manner in which they carry out these missions. Secondly, the influence of these responsibilities and styles on conflicts is investigated. Finally, it will be analyzed in how far autonomy influences the relationship between regulatory agencies and conflicts.

### 7.2.1 Functions and missions

The formally defined responsibilities of the four regulatory agencies studied in this section, OPTA, Oftel/Ofcom, Dutch traffic and transport departments, and British PTAs, do not differ radically. Although the tasks of regulating telecommunication or bussing markets seem to differ drastically, there is in fact much overlap from a regulatory perspective. In both types of markets, the main task is to provide and guard access to the market and to create a level playing field. Newcomers with the intention of competing with the established firms must be guaranteed equal chances, while companies that do not adhere to the rules must be prosecuted.

OPTA's main responsibilities are to issue licenses to the market parties active on the telecommunication market and to resolve interconnection disputes. It does so in the first place by determining relevant product and geographical markets and then analyzing whether parties with substantial market power operate on any of those markets. It then has powers to determine the interconnection tariffs charged by Substantial Market Power (SMP) holders, but will only use these powers if the market parties do not succeed in negotiating their own tariffs. It furthermore monitors the tariffs of SMP holders to end-users. Finally, it has a number of responsibilities that require central coordination, such as the issuing of telephone numbers. In order to carry out these responsibilities, OPTA may investigate telecommunication companies and impose penalties during or after non-compliance with the regulations.

The British Oftel and its successor Ofcom had similar responsibilities in issuing licenses and keeping registers of them. It also had a duty, not only the right, to collect information about the market and to make it publicly available. As was shown in the court cases discussed, the Office also had an important role in interconnection disputes if negotiations ended in dispute.

The Dutch bus market regulators are located within the provincial bureaucracies, usually as part of the traffic and transport departments. Their two main responsibilities are to organize the tendering of concession contracts and the monitoring of public transport after the concession has been tendered. Their main function is to ensure a good price/quality ratio that fits the public transport objectives. The main quality elements here are the number and frequency of services and the quality of bus materials. They may also impose penalties if a concession holder does not comply with the contract agreed upon.

The British Public Transport Authorities had as main responsibility the efficient subsidizing of cost-ineffective bus routes. Under the new 2000 Transport Act, however, they also maintain some control over market entry. For example, in corridors where a PTA has invested money in roads and bus shelters, it may set quality standards for the buses and determine a driving schedule. The transport Commissions may sanction improper services.

All regulators mentioned enforce regulations on market access, the creation of a level playing field, and performance measurement. The sanctioning possibilities are also similar. The differences occur on two other aspects, namely the agencies' mission and the instruments they employ to achieve the mission objectives.

OPTA's mission statement is "to take care of competition and trust in the telecommunication sector in the consumer's interest." One of the legal duties is that OPTA is "to pursue a fully competitive environment." (Mansell et al., 1996) This

mission can be interpreted much broader than the specific responsibilities outlined in the previous paragraph. Promoting a fully competitive environment could mean that OPTA actively seeks to create a stable market environment for newcomers, because without newcomers the market would become a regulated monopoly. Ofcom also carries such a clause among its duties as outlined in the Communications Act 2003: “to further the interests of consumers in relevant markets, where appropriate by promoting competition.” This “promoting competition” clause is an important addition to the fairly limited tasks of regulating access and monitoring prices. It gives the telecommunication regulators the task of actively creating a level playing field. This task is far less specified than the other duties and gives the regulators an incentive to try other regulatory instruments besides those specifically described, as long as it is in the interest of promoting competition and therefore in the interest of the consumer.

Regulators in the bussing markets lack such unspecified clauses to promote competition. On the contrary, their mission is to guard the public interest by focusing on a quality/price ratio, rather than focusing on interesting more companies to offer their services.

These differences in mission and autonomy from the government also seem to have practical effects. In the first place, telecommunication regulators indeed employ different instruments to promote competition. Ofcom, for example, engaged in informal negotiations with the industry, rather than having public hearings. If the negotiations failed to succeed, the dispute was filed at the Monopolies and Mergers Commission, but this was an unattractive option both to the regulator and the industry, given the time and costs associated with such a procedure (Hulsink, 1999; Hall et al., 2000).

Secondly, and more importantly, the effects of the promotion of competition can also be observed in practice. Both telecommunication markets are characterized by a stable amount of competition between providers. This competition is completely based on regulation enforced by the agencies. A less strict enforcement style could have a devastating effect on the position of newcomers. In the bussing markets, there is only a small number of competitors, whereas it was expected that more firms would engage in competition. In the Netherlands, only three large parties have a position in the market and continuously compete for contracts. There is no way in which regional governments attempt to convince other market parties, such as private transport operators or other foreign companies, to participate in the bidding, other than sending notifications of the tender. In the British bussing market, five commercial providers

operate the cost-effective lines and hardly engage in competition. There is also little competition for subsidized lines. Within the London area there is no competition.

The main difference between telecommunication and bus transport regulators is thus that the former enjoy more autonomy from the government in actively creating competitive markets (regulation-for-competition), whereas the latter only operate within the strictly defined boundaries of regulations that were designed to guarantee a level playing field (regulation-of-competition). Equally important to this observation is that the telecommunication regulators have an incentive to use this freedom. As independent governmental organizations they want to perform as good as possible in order to put the organization on the map. It is important to these newly created agents to establish themselves as the center of the sector, as aids in fulfilling the organizations' objectives in order to justify their existence. Governmental departments have far less incentives to 'put themselves on the map' and to 'survive.' Independent agencies such as the telecommunication regulators therefore are likely to use the freedom that the law gives them in order to fulfill their missions. They will, in other words, actively explore their boundaries.

### 7.2.2 Rule-creation

The telecommunication regulators are as independent organizations part of the administrative system, but perform essentially legal tasks in regulating their sectors. Apart from enforcing regulations enacted by the legislature, they resolve disputes, for example on interconnection. However, autonomous regulatory agencies in the telecommunication sectors also perform other tasks besides rule interpretation. Most importantly, they create norms and procedures themselves. Just as courts create new rules sometimes by case law when they interpret a law in the light of a particular case, the telecommunication regulators also have this possibility to create norms by starting investigations and by taking decisions. Such norm-creation is only possible because the agencies possess a large amount of expertise about the sector. Often their employees were specialized telecom lawyers before joining the regulator. In telecommunication sectors, regulatory decisions (and judicial review thereof) are the main source of law. An illustration of this is that courts frequently note that the law is unclear on particular points or does not provide any regulation, so that the regulator had to develop its own approach. Perhaps the picture of a legislature that designs laws that are subsequently interpreted by agencies is incorrect. The major mechanism is

that agencies interpret the law, after which the interpretation is codified in amended legislation. In any way, telecommunication regulators are important rule-creators.

This creation of norms by telecommunication regulators is well visible in the regulation of technology. Since technological developments are difficult to foresee, there is no specific regulation on these issues. Developments in the telecommunication sector that have been difficult to regulate before were the improvement of Carrier-Select switches and of Pre-Select devices, interconnection switches, and more recently Voice over Internet Protocol (VoIP). The regulation that was developed for such technologies was by definition too imprecise to be applicable in practice. As a result, the interpretation of the regulator was in effect the first step in the creation of new norms. This also offers a chance for the agencies to pursue their missions of increasing competition. Officially, technological regulations are set up neutrally, i.e. no particular technology should be promoted over another due to regulation. However, regulatory agencies may, in interpreting the law, focus on technologies that promote competition. The implementation of improved CPS devices, for example, was actively supported by the agencies. They decided that the former incumbents should adapt to the new technologies as quickly as possible.

This mechanism, whereby regulatory norm-creation precedes legislation, is not confined to technology. Also in the determination of relevant markets for analyzing SMP positions, the negotiations on interconnection agreements, and the granting of excavation rights, regulatory agencies have made the first steps in the creation or specification of market regulations. Autonomous regulatory agencies therefore have the possibility to create new rules before the enactments of new laws.

Norms regarding the acceptable use of state powers had to be designed newly for reformed sectors. The type of regulation is, as was discussed before, completely new. Before regulators have any power to take decisions, they must first hold consultation rounds, establish accepted form of analysis, properly carry these out, and take a motivated decision. However, these new regulations have not led to increased competencies for the legal system. Courts have as much jurisdiction to review decisions made by traditional ministerial departments as they have on those taken by independent agencies.

The introduction of regulatory agencies also required new norms on the separation of state powers. A new balance had to be found between the work of the executive administration and the new agencies. This was a process that was also necessary in the bussing sectors, because these were new departments to be implemented in the governmental administration. Such norms could be said to transfer additional competencies to the legal system. The regulatory agencies take a

much more legalistic approach to the regulation of markets than the former bureaucracies did. As a result, it could be argued that after the introduction of regulators, the administrative system performs more legal functions and that therefore competencies have been added to the legal system. However, it is the question whether this is a direct effect of the introduction of regulatory agencies. There is no particular reason why agencies should, on the outset, adopt a more legalistic approach.

Another dimension of juridification was the expansion and differentiation of the law. It was already concluded that in the telecommunication sector, the regulatory agencies have been important rule creators. In the course of time, these rules have also sometimes differentiated. This has not been the case with technology regulations, but especially in the determination of product markets, regulations have indeed become more and more specific. This development is only partly influenced by the agencies. It is also the result of a strive of the market to have more certainty on the specific interpretation of rules created by the regulator.

Finally, the autonomization of regulatory agencies has also led to more conflicts in the telecommunication sector. This was the consequence of the aforementioned processes by which the agencies 1) had more freedom to pursue their missions 2) Had a number of less specified tasks and 3) had an incentive to pursue these missions. As a result, the telecommunication agencies actively explored their boundaries. This frequently led to disputes on the proper use of state power. A specific type of dispute exists, in which the right of the government to intervene in a market is questioned. In actively promoting competition, it may happen that independent regulators cross that fine line. It is stated that regulators must aim to create a level playing field, but the question how this may be accomplished is left open for interpretation. The law does not specify which powers may be used. Market parties may then complain to the regulator that it did not follow the correct procedures of intervening in the market, because the regulators lack the power of taking decisions in a certain area. Such disputes are on the procedural norms regarding the boundaries of state power. If the objection is not sustained, then the market party could refer the question to the court. Are such questions more frequently raised in markets regulated by autonomous regulatory agencies?

A number of particular cases that were discussed before could be used as evidence for an active exploration of boundaries by the regulator to which a market party complains. In (2003) *KPN v. OPTA*, OPTA placed an advertisement in which it claimed that consumers would almost always save money if they switched from KPN to another provider. Nowhere in the law was it stated that OPTA had or had not the

right to publish such claims. Since the law was unspecified and since the claim would clearly trigger some customers to switch, OPTA saw such advertisements as a good way to fulfil its mission of promoting competition on the market. OPTA could have published objective test results comparing the effects of different tariff structures for different types of customers, report these results, and make the numbers speak for themselves to the consumers. Instead, it chose an almost aggressive campaign as if it was KPN's competitor. And, from the viewpoint of competition, they are competitors in the sense that OPTA would like to reduce the former incumbent's market position.

Another example from OPTA was (2005) *KPN v. OPTA*, in which OPTA attempted to have KPN pay for the inspections that OPTA had a duty to carry out on its network. KPN would have to pay for inspections that could lead to its own punishment, according to OPTA. Argued from the other way around: If all market parties profit from a well maintained infrastructure, then why would only the network owner have to pay for its inspection? Fact is that the matter of costs was not specified in the law. OPTA chose to attempt to have the SMP holder and network owner pay for these, rather than all market parties.

More examples could be provided from both telecommunication sectors, each following this pattern: Unspecified regulation and an incentive to the agency to promote competition lead to conflict between regulator and former incumbent. In the bussing sector, such cases were very rare. This was not so much due to better specified law, because the initial Transport Acts were unclear on several points as well. Rather, the governmental departments in the bussing sectors had no incentive to more actively pursue competition and test in how far the legal boundaries would allow them to go in this mission.

### 7.2.3 Performance measurement of regulatory agencies

Since it was concluded that the incentive to promote competition is a driving force behind the conflicts between regulatory agencies and firms, it could be interesting to see how the agencies themselves look at their performance with regard to their missions. In particular, it would be interesting to see whether they evaluate their performance with regard to the number of conflicts they trigger.

The evaluation of the performance of telecommunication regulators is done in a comparative fashion by the ECTA (European Competitive Telecommunication Association.) The members of this association are telecommunication companies, often operating in several countries, that are challengers of the national former

incumbents. Therefore, they have an interest in the creation of strong regulators that closely watch anti-competitive behaviour by former incumbents.

Since 2001 the ECTA publishes its Regulatory Scorecard, in which it compares the performance of regulatory regimes in a large number of European states. The organization stresses that the scorecard is not only a measurement of the performance of regulatory agencies, but of the entire institutional frameworks that govern the national telecommunication markets. The research consists of a large questionnaire which is sent to all regulatory agencies. The evaluation of the results consists of three sections: “The overall institutional environment, the general market access conditions, and the regulatory effectiveness and competitiveness of key access markets and services” (ECTA, 2007). The institutional environment consists of the legislation, the regulatory agency, and the judiciary. Criteria on the basis of which the performance of these frameworks are assessed are the implementation of the European Regulatory Framework, the requirements for transparency, the powers of the agency to impose various types of penalties, the independence of the agency from political influence, the effectiveness of the appeals procedure, and the efficiency of the agency as dispute settler. The criteria for measurement of general market access conditions concentrate on technological neutrality, the existence of clear rules on margin squeezing, and the sharing of facilities. The effectiveness of implementation is measured using a large number of criteria, each counting for a small percentage in the final score, of an effective economic market, such as the number of customers that use alternative service providers than the former incumbent. The total checklist consists of 118 subquestions, the answers to which are scored on a 4-point scale. Such checklists are of course not perfect representations of reality. The authors readily acknowledge that they may have missed important criteria. Moreover, some criteria seem of less importance than others, even though they get the same weight.

The ECTA also makes a number of general recommendations on the basis of the findings. The harmful effect of long appeal procedures and the suspension of decisions by the regulatory agency have a prominent place on this list. The evaluation of the effectiveness of appeals procedures deserves some further elaboration in the light of this thesis on juridification after economic reforms. Six criteria are devoted to this topic. The overall idea behind all of them is that ineffective appeals procedures harm the regulatory regime. The reason, according to ECTA, is the uncertainty that plagues the market in case of suspended decisions and long waiting times before appeals are decided upon. This uncertainty results in an extra hurdle for newcomers on the market and could have retroactive effects, in the sense that an appeal can be honoured several years later. The first criterion is whether decisions by the regulator

are automatically suspended at the moment they are challenged in court. The second criterion, which only applies if the first criterion is not applicable, is whether a competent court is generally restrictive in deciding upon the suspension of a regulatory decision under appeal. A strict standard for suspending decisions, for example that suspension is only possible under conditions of irreparable harm, is valued higher than a lax standard. The third criterion is the time required to process an appeal. A maximum score is given if the appeal takes less than a year to decide upon. The fourth criterion is the number of market analyses against which an appeal is filed. These market analyses include the determination of substantial market power and are frequently the target of appeals because of the large implications to SMP holders. The maximum score is only achieved if less than 25% of the relevant market analyses are appealed against. The fifth criterion subsequently determines how good the decisions were from a legal perspective, because it measures how many decisions were annulled after the appeal. The sixth criterion measures in how far interested third parties may appeal against decisions taken by the regulator. This sixth criterion is interesting, because it is a bit contradictory to earlier statements in the report. Appeal procedures are clearly not valued, because they create uncertainty. However, under the last criterion it is valued maximally if third parties are able to file an appeal against regulatory decisions. The logic behind this is that the possibility to appeal against regulatory decisions that affect the former incumbent will improve the chances for survival to newcomers on the market. However, the result is that there are more instead of fewer possibilities for appeal against decisions. Based on these criteria ECTA also makes a number of recommendations, such as the limitation of the time-frame required for appeals procedures, for example by installing specialized courts.

<b>Table 7.1: Summary Results of scores, ECTA Regulatory Scorecard 2007</b>				
<i>Country</i>	<i>Institutional Framework</i>	<i>General Market Access Conditions</i>	<i>Effectiveness of Implementation</i>	<i>Total Score</i>
UK	129	122	138	389
Netherlands	127	127	134	388
Denmark	120	97	124	341
Norway	112	92	120	324
France	116	77	111	304
Spain	112	62	112	286
Portugal	109	49	127	285
Italy	112	82	91	285
Sweden	98	69	114	281
Finland	92	64	115	271
Austria	92	62	114	268
Ireland	120	67	74	261
Germany	77	82	101	260
Hungary	105	58	88	251
Slovenia	105	54	90	249
Belgium	56	64	108	228
Greece	102	39	79	220
Czech	109	30	64	203
Poland	73	54	70	197
<i>Source: ECTA Regulatory Scorecard 2007</i>				

The Dutch and the British telecommunication sectors enjoy comparatively very good regulatory frameworks, according to the ECTA scorecard (ECTA, 2007). In fact, the two countries are ranked first (UK) and second (Netherlands).

The ECTA especially praised the integrated approach toward the various electronic communications markets (fixed, mobile, broadband). The Netherlands is the top-performer on the criteria of market access, while the UK scores highest on the effectiveness of implementation. On the points relevant to this thesis, namely the effectiveness of appeals procedures, the Netherlands scores maximally on all but one category. That weak spot could perhaps already be predicted from the previous chapters, namely that more than 75% of the decisions (regarding market analyses),

were challenged in court. It should be noted that less than 25% of these appeals succeeded, which on the one hand indicates the strong legal robustness of the OPTA decisions, and on the other hand the tendency of KPN to challenge every possible decision. The United Kingdom scores even better on these indicators. Only the time-frame between appeal and final decision is over one year on average.

Some of the criteria on the effectiveness of appeals procedures have remained the same over the course of years. In the UK, this trend reveals that the percentage of appeals against decisions has always been extremely low, namely under 2% since 1995. Also the time-frame required to handle such appeals has always remained low. The relatively high score in the 2007 assessment was the median of only a few cases. In the Netherlands, the number of appeals has always been very high, from about 80% in 2004 to 100% in 2007. Since market parties use every possibility for appeal, it seems that the revision of the Dutch telecommunications act, leading to the new act in 2004, was a right decision. The major difference with the previous act was that the possibilities for appeal were limited by a significant degree. According to Ottow (2006) the new system “correlates better to the specific regulation of this market.”

The median time-frame required to handle these appeals has declined from 18 months to 11 months. Contrary to the UK, the number of appeals was high in the Netherlands, so this decrease can indeed be marked as a trend toward faster appeals procedures. OPTA in a reaction also indicated that it aims to improve further on this point. It therefore seems that the measurement of performance has at least some effect on the daily operations of regulatory agencies in the telecommunication sector.

In the bussing sector, such performance measurement is largely absent. The reason is that public transport markets are far less comparable across nations. Although the regulations in telecommunication markets differ across countries, all European member states have implemented more or less the same institutional framework. In the bussing sector, many different institutional frameworks exist, from free competition in some parts of the UK to the integrated model in Germany and from the public-private partnerships in France to regional concession tendering in Scandinavia and the Netherlands. Due to the lack of comparable elements, there are very few handles to introduce a regulatory assessment at the European level in a similar fashion as the regulatory scorecards for the telecommunication markets. There is, however, a large amount of transparency with regard to the concession procedures in the bussing sectors. Governments publish results of their tenders; of course a bit more prominent if the offers were good. They also maintain statistics on the number of passengers. However, due to the many different ways in which concession contracts are structured, from a focus on the lowest price to the delivery of better

services for a particular budget, there is still no possibility for comparison across regions. Regions therefore only compare the results to tenders in previous periods.

The main conclusion to be drawn from this paragraph is that, depending on how the criteria on performance measurement are set, regulators are interested in promoting competition though also in preventing disputes.

## **7.3 Courts**

### 7.3.1 Impact of judicial decisions

In 4.3.2.1, an important conflict in Noord-Brabant was discussed. In March 2004, the Province of Noord-Brabant started preparing for a tender in which public bus transport for almost the entire province would be tendered in one batch. Only in October 2006, two and a half years, two tenders, and two judicial procedures later, was the procedure finally finished. A committee of members of the Provincial States (the provincial legislature) investigated what went wrong. The conflict itself was already discussed in chapter 4, but one of the committee's conclusions is interesting because it stresses the impact of the possible threat of judicial review: This threat stimulates organizations to pre-consider such a review, formalize procedures, and implement a litigation strategy. First, it might be useful to introduce the case at greater length than was done in chapter 4, where the focus was only on the calculation model. Afterwards, this mechanism is also discussed for the other sectors.

Already in the preparatory phase of the first tender, several risks were taken. One was to work with a tight schedule. It would turn out that much external expertise on legal and financial matters was required and that the governmental organization had not enough time to implement all these advices alongside the expected advices given by local governments and transport companies. In the tendering phase, starting April 2005, several questions were raised by the transport companies. In answering these questions, additional legal advice was required. However, one question was not answered. This question regarded the possibilities for manipulation of the calculation model as used during the tender. The Province put this question aside because it was sent in after a formal deadline. It later turned out that this question was meant as a signal by one company that the tender would give rise to problems. Indeed, after the offers had been made, it turned out that one company has 'exploited' the possibilities of the calculation model. That particular bid by BBA was laid aside, against which the BBA filed a case at the court. That case was discussed before in chapter 6 and the

verdict of the judge was that the decision should be reversed. He left it to the province to determine how to continue the tender. After again seeking external legal advice, the province decided to start a new procedure and to evaluate the first tender in order to learn from it. The contract with the concession holder was therefore extended by another year, after which there was no possibility for further extension. There was also the possibility for granting a concession for one year by private contract, which could later be extended for another year. Three separate legal advices pointed this out as the best option, but the Provincial Executive was afraid that new appeals would be filed against such a decision. As a result, the concession period ended 1<sup>st</sup> of January 2007, after which the new concession had to start.

In the preparation phase for the new tender, the province decided to have the tender assisted by a group of external advisers on legal, financial, and transportation issues. After the offers had been made, it turned out that Connexxion had offered an extraordinary low price. The offer was based on a discount factor in case of additional work. Connexxion offered these additional services for an extremely low price. The team that evaluated the offers contacted Connexxion and asked whether they were aware that their offer could lead to extremely low subsidies per distance. Connexxion representatives answered that they were aware of this, but also indicated that they believed that the calculation model as used in the tender would not be used after implementation. They qualified the model as “quite absurd” and open for manipulation. The governmental representatives react that it remained to be seen whether the model itself or Connexxion’s interpretation of the model was absurd, but that the model would also be used after implementation. Later, Connexxion sent a letter in which it claimed to have made a mistake. The factor for additional work was a writing error and should have been interpreted as a percentage (thereby reducing the discount offered for additional work.) The Province’s legal adviser argued that it was unlikely that the passage from the offer could be marked as a writing error, but insisted that there was a large risk involved in not putting the Connexxion offer aside, because it was unrealistically low. The Provincial Executive then decided to grant the concession to Connexxion, including the extremely low factor used for additional work. More than a month later, Connexxion reacted that this situation would have unacceptable consequences for the company. It proposed to adjust the discount factor to an acceptable degree, but the Provincial Executive refused this. In the mean time, Connexxion was not prepared to order new buses and to negotiate with the trade unions on the transfer of personnel. The trade unions increased the pressure on government and company to find a solution, in order to have certainty for the personnel. Connexxion and Noord-Brabant also wanted the situation to be clear and

decided to ask for judicial opinion. This is therefore a case that is filed by both parties to gain certainty. Connexxion, however, refused in any case to start its services at the starting date of the concession period. The government then decided to open negotiations with all transport companies that made an offer to find a solution. Under high pressure of the labor unions, the government decided to withdraw their decision and to grant the concession to BBA/Veolia, the next best tender.

The provincial committee drew a number of conclusions from the investigation. With regard to the relationship between parties, the members of the committee concluded that there had been a general lack of trust of the government in the market parties. They also concluded that this attitude was not always justified. At several moments during the two tenders, transport companies gave well-intended advice, but these did not fit the strictly legal way of thinking that was applied in the tendering procedure. With regard to the law, the conclusion was drawn that many different laws applied, from the Passenger Transport Act 2000 and the laws on tendering to the General Public Law Act.<sup>5</sup> This created a complex and unspecified legal framework for the tendering procedure. The high frequency by which external legal advice was necessary was largely caused by this complexity.

With this degree of indeterminacy, the judge had a large influence on the market. In the preparation of a tender, governments aim to translate the transport policy objectives into legal criteria for the evaluation of bids. However, when the bids are placed and evaluated, only those criteria count and not the objectives behind them. Bids are not to be evaluated on the basis of their realistic implications, but on the basis of their correctness according to the calculation model. Take the offer that was made by BBA in the first tender in Noord-Brabant. The offer was clearly not the economically most advantageous offer from a common sense perspective, as its acceptance would imply a doubling of the budget. Yet, according to the judge, it was the most advantageous offer in legal terms, because it got the best score according to the calculation model. As a result, the government needed to hire an additional set of legal advisers to improve the calculation model. The companies also started to invest more time in the analysis of the calculation model, for there might be another hole in the model that could be used to their advantage. As a result, the realistic implications of the model became less important.

Then, the committee made a number of recommendations for the future, as a reaction to the observed juridification in the sector. One observation was that the province had no litigation strategy during the procedures. In other words, the province only started to think about dispute resolution the moment that a dispute arose. The

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<sup>5</sup> Algemene Wet Bestuursrecht

advice was to anticipate on conflicts and determine how to react beforehand. This would not only speed up the procedure, but also would provide legal advantages. If all actions and decisions were taken with the idea in mind that a conflict could occur, all people involved in the decision-making process would be more likely to weigh the legal advantages and disadvantages if they would have to defend the decision in court. This pattern, in which the fear for a legal check leads to an increased focus on ex ante legal correctness in both public and private organizations, was observed as a more general trend in all sectors and in all market parties. Both regulation and engaging in competition became increasingly a legal-technical exercise.

Although there is not such an excellent illustration of the impact of judicial decisions available from the British bussing sector, judicial decisions there, too, result in an increased focus on following the complex legal procedures carefully (cf. James, 2007). This becomes visible in two ways. In the first place, it can be observed in the measurement of performance of transport companies. There are few public interest regulations that British bussing companies have to comply with. They may, for example, design their own driving schedules. However, after these schedules have been drawn up and approved, the company has to work according to these schedules. Busses may not leave too late or not drive at all if the schedule required that they do. Transport Commissioners are responsible for enforcing these regulations, but their task is becoming increasingly complex after the court did not accept the methodology used. See for example (2004) *Shamrock Coaches v. Department of Transport*, in which the Traffic Commissioner of the Welsh Traffic Office accused a bus company of not holding to the schedule. He stated that: “Out of the 477 journeys monitored, he found that 25 per cent had failed to run at all and 13 per cent had failed to run on time. A journey failed to run on time if it was more than five minutes early or late. Six journeys had operated unregulated.” He concluded therefore that 39% of the journeys were not in order. The accused company did not accept these accusations on a number of grounds, the most important (for the argument of this section) of which was that the Traffic Commissioner had used a flawed methodology in looking at the evidence for his claims. He had organized a three-day hearing in which evidence against the company was presented, but had apparently not taken the excuses carefully enough into account. The Transport Appeals Tribunal, where the company appealed the Commissioner’s decision, ordered that the hearing should be re-opened. The Commissioner then wanted to organize a hearing specifically on the excuses of the company for its malperformance, but the company demanded a complete re-hearing. It also wanted to replace the Commissioner by another one. The Commissioner refused these last demands, feeling that he had to deal with the case himself, but

reopened the hearings and once more, with greater care and precision, went over the excuses made by the company for the problems in service. He was also frustrated by the plaintiff, who refused any cooperation. Still not satisfied with this repetition of the procedure, Shamrock appealed for a second time, but the judge agreed with the Commissioner: “In my view this was not a case in which justice required that the matter be transferred to another Commissioner. It is true that the Commissioner's second decision was not very different from his first. He found it difficult to conduct a more detailed analysis and his second decision could also be said to have been reached by the application of a broad brush. In my view that is, to a large extent, inevitable in cases of this kind. If it is not possible to relate specific excuses to specific irregularities it will be difficult for the Commissioner to do other than to apply a broad brush.” Shamrock then even appealed to the High Court, claiming that the Commissioner had not followed the procedure correctly. He had failed to advertise the second hearing, while public inquiries must always be advertised. The Lord Justices did not agree with the plaintiff, because the second hearing was not a separate hearing but a continuation of the first. In the verdict, the Lords Justices complimented the Traffic Commissioner: “In my view, the Commissioner's decision to continue with the second hearing was plainly right and the Transport Tribunal was right in upholding that decision.” However, the case also shows how precise procedures have to be followed by regulators and that they have to anticipate that their actions could be reviewed in court. They have to bear this in mind while doing their job and therefore take a more legal approach to their work.

In the Dutch bussing sector, tendering governments have to monitor the performance of their service providers as well, but this has not led to judicial conflicts. The reason is that in the UK there are many small companies, which is a situation more complex to monitor than in the Netherlands, where there is only one company in a certain area. Therefore, taking judicial review into account is important in both sectors, but in different ways depending on the market structure.

In the telecommunication sectors, similar processes were observed, although the regulatory agencies in these sectors were already much more prepared for the impact of judicial review before actual conflicts occurred. This was for two reasons. In the first place, the regulation of telecommunication was much further developed in legal terms. The documents produced by Oftel and OPTA were already of higher legal standards than the first tenders organized in the bussing sector. One regulator in the bussing sector qualified the first documents in hindsight as “utterly naive,” whereas regulators in the telecommunication sector noticed a general satisfaction with the legal level of the first published documents. The second reason was that the

autonomous telecommunication regulators could adopt the strategy they desired and estimate the implications of their decisions. Long before actual decisions in the both the Dutch and the British sector would be published, the regulators were aware that the former incumbent could challenge them in court. This made that they were prepared and took measures beforehand. These measures were the same as those that would and will be adopted in the bussing sectors, namely a permanent presence of legal specialists and the determination of a litigation strategy long before actual conflicts emerged. The result in all these sectors was therefore similar, yet they were reached in different ways. In the telecommunication markets, juridification of procedures had already taken place beforehand, in the Dutch bussing sector, this was the result of the impact of judicial review.

### 7.3.2 Specialization of courts

Just as agencies and commercial legal specialists specialize in particular areas of the law, the judiciary sometimes adapts to societal needs. Changes in the court service's organization are normally a reaction to the demand for particular services, so that they could be an indication of a growing importance of a particular type of law.

The legal systems of both countries in this study have set up a specialized organization for appeals against regulatory decisions. The clearest example is the United Kingdom, where the Competition Appeals Tribunal, erected in 2003, deals with all competition-related issues. Within the telecommunication sector, the tribunal treats not only competition cases, but also appeals against regulatory policies pursued by Ofcom. It does so in a different way than the High Court did before the CAT was erected. The High Court tested regulatory decisions strictly on the basis of the law, taking a correctness approach. CAT aims to judge the regulatory decisions on their merit, thereby taking more a reasonableness approach. The reason is that the tribunal wants to see the relatively new competition and telecommunication laws develop in their own context (Sawyer, 2006). The CAT's board consists not only of lawyers, but also of economists and accountants. According to Ottow (2006) this benefits the expert assessment of appeals matters and should be considered by the Dutch College for Commercial Appeals. There have not been any cases by or against actors in the bus services at the CAT.

In the Netherlands, the specialization of the court on competition issues is less clear. Such issues are dealt with by the aforementioned College for Commercial

Appeals<sup>6</sup> in The Hague. This college is part of the administrative law system and handles all cases by companies against governmental decisions, including those against regulators. Both in telecommunication and bus services, the majority of cases indeed took place at this court. However, the reason for reorganization was more to increase efficiency than to take a different judicial approach in reviewing regulatory decisions, such as was the case in the United Kingdom.

## 7.4 Legal services

Important suppliers of juridification are the legal experts working in law firms or within the companies or governmental departments. It was concluded in chapter 2 that the market for legal services has increased by double digit percentages over the last decades. Given the fact that the market reforms have caused a number of additional disputes, it is logical that also in the utilities markets, legal advisory services have boomed.

What role do lawyers and legal specialists themselves play in the process by which formal legal institutions increase in importance? As they work on a commercial basis, it is logical to assume that legal advisers aim to develop their business further. Through marketing, they could actively promote their interests. However, a more subtle and more important mechanism is that of ‘colonization.’ Legal specialists bring with them their own language and culture to the economic sector. This language and culture are formal and adversarial. If one organization starts this process, then other parties have to follow in order to survive in a competitive sector.

### 7.4.1 The market for legal services

The need for legal specialists rises in case of intransparency, which occurs when laws and the procedures of the legal system become too complicated to be fully understood by people not trained in law. Such a development need not place courts in a more influential position, as long as each party hires legal specialists to represent their interests. This specialist will be able to act as an intermediary and explain all legal language. Therefore, many actors in reformed markets regularly hire legal assistance.

In all four markets, there were in fact very few organizations, of any kind, that were not assisted by legal specialists on a regular basis. In the telecommunication

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<sup>6</sup> “College van Beroep voor het Bedrijfsleven”

sectors, all market parties and regulators employ their own legal specialists and have connections to specialized lawyers that could represent them in court. In the bussing sectors, all major companies employ legal specialists. Government institutions have civil servants trained in general law and may hire specialized lawyers. The interest groups in both sectors, particularly trade unions and employers' associations, are well aware of the importance of the law and employ their own specialists. The only group of litigants that was clearly not assisted by legal specialists on a frequent basis were citizens appealing decisions about public bus transport. It might be recalled from the previous two chapters that such cases rarely succeeded. The explanation here is indeed that the complaints were often not filed on a proper legal basis. Given the reason these appeals were often dismissed, namely a lack of legal grounds, it is questionable whether a legal adviser would have brought the matter to court.

The services traded on the market for legal advice are all forms of assistance in legal matters. These services can range from checking whether a legal document contains no writing errors to taking pleas in the courtroom. Any of these tasks requires a certain amount of legal knowledge. Apart from specialization in a particular legal field, the most important aspect of the service sold by legal specialists is certainty. Since our European economies and societies are framed in a legal system, it is important to secure certain actions by putting them in legal terms. Examples are contracts, memoranda of association, etc. The assistance provided by the legal expert is comparable to translating a text into another language, only the language is the legal language as spoken and written in the legal system. Like a translator, the lawyer must understand the content and context of the matter to be legalized.

Legal advisers can be categorized with regard to their function in the legal system. In the first place, a distinction should be made between lawyers and other legal specialists, because only the former can offer the service of representing their clients in the courtroom. Furthermore, a distinction should be made between internal and external specialists. Internal specialists are employed by a market party and form part of the hierarchy of its organization. External specialists are organized in law offices or advisory firms. They are called upon if organizations do not have place for a permanent legal counsel, require a uniquely specialized adviser, or require a lawyer to represent them in court. Stagecoach, for example, has only one in-house legal counsel for the entire company of 30.000 people (Taylor, 2008). This lawyer regularly instructs at least five different external law firms.

The most important feature of the legal services market from an economic viewpoint is the information asymmetry that exists between buyers and sellers of legal services. The buyers, individuals, companies, interest groups, agencies, etc.

either want a safety check that their actions comply with the law, require assistance in a legal dispute, hope to prevent conflicts, or hope to get in a favorable position in a possible future conflict. The information asymmetry is particularly encountered in the latter type, assistance in legal dispute. Recalling Genn's paths to justice, a party that is involved in dispute has the option of ignoring the dispute or to make a case of it (Genn, 1999). Only after this choice is made in the model, two other choices are made on the hiring of legal assistance and on starting a court case. In practice, legal advisers are already involved in making the first decision. They estimate in how far a dispute could end in victory before the court, even before the decision to ignore the problem is made or not. If the specialist believes there is a chance of winning a potential case, he or she could advise the client to notify the other party that a conflict is present and that at least one party will not give in. However, in this stage of the conflict, the information asymmetry is not problematic yet. It is in the interest of both adviser and client to act in the best interest of the company.

This could be different in the decision to go to court or to find alternative solutions. The legal advisers have an interest in solving the conflict by legal means, i.e. through a legal arrangement or by means of the court. It could well be in the better interest of the company to settle the dispute through an alternative mechanism, but no information is available to the client to determine so. However, such claims are difficult to test and many lawyers will always advise in their clients' best interests, for example by referring to alternative dispute resolution methods. An interesting additional feature of this market for dispute resolution is that if one party starts a court case and is aided by legal specialists, the other party has no option but to follow. The supply side for legal advice is therefore characterized by a lever: Hiring one expert almost always necessitates the hiring of another.

However, also on compliance issues, there is an information asymmetry. Clients that hire legal assistance to make sure they comply with the law are unable to tell in how far their current practices are in compliance. After all, if they did they would not require assistance. The buyer of legal expertise thus does not know whether the hiring of legal assistants is required or not. Also in this market, there is leverage to a certain degree. If several market parties hire legal assistance, it will sooner or later occur to the other parties to do so as well.

### 7.4.2 Supply

The legal specialists themselves have also adapted to the changes in market reforms. These changes are most visible in the different specializations of lawyers and advisers in particular fields relevant to the reformed markets. Especially telecommunication law has emerged as a specialization. It was already noted that the companies in the telecommunication sectors are returning customers to the same law firms. This is the result of the presence of specialized lawyers in that particular firm. The important litigants in the telecommunications are all repeat players and hence the law firms tend to develop a long-term relationship with them and offer specialized services (See Galanter, 1974). Legal consultants confirmed in interviews that they profit from the market liberalization and especially from the large increase in complex regulation and case law.

Several universities offer courses in telecommunication law, not seldomly taught by legal counsels from telecommunication firms. All in all, there are several connections between legal counsels, legal researchers, teachers at universities and lawyers, which is a strong indication that telecommunication law has been put on the map as a separate field of law, but that the number of specialists that combine training with experience is small and closely interlinked. This holds for both countries, although the development took place much earlier in the United Kingdom. The amount of specialists and universities that offer courses in the field is also much larger there, likely due to the magnitude of the sector. Yet, no consultancy firms specialize in telecommunication law only.

The situation in the bussing sectors is very different. There are no particular courses in public bussing law, and very few in public transport law. The majority of people working on the supply side of legal advice in the bussing sector have specialized in transport law or public law. Only a limited number of lawyers offer particular services regarding cases on bussing. On the other hand, several lawyers are organized together with transport scientists and other consultants in advisory firms that offer full services to companies and governments, including legal advice.

There are several factors that explain the different organizational forms found in the two different sectors. The greater demand for legal services in the telecommunication sectors is largely due to the greater financial size of the market. However, the supply of legal services has chosen a different form of organization. Lawyers specialized in telecommunication law have been able to focus exclusively on legal services. It was possible in this sector to see the legal work as separate from the rest of the business. Lawyers were only called upon in case of a conflict. Legal

experts in the public bussing sector have chosen to offer their services in combination with other specializations, because their tasks are never carried out separately from other advisory services. The moment a contract is put up for tender, all parties need legal advisers, but also traffic experts, technology advisers. Being able to offer the full range of services is considered a large advantage in the bussing market, and therefore lawyers and other experts have combined their expertise in advisory firms on public tenders. Legal advice in telecom is less tightly connected to other expertise, such as technology.

#### 7.4.3 The role of independent experts in conflicts

Independent legal experts often play a role in disputes. In some of the cases, the verdict reached by the judge was partly based on the opinion given by such experts. This phenomenon occurred in all sectors. Experts play different roles in the different sectors.

In the bussing sector, they are involved in creating calculation models, for example in the cases on employees' rights and obligations, and in gathering information. This latter task is usually performed by accounting offices. The creation of calculation models is a task for which objectivity is required, but just the fact that the information is gathered by an external accountant is for all judges and market parties enough reason to assume that it is indeed objective.

This is different in the telecommunication sectors, where often both parties hire their own experts to construct a calculation model. The case then sometimes ends in an 'experts' debate.' Legal experts in these cases are far more often hired to use their knowledge to defend one side in a case, whereas in the bussing sector there is often only one independent expert.

### **7.5 Analysis and conclusion**

The role of the legal system in the process of juridification after economic reforms is important in multiple respects. The analysis of the role of the various legal institutions (regulatory agencies, courts, and commercial legal services) in selected reformed sectors shows that the legal system has had a profound impact on the daily operations of market parties. The most general conclusion to be drawn is that the law has assumed a far more central place in these daily operations and that this is caused by

the way in which the legal system responded to its task of administering the new market regulations after the reforms.

Regulators were called the market governors in the first instance. The regulators have in some cases contributed to juridification, by adopting a legal-technical style of regulating. However, this was also under the influence of the courts.

The courts are the market governors in the second instance. Court decisions have had a high impact not only on the parties that were directly interested in the case, but on the entire sector. They are the only body for appeal against regulatory decisions and therefore any market party that wants to settle a dispute with the regulator in a formal way has no other option but to file a case. The court checks whether the correct legal procedures that underlie the action or decision were followed. As a result, there is an increased focus within companies and regulatory agencies to work according to legalized procedures. A focus on correct procedures in the courts leads to a focus on correctness in the regulators, the companies, and their legal advisers. This has increased juridification of the sectors further.

This trend has led to a third type of legal market governors, the legal experts that assist companies, regulators, and interest groups with legal advice and representation in court. It was noted in particular that the market for advisory services has increased in all sectors. Lawyers are not only hired at the moment of conflict, but are involved in daily operations at an earlier point in time so that they may advise on the prevention of conflicts, as well as be up to date with the case if a dispute is unavoidable nonetheless. Companies rely increasingly on legal counsels and experts in strategic decision-making. In heavily regulated sectors, such as the telecommunication infrastructure market, the correct use of the law may determine success or failure in the industry. Especially in the bussing sector, it was also noted that the legal experts brought in the norms and values of the legal system, such as precision and adversarialism.

This introduces the similarities and differences between the four markets studied. The independence of telecommunication regulators has certainly had an initial effect. The political autonomy allowed these regulators to more actively pursue their missions of improving market competition. This has initially increased juridification in telecommunication, because market parties challenged decisions in court. However, in the longer run the effect was the same in all sectors. In all sectors, actors relied more on legal norms and the experts that specialized in them. This development was similar to the telecommunication sector where almost all regulatory decisions were challenged to the bus sector, where the regulators only recently acquired somewhat larger governing powers.

The main general conclusion that can be drawn from this chapter is that the supply of various legal arrangements (adjudication by regulators, specialized and efficient courts, specialized commercial legal services providers) has enhanced the juridification of these liberalized sectors.

## **8 Evaluation of the economic consequences of liberalization**

### **8.1 Introduction**

In the previous chapters, a number of developments following market liberalization was described and explained. It was concluded that liberalization leads to an increased importance of formal legal arrangements in the governance of liberalized sectors. The developments as described in chapter 3 and further could be summarized in the following causal chain of developments: Liberalization leads to more markets, more actors on these markets, and thereby to more relationships. This means that there is an increase in transactions and this increase alone leads to a greater occurrence of conflicts. However, these relationships are also of a more formalized nature, because these are relationships between competitors or between companies and regulators instead of relationships between governmental organizations, which increases the likelihood that conflicts will be settled in a legal way. Furthermore, liberalization leads to more risks and uncertainties and to more strategies to reduce these, which eventually leads to more conflicts and to a more formal legal way of settling disputes.

#### 8.1.1 More markets and more market parties

The creation of more markets, more market parties engaging in competition on these markets, and increased competition, implying uncertainty to these market parties, were all expected consequences of liberalization. Therefore, these are the developments that were often evaluated in the past by governmental institutions.

The advantages of the break-up of hierarchies into markets and the increase in number of market parties, i.e. of introducing and increasing competition, were already described when discussing the motives for liberalization. Summarizing, the introduction of competition in public services sectors was expected to lead to lower prices, higher service levels, and more flexibility because there is more choice for consumers. There may also be a number of disadvantages to the introduction of competition. Competition could lead to a decrease in quality if it is difficult for consumers to judge the quality of services. If there are many competitors or if firms use various tariff structures, it could also become unclear to consumers which offer is the best option. Consumers may even decide to choose sub-optimally and not be interested in the best deal (Schwartz, 2004). Finally, the position of employees could

be weakened as they lose their job security. The evaluations of liberalization in the studied sectors have mainly focused on the advantages and disadvantages of these intended consequences.

In the Dutch telecommunication sector, an evaluation study was carried out by the Ministry of Economic Affairs in 2008. Using new analyses and plug-ins from previous reports, the quality of service, accessibility of services to consumers, and working conditions were evaluated. Quality was operationalized as variety of choice, freedom of choice, and consumer satisfaction. Accessibility was measured as speed by which a new connection is created, the number of infrastructures, and of course the price for final consumers. Efficiency was judged on the basis of value added by market parties. Working conditions were judged on the basis of the level employment, level of salaries, and fringe benefits of employment. The most important positive conclusions were that consumers value the increased choice of different subscriptions and that the price of calling has been halved for national calls and has decreased by about 90% for international calls. A neutral development was that the value added had remained more or less the same: Prices have decreased but the use of services has increased. An ambiguous development would be that the terms of employment have been under pressure due to the privatization of KPN. This could be seen as a negative development, as liberalization is apparently bad for employees, or a positive one, because salaries are more flexible and have been brought to a more efficient level (TNO, 2002; Berenschot, 2007; TNO, 2007; Ministerie van Economische Zaken, 2008; Regioplan, 2008).

A similar study was carried out for eleven other Dutch sectors, among which the bus sector. The criteria for evaluation (quality, accessibility, efficiency, and employment) were similar (Ministerie van Economische Zaken, 2002, 2008). The researchers compared those parts of the market that were governed by means of a concession system (most regions) with those parts of the market that were not put on tender but instead granted by private contract (four main cities and a few regions).

The main conclusions were that consumer satisfaction had increased in the concession regions, but that the price was still considered too high. The number of scheduled hours had increased in the concession regions, whereas it had decreased in the other regions (NEA, 2005). This was of course evaluated as positive, but it was also pointed out that these increases had been in urban areas whereas in rural areas the number of services had decreased. Efficiency had increased, because governments saved on average 15-20% on subsidies given compared to the situation before the concession system (Berenschot, 2004; MuConsult, 2004). In private contract areas

this was only 5-10%. The employment level had decreased, partly because of efficiency gains (AIAS-UvA, 2007).

Since the British liberalized their sectors before many other countries, evaluations were often carried out by comparing the UK with the performance of other countries on various indicators. This was done systematically for many sectors, including telecommunications and public bus transport, by the OECD (Hoj et al., 1995). For telecommunications, the evaluation was based on price level and productivity growth. On both evaluation criteria, the competitive environments, including the UK, scored better than non-competitive countries. These results were confirmed by Florio (2003), who calculated that the price of telecommunication services declined sharply relative to the general price level in the UK. Value added by BT as a privatized corporation also increased compared to the general economic trends. Consequences for employees were not part of these analyses.

A large evaluation report on the British bussing sector was issued by the House of Commons Committee for Transport, Local Government, and the Regions (2002). The liberalization policy was evaluated on many criteria, including bus usage, operating costs, number of journeys, fares, and reliability. Several positive developments were listed. For example, the operating costs per kilometer fell by 46 % over a period of 15 years (1985-2000). Also, consumer satisfaction with quality increased and remained at a high level (National Statistics, 2007). However, most developments were ambiguous or negative. Wage levels dropped significantly over the same period. Fares increased significantly in real prices and were higher than in comparative countries such as Germany. Also a number of real problems were encountered. It was concluded that on-the-road competition caused uncoordinated services, instability of the network, and restrictions on ticket use. The reliability of services was very low outside London. In tendered areas there were also problems as the costs of tendering increased. Finally, public transport was not available for a number of social groups.

All reports discussed go into the evaluation of competition much deeper than can be summarized in table 8.1.

<b>Table 8.1: Summary of the effects of liberalization on accessibility, efficiency, consumer satisfaction and employment. + = positive, +/- = ambiguous, - = negative development</b>				
Sector	<i>Accessibility (price and availability)</i>	<i>Efficiency (value added / subsidy required)</i>	<i>Consumer satisfaction</i>	<i>Employment (level and terms)</i>
Telecom NL	+	+	+	+/-
Telecom UK	+	+	?	-
Bus NL	+ (price and availability in urban areas) - (availability in rural areas)	+	+	+/-
Bus UK	-	+	+	-

Although the conclusions are sector specific, it can safely be concluded that the direct consequences of liberalization are largely positive, but that there are also drawbacks. They are more positive in telecommunications than in the bussing sectors. The developments are more negative for British than for Dutch employees.

### 8.1.2 Greater formalization of relationships

It was concluded that the previous developments not only led to more (potentially conflictuous) actors and hence to more relationships, but also that the nature of these relationships has changed. In particular, several of these relationships became more formal, they were increasingly specified in contracts in order to reduce uncertainty. Also the relationships between firms and regulators are increasingly subject to formal legal procedures.

Formalization, too, has advantages and disadvantages. On the one hand it can be viewed as a positive development. Parties know beforehand what to expect from their partners in business or from the institutions that govern them. Also, if one of the parties does not live up to the contract, there are clear consequences spelled out in the agreements made beforehand. This was also the view of most of the interviewed parties (consisting of Dutch lawyers and regulators) consulted for this study. They

viewed formalization as a good and necessary development as part of the professionalization of their sector. This held both for the contractual agreements (especially in the bussing sector) and the transparency and objectiveness of procedures to be followed by the regulators (both sectors).

Yet, there are also several disadvantages to formalization that were less frequently mentioned during interviews. In the first place, reducing uncertainty by introducing new contracts or procedures may cause controversy over the interpretation of these legal documents.

In the second place, more formalization also meant that the benefits of informality are reduced. If parties engage in formal relationships, it is less likely that they will solve disputes without the interference of a third party, which could be regarded as a disadvantage.

In the third place, formalization brings costs with it, transaction costs (just as the first argument, which also leads to transaction costs). Contracts and procedures have to be drawn up by legal specialists who often have a university education. Hiring such specialists is a transaction cost for the organizations which require a formalization of their relationship.

Formalization is, in short, a necessary evil. If it were not required to formalize relationships it is not likely that many actors would do it. However, if necessary, it can help in reducing risks and uncertainties. Apparently there was a need for this uncertainty reduction in the liberalized sectors, as many interviewees indicated that they would prefer relationships to become even more formal in the future, because this increases transparency and predictability.

### 8.1.3 More conflicts

An increased number of conflicts is sometimes perceived as a bad development, even if these are not legal conflicts. Conflicts mean that there are problems with cooperation between parties and they cause uncertainty over the outcome of the dispute. However, this is also precisely why an increase in conflicts could also be evaluated positively. It shows that competition in a sector is working and that market parties actively pursue their own interests, rather than, for example, engaging in cartel-like agreements. Conflicts are therefore not necessarily a bad development in themselves, but it does pose transaction costs to market parties.

## **8.2 Costs and other economic consequences of juridification**

Since the underlying aim of all liberalization policies was to increase efficiency, it might be useful to look at the costs associated with juridification. The costs of juridification, which are both posed to market parties (and ultimately to consumers) and to governments (and ultimately to taxpayers), are from an economic perspective transaction costs: Costs that are made in order to facilitate transactions. It is assumed that formal legal arrangements increase these transaction costs, but how large are the extra costs imposed by juridification, and who has to bear them?

A number of other, non-measurable advantages and disadvantages are shortly referred to. They have not been studied in depth, but are nonetheless important for the evaluation of juridification in at least some of the sectors. Finally, reference is made to the time factor: Are these evaluations only valid in the short run, or are there permanent costs associated with juridification?

### 8.2.1 Costs

Since there is a relationship between economic policymaking and juridification, and since these policies are largely evaluated on the basis of their economic costs and benefits, it is interesting to pay attention to the costs and benefits of juridification as an unintended consequence.

The existence of a legal system can be viewed as a form of transaction costs to economic actors. Rather than producing, the legal system provides the structure for others to produce wealth. They allow transactions to happen. In exchange for this, certain fees are charged. The aim of this section is to calculate as good as possible the operational costs of the legal system to the economic actors of the sector. The legal system is defined to consist of the court, the regulatory agencies, and all legal experts that fulfill roles as lawyers, legal counsels, or legal consultants. The actors in the sector are all companies, consumers and interest groups. The costs of each form of juridification will be mentioned separately, as well as the actor that bears the costs. The costs will be calculated per sector per year in Euro's. All data are in 2007 prices. If statistics were unavailable for that year, older data were used and compensated for inflation.

### 8.2.1.1 Measurement

The aim of this section is not a full cost-benefit analysis of liberalization, if only because there are no benefits measured. However, a similar methodology is used in the sense that the aim was to monetize all costs associated with juridification. Using this methodology, the first step is to list all possible sources of costs. The second step is to place a monetary value on each source. In order to be comparable, the costs must be in present value, which means they must be compensated for inflation and that they need to be discounted (Nas, 1996).

The easiest way to measure the costs of juridification is by looking at the costs of the legal institutions that have increased in importance. These three institutions were already mentioned: courts, regulators, and commercial legal services. The costs of regulators are difficult to determine, because regulators are engaged in a number of activities, among them dispute settlement and litigation. These are difficult to separate from the other regulatory tasks and hence the costs of dispute settlement and litigation alone cannot be determined to an adequate degree. The costs of the court system and commercial legal services can be more clearly related to litigation, therefore the focus will be on these two.

Courts are clearly a form of transaction costs to market parties. They have to pay the court fees. However, these court fees cover only a small percentage of the actual costs. The rest of these expenses are covered by the Ministries of Justice and therefore ultimately by the taxpayers. In order to capture all transaction costs, all court expenses should be taken into account, including court costs, salaries, and other expenses. Therefore, the total costs of the court system were taken, which are publicly available. Also known is the number of judges that is judging cases in any sector. Therefore, the costs of the judicial system were divided by the number of judges to get the total court costs per judge, and then multiplied by the number of judges engaged in relevant cases (in fte). To get the total number of judges in fte, statistics from CEPEJ (2008) were used. The number of full-time judges was multiplied by 1, the number of part-time judges by 0.5, and the number of lay judges (who work between 17 and 35 days per year) by 0.1.

The exact number of court cases in any of the sectors is unknown, but a conservative estimate was used by counting all cases available in electronic databases. This number can therefore be seen as a lower limit.

Another form of transaction costs are commercial legal services. The services provided do of course represent an economic value. Lawyers are not unproductive, because they facilitate transactions by processing legal procedures. However, just as

with regulators and court staff, they pose extra costs to the service providers that need not to be made without the shift in governance mechanisms. They are, in that sense, transaction costs. In order to measure these costs, the hourly costs of an external lawyer working in the particular legal field was multiplied by the estimated number of hours spent on legal advice hired by organisations per year. In addition to that, the number of legal councils was multiplied by their annual costs of labour (by taking the average annual salary multiplied by two to estimate the total labour costs).

As one can see, estimations were used for a number of variables. This calculation should therefore be seen as a (conservative) estimate of the order of magnitude of these legal transaction costs. The labour cost of a judge was calculated by dividing the total costs of the judiciary by the number of judges. The number of judges was available through the court administration. The estimation for the fte of judges working in a particular sector was based on the total number of known court cases in the sector and their complexity. , Especially telecommunications cases can be complex cases of which a judge could only process a limited amount. The average number of hours that lawyers spend on a case was estimated for the Dutch situation through questions in interviews, in which it was also asked in how far these estimations would differ from the British situation. Information on the exact hourly costs of lawyers could not be obtained from interviews (also because this highly depends on the case and the experience of the lawyer). For this, assumptions were used based on information about lawyers' tariffs from investigations by business newspapers (The Times business edition and Financieel Dagblad) and set to €175,- for a Dutch lawyer, €200,- for a British lawyer and €500,- for a senior lawyer in both countries. The internal labour costs of legal personnel were estimated using salary information from job advertisements, which was doubled to obtain the total labour costs. The fte of legal staff within companies was estimated on the basis of information on expenditures from annual reports of the main companies in each sector. When assumptions are made, for example about the fte of judges or legal staff working in a particular sector, these are stated in the text above the tables. In all cases, the particular sources of information are mentioned directly under the table. The grand totals were rounded off in order to stress that these numbers represent an order of magnitude rather than an exact calculation.

Schematically, the potential costs are as following:

<b>Table 8.2: Potential transaction costs of the increased importance of legal governance</b>		
<i>Transaction cost</i>	<i>Burden for</i>	<i>Way of measurement</i>
Courts	Litigants and taxpayers	(Total costs of court system / total number of judges in fte) * number of judges in fte that is occupied with relevant cases
Commercial legal services	Organizations that hire legal assistance	(Average costs of lawyers per hour x estimated number of hours of legal advice hired by organizations per year) + (Average annual salary of legal counsel x number of legal counsels employed by organizations)

#### 8.2.1.2 Costs in the British telecommunications sector

The first cost measured is that of the court services. The total costs of the British court system was £1.8 Bln. for the year 2007, which amounts to €2.4 Bln.<sup>7</sup> The total number of judges in fte in the UK was about 5100, so the total court system costs were estimated at €470,000.- per judge. Given the minimum number of 27 court cases on average per year (the known population) in the British telecommunications sector, the number of judges in fte was estimated at 5. With five judges, the total court costs were estimated at €2,4 Mln.

The most difficult costs to estimate were those of commercial legal service providers. There were eight law firms that regularly worked on telecommunications cases. Of these, there were four that really specialized in this area and took the major cases, those cases where high costs were made. It is assumed that each office employed at least one partner with expertise in telecommunications law, and that each partner had a unit of about 10 junior lawyers. The average hourly cost of a senior lawyer such as a partner would be €500.- and for a junior this would be €200.-. Full-time partners would charge about 1000 hours per year and junior lawyers about 2000 hours. The total costs would then amount to  $€500.- * 1000 * 4 + €200.- * 2000 * 40 = €18 \text{ Mln.}$

In chapter 7 the number of legal counsels working in the sector was estimated at 400. However, many of these counsels work on other issues than fixed voice

<sup>7</sup> Using an exchange rate of 1£ = €1.349

telephony in the United Kingdom. For a company such as BT, UK fixed voice telephony makes up about 18% of its total staff costs. If that is similar for other companies, it may be assumed that 18% of these legal counsels should be regarded as costs of juridification. This means that 72 legal counsels should be counted in. At an average cost of €100,000 per counsel (conservative estimate, assuming a salary of €50,000.-, doubled for total labor costs), this comes down to €7.2 Mln. This makes that the total costs of commercial legal services are about €25,2 Mln.

<b>Table 8.3: Estimated transaction costs of juridification in the British telecommunication sector per year in Euro's</b>		
<i>Type of Cost</i>	<i>Measurement</i>	<i>Amount in €</i>
Costs of courts	Total costs of court system	2.4 Bln.
	Number of judges	5
	<b>Total costs of courts</b>	<b>2,4 Mln.</b>
Costs of commercial legal services	Average costs of lawyers per hour	500 (senior lawyer) 200 (junior lawyer)
	Number of hours per year charged by lawyers	4,000 (senior lawyer) 80,000 (junior lawyer)
	Annual cost of in-house legal counsel	100,000
	Number of in-house legal counsels in service	72
	<b>Total costs of commercial legal services</b>	<b>25,2 Mln.</b>
<b><u>Total legal costs</u></b>		<b><u>28 Mln. (rounded off)</u></b>
<i>Sources: BT Annual Report 06-07, the BT website, OFCOM Statement of Principles for Broadcasting Act Licenses and Telecommunication Regulation, Oftel Annual Report 2003, The Legal 500, Westlaw, The Times business edition, and expert estimates.</i>		

The total annual transaction costs of the shift in governance mechanisms in the British telecom sector is thereby estimated at **€28 Mln.**

### 8.2.1.3 Costs in the Dutch telecommunications sector

Telecommunications cases in the Netherlands were sometimes large and difficult cases, and experts estimated that they required the attention of a full-time expert judge. With total costs of the judicial system of €0.6 Bln. and slightly over 2000 judges, this comes at about €300.000.-.

During the first years after the liberalization of telecommunications services, there were about 20 junior lawyers in the Netherlands working full-time on telecommunications cases. At an average of 1750 chargeable hours per years, this comes at 35000 hours per year. The average labor cost of these lawyers is about €175.- per hour, so this implies a cost of about €6,1 Mln. for the entire sector. The teams of junior lawyers were of course headed by more expert lawyers who charged at partner tariff of about €500.-. If there were two of such lawyers working full time on telecommunication cases, their total cost would be €1 Mln. at 1000 chargeable hours per person per year.

There are about 50 legal counsels working for Dutch telecom companies. As in the British sector, not all these lawyers work for fixed wire voice telephony, but the percentage is larger than for example BT. For KPN, about half of its legal counsels are occupied with this form of telecommunications. This means 25 legal counsels. Multiplied by an average cost of €100,000.- per counsel per year, this comes at €2,5 Mln.

Together, the costs of commercial legal services in this sector amount to €7,1 Mln. + €2.5 Mln- = €9.6 Mln.

<b>Table 8.4: Estimated transaction costs of juridification in the Dutch telecommunication sector per year in Euro's</b>		
<i>Type of Cost</i>	<i>Measurement</i>	<i>Amount in €</i>
Costs of courts	Total costs of court system	573 Mln
	Number of judges	1
	<b>Total costs of courts</b>	<b>0.3 Mln.</b>
Costs of commercial legal services	Average costs of lawyers per hour	500.- (senior lawyer) 175.- (junior lawyer)
	Number of hours per year worked by lawyers	2000 (senior lawyer) 35000 (junior lawyer)
	Annual cost of legal counsel	100,000.-
	Number of legal counsels in service	25
	<b>Total costs of commercial legal services</b>	<b>9.6 Mln.</b>
<b><u>Total legal costs</u></b>		<b><u>10 Mln. (rounded off)</u></b>
<i>Sources: Rechtspraak.nl, Financieel Dagblad, Kat (2007): "In-house bij de Legal Counsel," KPN Annual report 2007, and expert interviews.</i>		

Adding up all costs, the total transaction costs in the Dutch telecom sector are estimated at **€10 Mln.** per year.

#### 8.2.1.4 Costs in the British bussing sector

The costs of court cases were lower in the bussing sectors than in the telecommunications sectors. There were a few cases in the House of Lords over the past decades, but most cases never reached the higher level courts. There are no specialized judges, but with an average of 10 cases per year, the number of judges required to process these cases are set to 1 fte (0.1 fte per case). One judge in the UK court system comes at about €425,000,-.

Court cases in the British bussing sector required in general less time than telecom cases. Experts stated that it could range from 10 to 200 hours, but that 150

hours would be average for a client from the public bussing sector. With 10 cases on average per year, this means that  $150 \times 2 \times 10 = 3000$  hours per year are required. At an average cost of €200 for a junior lawyer (there is no reason to assume a different cost than in the telecommunication sector), this leads to an estimated cost of  $3000 \times €200.- = €600.000.-$ . Bussing cases generally require less input by senior lawyers. It is estimated that per case, ten hours are spent by the senior lawyer at a cost of  $10 \times 2 \times 10 \times €500.- = €120,000.-$  (assuming the lowest estimate of the number of. The total costs of commercial lawyer services in the sector are therefore estimated at  $€600,000.- + €120,000.- = €720,000.-$ .

The number of legal counsels working in the sector was estimated at 10 in chapter 7. At an average cost of €100,000.-, this would mean that the total costs of legal counsels amount €1,000,000.-.

The total costs of commercial services thus amount to about €1,72 Mln.

<b>Table 8.5: Estimated transaction costs of juridification in the British public bus transport sector per year in Euro's</b>		
<i>Type of Cost</i>	<i>Measurement</i>	<i>Amount in €</i>
Costs of courts	Total costs of court system	2.4 Bln.
	Number of judges	1
	<b>Total costs of courts</b>	<b>425,000.-</b>
Costs of commercial legal services	Average costs of lawyers per hour	500.- (senior lawyer) 200.- (junior lawyer)
	Number of hours per year worked by lawyers	190 (senior lawyer) 2850 (junior lawyer)
	Annual cost of legal counsel	100,000.-
	Number of legal counsels in service	10
	<b>Total costs of commercial legal services</b>	<b>1,72 Mln.</b>
<b><u>Total legal costs</u></b>		<b><u>2 Mln. (rounded off)</u></b>
<i>Sources: Annual reports 2007/2008 of Nexus, Centro, Metro, Merseytravel, SYPTE, GMPTE, and Transport for London, The Times business edition, and expert estimations.</i>		

Adding up all costs leads to an estimation of **€2 Mln.**

#### 8.2.1.5 Costs in the Dutch bussing sector

With a minimum average of 4 cases per year, there are no full-time specialized judges in the Dutch bussing sector. However, these cases were often substantial issues about tendering, so it may be assumed that at least 0,5 fte of judge time went into these cases. This comes at about €117,000.- for the judicial system in this sector.

The most important part of the legal costs in the Dutch bussing sector are made in the phase in which the tender is designed, because legal expertise is hired to draw up the documents in such a way that the chance is minimized that legal conflicts will emerge during or after a tender. The easiest way to calculate these transaction costs of juridification in the Dutch bussing sector is by looking at the costs made per tender. In the Netherlands, there are 62 concession areas, most of which have by now been put on tender at least once. Each tender requires the hiring of legal advisers. From interviews it became clear that each tender requires the work of a team of two legal advisers and two assistants for a period of about two months (the actual preparation period of a tender is longer, about one year, but external legal experts take part in only a few phases of a tender project), including the costs of office and administrative assistance. This implies a cost of roughly €50,000.- per tender. Given 62 concession areas that are put on tender once every four years, this imposes a cost of about €775,000.- on the concession owners per year.

At the same time, legal counsels of the companies also make costs. Companies require such legal assistance for a shorter time per concession, but there are usually at least two companies bidding for a concession contract. It is assumed that these costs in total are similar to those of the concession owner.

Apart from the costs of tendering, there are of course also disputes to be settled. Some of these were over tenders, others not. Expert lawyers require about 100 hours preparing for an average bussing case, again with high variation (based on interviews). This means they work  $100 \times 2$  (number of parties)  $\times 4$  (number of cases) = 800 hours per year on average. This amount also explains why there are no law firms specializing in bus transport only. At an average cost of €175.-, about €140,000.- is spent annually on their services. Partners were assumed to spend two working days per case, which leads to  $4 \times 2 \times 8 = 64$  hours per year. At an hourly tariff of €500.- their costs were €32,000.-. The costs of legal counsels and other legal services should not be measured anymore, because they are already incorporated in

the costs of tendering as estimated under the legal costs of regulatory agencies. So the costs of commercial legal services remain €140,000.- + €32,000.- = €172,000.-.

<b>Table 8.6: Estimated transaction costs of juridification in the Dutch public bus transport sector per year in Euro's</b>		
<i>Type of Cost</i>	<i>Measurement</i>	<i>Amount in €</i>
Costs of courts	Total costs of court system	573 Mln
	Number of judges	0.5
	<b>Total costs of courts</b>	<b>117,000.-</b>
Costs of regulators	<b>External lawyers hired during tender procedures</b>	<b>775,000.-</b>
Costs of commercial legal services	Average costs of lawyers per hour	500.- (senior lawyer) 175,- (junior lawyer)
	Number of hours per year worked by lawyers	64 (senior lawyer) 780 (junior lawyer)
	Annual cost of legal counsel	(see text)
	Number of legal counsels in service	(see text)
	<b>Total costs of commercial legal services</b>	<b>172,000.-</b>
<b><u>Total legal costs</u></b>		<b><u>1 Mln. (rounded off)</u></b>
<i>Sources: Annual Reports of bussing companies, Financieel Dagblad, and expert estimations</i>		

The total costs due to juridification in the Dutch bussing sector are estimated at **€1 Mln.**

### 8.2.2 Comparison

There are similarities and differences between the different costs of juridification between the sectors. In all sectors, the costs of regulatory enforcement are higher than

any of the other costs. Also in all sectors the fees charged by the courts are only a minor cost.

<b>Table 8.7: Transaction costs of juridification per year in the four markets and legal transaction costs as percentage of total turnover</b>		
<i>Sector</i>	<i>Legal transaction costs</i>	<i>% of total turnover</i> <sup>8</sup>
Telecommunications NL	<b>€10 Mln.</b>	0.15%
Telecommunications UK	<b>€28 Mln.</b>	0.25%
Bus services NL	<b>€1 Mln.</b>	0.07%
Bus services UK	<b>€2 Mln.</b>	0.03%

The relative costs in the Dutch bussing sector are more than twice as high as in the UK sector. The reason for this is the relatively costly procedure of organizing a tender, especially because tendering requires specialized knowledge that regional governments cannot afford to have in-house if they only use it once every four years. Therefore, external specialists must be hired, whereas telecom regulation is largely done by specialists working for the regulator. The costs in the British telecommunications sector are higher than the Dutch. The main difference lies in the costs of external legal staff. The Dutch firms have relatively more legal counsels. What also differs is that in the British telecom sector, a large contribution to the costs is paid through taxes, whereas the Dutch regulator can work solely on the basis of firms' contributions. This means that taxpayers (i.e. consumers) pay a relatively larger share in the United Kingdom compared to the Netherlands. Finally, legal transaction costs are relatively high in the telecommunications sectors compared to the bussing sectors. The reason may be that there is a higher level of direct competition between competitors in the telecommunications sectors, leading to a higher need for legal assistance.

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<sup>8</sup> Based on 2007 annual reports by BT for Telecom UK, KPN for Bus NL, Connexxion for Bus NL and First for Bus UK. The revenues of these companies in the relevant market segments (fixed voice communications and bussing services in the domestic countries of that company), together with their market shares as reported in chapter 3, give a reliable measure of the total turnover in that market segment.

### 8.2.2.1 Some remarks about economic consequences

A number of remarks should be made regarding these monetized consequences of juridification. In the first place, it was sometimes difficult to get reliable data. Therefore, these numbers are rough estimates, which nonetheless give a good idea of where the major costs of juridification lie and how the different sectors compare to each other.

In the second place, the costs of juridification are calculated per year. From the interviews it became clear that especially the costs of commercial lawyering can vary dramatically from one year to another. Especially if new legal developments have taken place and therefore new types of conflicts are emerging, the costs are very high. However, if some experience has been gained with the new law, cases become more standard and a fixed fee can be agreed beforehand. These fees are often lower, because less research is required. During later years, the regulation/litigation cycle may start again following new legislation. The data presented above are representative for a year in which new legal developments have taken place.

Finally, the costs may not seem to be very impressive. For example, the total annual revenues in the Dutch telecommunications sector amount to about €3 Bln. However, apart from the fact that these costs are still significant in absolute terms, the major costs are likely not the direct costs measured here, but the indirect costs of internal formalization (the way in which regulators and companies operate, knowing that they may have to appear in court at some point in time to defend their decisions or to raise accusations about the actions of the other party). These costs are too difficult to measure quantitatively, yet from several interviews it became clear that they are a real burden.

### 8.2.3 Uncertainty about the outcome of a legal case

One element of litigation has not received much attention, namely the aspect of time. The costs of a court case involve not only material costs, but also time. The most important aspect of this time dimension is that parties remain for a while uncertain about the outcome of the case. While the case is being processed, actors in the field have to act without knowing how a particular law should be interpreted. This plays an important role in the telecommunication sectors, because court cases can take a significant amount of time, sometimes years. This is because of their complexity and because of the possibilities for appeal. Therefore, it may happen that actors have to

pay a large amount of money years after the dispute over that sum took place. For example, consider two operators that have an agreement on interconnection. Both parties agree to charge equal tariffs. One month after the agreement, the sector regulator conducts a market analysis and concludes two things, namely that one of the companies has substantial market power and that the tariffs that this company charges for interconnection are too high. The company has to lower its tariffs and asks its competitor to do the same, but this competitor decides not to do so. The company that holds SMP then decides not to pay anything above the tariff that it is allowed to charge itself. The result is of course a dispute between the two companies. The small company is the one that is most dependent on the resources, but if a complex case emerges with high stakes and no case law, it may take years before it knows the outcome of the case. The outcome of the case is dependent on the dispute that the larger company has filed against the decisions by the sector regulator and against which there are several possibilities for appeal. Until then, the small company has to live with reduced revenues and cannot be certain whether it will receive the rest of its money. On the other hand, it has to keep the interconnection in place in order to operate on the market.

In the bussing sectors, such uncertainty plays a limited role. There are fewer governmental decisions, only one every concession period, and there are fewer possibilities for appeal.

#### 8.2.4 Internal formalization in the firm

Juridification has in the long run implications for the way of working within organizations. Lawyers and legal counsels have been captured in the cost calculation, but other personnel also has to work more legalistically if there is a possibility that their work would be reviewed in court. This leads to the implementation of more formal procedures within organizations. Unfortunately, these costs are very difficult to capture, as there are many other factors that influence the internal organization of companies, but these costs could be significant, because every staff member may in the long run be affected by it and therefore might work less efficiently.

### **8.3 Transition?**

The evaluation of juridification after market liberalization must incorporate one more element and that is the time-frame. The proponents of liberalization often argue that a

transition from state to market governance takes time. During this transition phase, most actors have to adapt to the new circumstances and it is unlikely that optimal price and service levels are reached during this transition period. This transition phase may take as long as a generation change before former state monopolists and consumers are used to a truly free market, but in the end the invisible hand will overcome all hurdles.

It is therefore an important question whether juridification is also one of these temporary phenomena that will eventually disappear. In order to determine that, the juridification trend must be unraveled again and be split in temporary and permanent elements. The starting point is the divide between the litigation trend and the trend to incorporate more legal rules and procedures.

It was established that a large part of the current litigation cases in all sectors are caused by an element of liberalization policy. Are such cases likely to remain in the future? That depends on the reasons why these disputes erupted and the reasons why these disputes were brought before the court. Several disputes emerged over the interpretation of new market rules. These are typically cases of a temporary nature. It will take some time until the most prominent issues have been interpreted by the judiciary, but it will happen. On the other hand, this does require that the market rules are not altered anymore. And this is exactly what does not happen in the observed sectors. In both telecommunication sectors, the law is changed every few years. This is necessary in order to keep the law in line with recent technological developments, but it does mean that the legal environment changes now and then. The same holds for the British bus transport legislation, which has moved from state control to free competition to regulated market. However, what is more important are not the changes in law, but the constant changes in the approach taken by the regulators. Telecommunication regulators review the market each year. Each of these analyses differs from the other and each of them will be challenged. In the bussing sectors, the concession management changes every period, depending on the political climate, the experiences during the previous period, what is in fashion, etc. New legal circumstances are created on a more or less constant basis, so that the interpretation of this legal framework also changes. Even a small difference can have large consequences in a legal dispute. It is therefore likely that disputes over the interpretation of the law will remain.

The other important type of dispute was the dispute as a direct result of conflicting interest. Such legal conflicts are continuations of competition in the courtroom and have little to do with the legal framework. Actors start these disputes

because they take on every opportunity to hinder the competition. Since the competition is likely to remain, such conflicting interests will also remain.

Then, if both these types of disputes are not of a temporary nature, then the next question is whether such disputes will continue to be solved in court. In the telecommunication sectors, this is likely to be the case as there is no alternative. Actors currently use all possibilities to appeal if a decision is taken that is not favorable to them. Such disputes are difficult to solve through mediation, because there are more than two actors involved in the market. Furthermore, arbitration could partly solve the problem of lengthy procedures, but the current work of the sector regulators is in part already arbitration, and these decisions are still challenged. In the bussing sectors, a large problem that was identified was the distrust between various actors. Here, it could be argued that some types of cases will disappear if trust is restored through the introduction of more contractual relations. This is, however, impossible to predict.

This introduction of contracts leads the analysis to the second trend that could be regarded as a temporary phenomenon. Is the increased use of internal legal procedures, legal counsels, and contracts a temporary phenomenon? This trend was observed mainly in the Dutch bussing sector and it is likely that the trend continues for some time. The mechanism that works behind this trend, namely uncertainty reduction through legal contracts, is likely to continue as long as there is uncertainty left. When experts and policymakers were asked whether the trend would continue, all answered that at least the concession contracts will continue to grow in scope and complexity. Even after the trend levels off, it is highly unlikely that the trend will be reversed. In the telecommunication sectors, the procedures implemented by telecommunication operators will remain in place, though it is unclear whether the legalization will continue.

All these claims on the permanence of juridification are of course based on observation and logical reasoning. In reality, such trends are difficult to foresee. At least, it can be argued that there is no reason to see such trends as part of a transition phase. It is far more likely that the largest part of conflicts and internal rules will be permanent.

## 8.4 Analysis and conclusion

The evaluation of liberalization policies has mainly focused on the advantages and disadvantages of intended consequences. In this chapter, an attempt was made to review an unintended consequence of juridification.

The costs of juridification were measured in all sectors. These costs were relatively large in the Dutch bussing sector. The legal overhead costs of organizing and bidding for a tender form a significant portion of the total value of these tenders.

The distribution of the costs of juridification is unbalanced. Yet, it is also difficult to determine who ultimately pays for these costs. Two groups are directly involved. Taxpayers will bear the costs made by regulatory agencies and service providers bear their own increased transaction costs. However, who ultimately bears these costs is unclear. Regulatory agencies may cost money, but also generate income for the government in the form of fees and fines. Sometimes this income is larger than the costs of operating the organization. These fees and fines are paid by firms. Firms, on the other hand, may convert the increased costs due to juridification in the price of their services (depending on the price elasticity of supply and demand). Since this price of services is dependent on so many variables, it is impossible to distinguish the amount that is due to juridification.



## **9 Summary and conclusion**

### **9.1 Introduction**

In this chapter the main findings of the study are summarized and conclusions from these findings are drawn. The first part focuses on the causal mechanism between liberalization and juridification. It is argued, on the basis of the previous chapters, that liberalization has increased risks and uncertainties in the four liberalized markets studied, that actors in these markets have pursued strategies to reduce risks, which has led to new types of conflict between these actors, and that some of these new types of conflict have been taken to court. Court decisions have thereby become elements of economic governance that have increased in importance. In the second section, the consequences of this increased importance of formal legal arrangements are summarized in terms of economic advantages and disadvantages. In the third section, attention is paid to the generalizability of the results to other markets, and to the permanence of the juridification trend following liberalization.

### **9.2 How liberalization leads to new conflict types**

The theoretical argument that liberalization enhanced juridification starts with the observation that liberalization, the introduction of competition in formerly public economic sectors, leads to an increase in risks and uncertainties to various market parties. Competition exposes service providers to the risk of bankruptcy. Privatization causes new pressure on employees who move from the public to the private sphere. New market regulations contain many new uncertainties to all parties.

Market parties aim to reduce the risks and uncertainties posed to them. Companies follow particular strategies in order to avoid problems, in the end bankruptcy, and/or try to profit from the new opportunities offered. Employees aim to secure their job position. Market parties and regulators discuss the interpretation of competition regulation. However, many of these strategies could easily lead to conflicts. Some of these conflicts could become legal conflicts to be resolved by the court.

This is in line with the communicating vessels theory. According to this theory, there are various institutions that could perform the function of reducing risk and

uncertainty, summarized in table 9.1. The liberalization policy has removed the state, in its role as service provider, as an institution to reduce risk and uncertainty. Market parties are likely to search for alternative solutions such as cartels or other forms of economic cooperation, but most of these are not an option in modern liberalized economic sectors.

<i>Coordination Principle</i>			
Markets			Private
Communities	Informal	Horizontal	Private
Associations	Formal	Horizontal	Private
Firm hierarchies	Formal	Vertical	Private
Courts	Formal	Vertical	Private / Public
States (as rule-makers and rule-enforcers)	Formal	Vertical	Public

*Source: (Van Waarden, 2002)*

Communities facilitate economic transactions through trust and informal norms, but these mechanisms often work only on a smaller scale than (inter)national economic markets.<sup>9</sup> The possibilities for associations are limited under the new antitrust regulation. Firm hierarchies are broken down by liberalization policies that aim to increase the number of markets.

The research questions posed in the first chapter focus on testing this theory in four liberalized markets. In short: Has liberalization increased the risks and uncertainties to market markets? What strategies have actors pursued to reduce these risks and uncertainties? Do risks and uncertainties, and strategies to reduce them, lead to conflicts between these actors? And which of these conflicts turn into legal conflicts to be resolved by the courts? In the following sections, the answers to these research questions are presented.

### 9.2.1 Risk and uncertainty

A number of new risks were identified in the liberalized sectors. In both the telecommunications and the bussing sectors, these new risks affected multiple parties.

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<sup>9</sup> An exception is trading on global financial markets. See Knorr Cetina: *Global Microstructures: The Virtual Societies of Financial Markets*.

One new risk type was obvious, namely the risk of competition itself. However, this was not the only type that was encountered.

In the telecommunications sectors, the first main risk to companies was that of cut-throat price competition. Since the provided services were more or less similar in quality, the competition would focus mainly on price, with the risk of low margins for the providers. Other risks depended on the type of company. Former incumbents had to watch out for their reputation. On the one hand they had to maintain at least the same high quality level that customers were used to, but on the other hand they were portrayed as old-fashioned bureaucratic organizations by the competition. These competitors, newcomers on the market, had their own problems. They had to compete with other newcomers, but also with the incumbents that had much market power and controlled an essential facility. This required regulation by the government, which then led to another risk to the incumbents, namely to be obliged to comply with strict regulations. Finally, a difficult uncertainty for companies to deal with was that of technological development. Companies ran the risk of investing in a technology that would not become the standard in the market or supported by the network owner. This is of course a normal business risk, but the interesting dimension in telecommunications was that governments had to design new regulations for different technologies. Despite the efforts to create technology-neutral regulations, it was difficult to predict which technologies would be supported in the future.

Customers ran not so much risk. The main risk was that of intransparent tariff structures, which makes it difficult to choose the best possible offer.

In the bussing sectors, the main risk to tendering governments was the uncertainty during the tendering procedure. This uncertainty was due to several reasons. In the first place, the concession contract lasted for several years. Governments had to identify public interests, but of course these interests could change over the course of time. Secondly, a risk was that the transport company would not live up to the contractual obligations. Thirdly, it was difficult to translate policy objectives into legal contract terms. This could lead to different possible interpretations of the contractual clauses by different transport companies during the bidding, but also to differences of opinion between the tendering government and the concession holder. Fourthly, governments ran the risk that simply no companies would be interested in the tender, or that it became clear beforehand that only one company would be interested. In the last case, the offer would likely not be advantageous to the government. Such situations were often the consequence of inflexible contracts.

To companies, the main source of risks was similar to that of the concession owners: Uncertainty about future developments. They have to make an offer not knowing developments such as fuel prices, wages, and numbers of passengers. An associated risk was that of a market with only rigid contracts available, which left little room for innovation or more efficient routes and schedules. Smaller risks were the dependency on a single region and, for Dutch companies, the uncertainty about having to take over the personnel of the previous concession holder.

In both sectors, the position of employees came under pressure. The increased focus on efficiency led to less certainty about employment and about the conditions of employment.

### 9.2.2 Strategies to reduce risk and uncertainty

In many cases, actors actively pursued strategies to reduce these risks. In the telecommunications sectors, the main risk-reducing strategies for the incumbents were to stress their solid reputation and to cooperate with other market parties with regard to network access and interconnection only to the extent that the law required them to do. Furthermore, in the Netherlands the incumbent appealed to almost every regulatory decision during the first years after liberalization. New entrants had exactly the opposite interests to those of the incumbent. Therefore, they stressed their young and new appearance compared to the old state departments that the incumbents still were. Furthermore, they sometimes cooperated in negotiations with the incumbent or in lobbying activities, in order to create a stronger opposition to the powerful incumbents. They also frequently filed complaints at the regulatory agency about the misuse of market power by the incumbent.

It becomes clear from these strategies that competition cannot be seen apart from the high influence of regulations and regulator in the telecommunications sectors. These are also risk-reducing institutions, reducing the risks of a non-level playing field and guaranteeing access to the essential facility to all parties. These regulations often needed adjustment because the environment had changed, for example due to technological developments. Then, a new cycle of rule creation, implementation, enforcement, and evaluation starts. Service providers attempted to influence this regulatory process to their advantage, which is also a strategy. All in all, most of the strategies led to legal conflicts directly or indirectly. The whole process of creating, enforcing, and adapting the game-rules of the market led to tensions between

different the actors, especially between incumbents and regulators, and between incumbents and newcomers on the market.

In the bussing sector, transport companies had three main strategies to reduce their risks: They attempted to win contracts that gave as much as possible freedom for efficiency improvements (i.e. contracts with few fixed requirements), they tried to negotiate escape clauses for unforeseen circumstances, and they merged into larger firms.

Regional governments pursued almost the opposite strategies. They attempted to rule out uncertainty by writing contracts that were both specific and inflexible. This frequently led to tensions between concession owners and interested companies in the bidding phase and between concession holders and concession owners in later phases. Also passengers and residents sometimes had opposite interests than the transport companies or the governments, which also caused problems.

These problematic situations that occurred in the sectors due to strategies to reduce risks, frequently caused conflicts between these parties.

### 9.2.3 Litigation

The first question to be answered about litigation is whether it has increased in the selected sectors because of liberalization. A quantitative design to test a possible relationship between liberalization and litigation failed, because the database that was constructed, composed of all cases found in jurisprudence journals and court databases, was not representative for the total population of court cases. A significant increase in the number of cases can be observed at the moment that electronic databases were introduced. Therefore, the known population of cases was biased toward time. Instead, it was decided to focus on new types of conflict that could clearly be linked to liberalization policies.

It turned out that there were two main reasons why liberalization led to litigation. In the first place, a number of cases was directly caused by the introduction of competition. These cases were either between firms or between firms and regulators, depending on the market structure. In the second place, public interests had to be safeguarded. Formerly the state provided certain services because public interests were involved. After the liberalization, regulation was needed to safeguard these interests. Conflicts appeared both over the interpretation of these new regulations and the fact that particular groups, notably ‘third parties’ that were not part of the main transaction, were of the opinion that their interests were not

safeguarded well enough. Re-regulation in this case also includes the enforcement of regulation by sector-specific agencies.

#### 9.2.4 Two different roots of conflicts

A large number of court cases was studied and categorized in order to see which issues caused particular categories of legal disputes and to see whether an element of liberalization was among the causes. Two main conclusions could be drawn from this exercise: 1) There are indeed a number of new conflict types that were caused by an element of liberalization; 2) There are two main issues which produce legal conflict. The first one is the introduction of competition, which necessitates the creation of a 'level playing field' for all competitors, that is, to correct for market asymmetries which make that some companies have unfair advantages over other parties. This task is first taken care of by the sector-regulator. But its decisions give in turn rise to legal conflict over their interpretations. The second one is the protection of public interests, including those of third parties, that do not take part in the main transaction (service provider to customer in the telecommunications markets and the cost-effective part of the British bussing market, concession owner to service providers in the other bussing markets). More regulations were required to guard these third party interests, notably in the form of case law produced by courts. Conflicts resulted when particular groups turned to the court because their interests were in their opinion not protected to an adequate degree. Also, legal conflicts were started over the interpretations of such regulations in case they were present.

The findings can be summarized in the following tables:

**Table 9.2: Summary of risks/uncertainties, strategies to reduce them, and areas of legal conflict in the British and Dutch telecommunications markets**

<i>Actors</i>	<i>Risks / uncertainties</i>	<i>Strategies</i>	<i>Area(s) of conflict</i>	<i>Root cause</i>
Incumbent	<p><b>Cooperation with competitors</b> As a main network owner, the incumbent is obliged to make arrangements for interconnection and access with other parties. The incumbent is thereby forced to cooperate with its competitors</p>	Offer minimum cooperation. The incumbent had an incentive to interpret the legal obligations in a minimal way, because it reduces costs and because there is no reason to help the competitors more than necessary.	The facilities / conditions for interconnection The facilities / conditions for access	Introduction of competition
	<p><b>Competition from pricefighters</b> The newcomers on the market can design relatively lean organizations which enables them to offer lower prices.</p>	One strategy is to stress the solid reputation that the incumbent has built up in the past. Another is to adapt the tariff structure and use comparative advertisement to show how these structures are favorable under particular conditions. Since there are many variables in the tariff structures, these tend to be complicated to compare for consumers.	Tariff structures and marketing claims about them	Introduction of competition

**Table 9.2 (cont.): Summary of risks/uncertainties, strategies to reduce them, and areas of legal conflict in the British and Dutch telecommunications markets**

<i>Actors</i>	<i>Risks / uncertainties</i>	<i>Strategies</i>	<i>Area(s) of conflict</i>	<i>Root cause</i>
Incumbent	<p><b>Regulatory action</b> The mission of autonomous regulatory agencies is to create a level playing field. This will in certain situations clash with the interests of the former monopolist.</p>	<p>Challenge and appeal decisions by the regulatory agency. This can sometimes turn the decision around, but another advantage is that such procedures tend to take much time, leaving the competition in uncertainty. A counter-strategy used by regulatory agencies is to involve the parties in the decision process using consultation rounds.</p>	<p>Decisions about the existence and about the use of substantial market power. Decisions about the facilitation of new technologies. Challenges against the authority of the regulatory agency itself.</p>	Introduction of competition
New entrants	<p><b>Dependency on essential facility</b> New entrants cannot choose which network they prefer to use, as they are dependent on the main fixed network and therefore have to cooperate with its owner.</p>	<p>Regulation on network access and interconnection is vital to the new entrants so they will lobby for more favorable regulation. They will also challenge alleged misuse of marker power or non-cooperation by the network owner.</p>	<p>Conditions for interconnection and access Misuse of substantial market power Non-cooperation by network owner.</p>	Introduction of competition

**Table 9.2 (cont.): Summary of risks/uncertainties, strategies to reduce them, and areas of legal conflict in the British and Dutch telecommunications markets**

<i>Actors</i>	<i>Risks / uncertainties</i>	<i>Strategies</i>	<i>Area(s) of conflict</i>	<i>Root cause</i>
Employees	<p><b>Switch to commercial status</b>                      The privatization of the public service providers meant that the employees lost their civil servant status. Furthermore, the introduction of competition necessitated re-organization in order to turn public corporations into competitive companies.</p>	<p>Securing certainties. Employees, often united in sector-specific unions, demanded job certainty for the workers at the incumbent.</p>	Em- ployment	Public service character
Other	<p><b>Conditions for installation</b>                      Due to the shift from public to private legal stats of the network owners and due to the entrance of new firms that could want to construct their own network, there could be clashes between the interests of the companies, the landowners and the general interest.</p>	<p>The main strategies for all parties involved lobbying, negotiating, and challenging non-cooperation.</p>	The conditions of network installation and mainte- nance	Public service character

**Table 9.3: Summary of risks/uncertainties, strategies to reduce them, and areas of legal conflict in the British and Dutch bussing markets**

<i>Actors</i>	<i>Risks / uncertainties</i>	<i>Strategies</i>	<i>Area(s) of conflict</i>	<i>Root cause</i>
Service providers	<p><b>Limited amount of concession areas</b> A limited amount of tenders make that a few losses can lead to a very different business situation within a year. This could be considered a normal business risk, but in a market with a few large tenders per year, only a few not-wins could already threaten the existence of a company.</p>	Challenging the decisions made in tender procedures if they are negative. This could sometimes lead to a different decision or to a new tender procedure. The potential gains are high and therefore almost always outweigh the costs.	Interpretation of tender rules	Introduction of competition
	<p><b>Future market conditions</b> Companies have to prepare an offer the will be valid for several years, during which the market conditions could change. This could be considered a normal business risk, but there is no option of choosing a contract for a shorter period of time.</p>	Reconsider making an offer. The main uncertainty to service providers is to be stuck in a rigid contract for many years, so companies could also have a strategy to make an offer for more flexible contracts only.	The interpretation of (flexible) contract terms	Introduction of competition

**Table 9.3 (cont.): Summary of risks/uncertainties, strategies to reduce them, and areas of legal conflict in the British and Dutch bussing markets**

<i>Actors</i>	<i>Risks / uncertainties</i>	<i>Strategies</i>	<i>Area(s) of conflict</i>	<i>Root cause</i>
Service providers	<p><b>Taking over of personnel</b>                      New concession holders are obliged to take over the personnel from the former concession holder. However, they often have not all information available about the status of this personnel.</p>	<p>The potential bidders could request extra information from the tender organizer. The tender organizer in turn will turn to the concession holder, who may or may not want to provide this sensitive information.                      After the procedure is finished, complaint can be filed about the obligation to take over particular employees.</p>	Indirect personnel	Public service character
	<p><b>Dependency on a particular geographic area</b>                      Certain bus service providers have historically focused on one particular area. That area could become a concession area.</p>	<p>If the particular area becomes part of a concession contract, the company is almost forced to submit a very low offer, since losing the tender would in many cases be the end of its existence. Another strategy could be to lobby for not putting public transport in the area on tender.</p>		

**Table 9.3 (cont.): Summary of risks/uncertainties, strategies to reduce them, and areas of legal conflict in the British and Dutch bussing markets**

<i>Actors</i>	<i>Risks / uncertainties</i>	<i>Strategies</i>	<i>Area(s) of conflict</i>	<i>Root cause</i>
Consumers	<p><b>Loss of influence on the quality of service</b>            Although in most cases of liberalization the consumers gain power, in this case they run the risk of decreasing quality. They have less influence as their opinion is only indirectly relevant during tender procedures, whereas there is still no alternative provider of similar services.</p>	Consumers unite in associations and attempt to increase the influence before and during tender procedures.	Quality of service, mainly in the form of availability of public transport (routes and schedules)	Public service character
Residents	<p><b>Loss of influence on the routes and schedules</b>            Residents that have an interest in the existence (or non-existence) of particular stops, routes or schedules have fewer possibilities to exercise influence, because the transport company is free to act within contractual clauses.</p>	Influencing the concession contract in such a way that the desired stop, route or schedule is taken up as a contractual obligation to the transport company.	Routes and schedules	Public service character

**Table 9.3 (cont.): Summary of risks/uncertainties, strategies to reduce them, and areas of legal conflict in the British and Dutch bussing markets**

<i>Actors</i>	<i>Risks / uncertainties</i>	<i>Strategies</i>	<i>Area(s) of conflict</i>	<i>Root cause</i>
Concession owners	<p><b>Translation of policy aims into tender criteria</b> The tender documents will have to reflect the policy aims of the concession owner, but it is a legal exercise to rule out different interpretations of the contractual clauses that could go against policy aims.</p>	Drawing up well designed contracts with the assistance of (external) legal experts.	The interpretation of contract terms	Public service character
	<p><b>Future market conditions</b> This uncertainty is similar to the uncertainty to companies. One has to draw up a contract that will be fixed for many years. Market conditions (and the public interest!) could change drastically during that time.</p>	Build in flexibility in the concession contracts.	The interpretation of (flexible) contract terms	Introduction of competition

**Table 9.3 (cont.): Summary of risks/uncertainties, strategies to reduce them, and areas of legal conflict in the British and Dutch bussing markets**

<i>Actors</i>	<i>Risks / uncertainties</i>	<i>Strategies</i>	<i>Area(s) of conflict</i>	<i>Root cause</i>
Concession owners	<p><b>Enforcing the contractual obligations</b>                      Since most concession contracts do not give incentives to providers to earn extra income by improving their service, one of the few ways to increase profits is to interpret the contractual clauses in such a way that costs are minimal.</p>	<p>The main strategy is to carefully design the legal clauses of the contracts so that there are no different interpretations possible.</p>	<p>The interpretation of (flexible) contractual terms</p>	<p>Public service character</p>
	<p><b>No interested parties</b>                      Due to uncertainties to companies, there could be no parties making an offer for a concession contract.</p>	<p>The concession owner could design the contract in such a way that it becomes more attractive to service providers. This will usually involve flexibilization of the contractual terms, because the main uncertainty to service providers is to be stuck in a rigid contract for many years.</p>	<p>The interpretation of (flexible) contract terms</p>	<p>-</p>

**Table 9.3 (cont.): Summary of risks/uncertainties, strategies to reduce them, and areas of legal conflict in the British and Dutch bussing markets**

<i>Actors</i>	<i>Risks / uncertainties</i>	<i>Strategies</i>	<i>Area(s) of conflict</i>	<i>Root cause</i>
Employees	<p><b>Switch to commercial status</b> The privatization of the public service providers meant that the employees lost their civil servant status. Furthermore, the introduction of competition necessitated re-organization in order to turn public corporations into competitive companies.</p>	<p>Securing certainties. Employees, often united in sector-specific unions, demanded job certainty for the workers at the incumbent.</p>	Employment	Public service character
Other governments	<p><b>Interest conflicts between local/regional governments</b> Different governments could have different interests in case of a tender. Within a concession area, local governmental interests could clash with other local interests or with regional ones. Between concession areas, there could be clashing interests between the two neighboring concession owners.</p>	<p>Attempt to influence the decisions of the concession owner when designing the tender and the contract. Discussions and negotiations beforehand could be organized by the concession owner.</p>	The authority of concession owners versus the authority of other governments	Public service character

The main general conclusion that can be drawn is that the degree of liberalisation did not influence the fact that risks and uncertainties come into existence and that legal conflicts emerge. Both elements of liberalization, namely the introduction of competition and the introduction of new regulation to protect public interests, played a role in all sectors.

The element introduction of competition led to conflicts about a perceived competitive disadvantage by one (type of) market party. In telecommunications, the imbalance was between incumbents, who controlled essential facilities, and newcomers. Incumbents in the telecommunications sectors complained about the high amount of regulation they had to comply with, whereas newcomers stressed their dependence on a network owner that was also their competitor. In bussing services, the imbalance existed between the current concession holders and the other market parties that wanted to make an offer. Current concession holders in the bussing market complained that they had to provide vital business information to their competitors, whereas the new bidders complained about the unfair advantages of the concession holder that exactly knew the opportunities and risks of operating in that particular concession area.

The public service character also led to conflicts in all sectors. Here the main risk was how policy objectives would be translated into market regulations. In telecommunications, the main policy objective was and is to create effective competition so that consumers ultimately pay lower tariffs. Incumbents in the telecommunications sectors sometimes felt that they were too often restricted by governmental interventions aimed to reduce their market power and filed complaints about these interventions. In the bussing sectors, there were many groups (passengers, residents, local governments) that felt that their interests were not correctly represented in the tender and filed complaints about that. Also, in all sectors employees felt that position was weakened due to the fact that there were no longer civil servants and sometimes used the court in an attempt to strengthen their position.

This does not mean that the risks and the resulting conflicts were the same in all markets. To name one major difference, in the telecommunications companies had to both compete and cooperate with each other on a daily basis. In the bussing sectors, competitors seldomly met. Therefore, liberalization in the telecommunications sectors led to ‘horizontal juridification,’ namely conflicts between competitors (although in court the case was usually between a market party and the regulator, because the market structure determined that market parties had to file a complaint at the regulatory institution which then took a decision, after which the other market party challenged this decision in court). Liberalization in the bussing sectors led to ‘vertical

juridification,' namely conflicts between the market parties and the governments that put concessions on tender. This is a consequence of the small degree of liberalization. However, as said before, conflicts existed in all markets. This also means that the relationship between liberalization and juridification exists in very different types of markets, which is further elaborated upon in section 9.4 on the generalizability of the conclusions.

Finally, it is also interesting to note that not all risks/uncertainties and strategies that were identified from the market and actor analysis can be shown to have led to legal conflicts. This means that no conflicts were encountered in which this strategy played a role. This does not mean that it never will. For example, it can be expected that bussing companies, that are heavily dependent on a particular geographical area, will appeal any decision to put this region up for tender, if only to buy time to prepare.

#### 9.2.5 Styles of court governance as an intervening variable

The line of reasoning as presented in the previous sections only involved the demand side of legal services. It was established that liberalization caused new types of court cases. However, it was hypothesized that the legal sphere would react to these socio-economic developments, as it did during other periods of social and economic change (see Habermas, 1981). The analysis of such a change in the legal sphere started with the observation of the role of the legal system in the studied conflicts.

When a verdict is brought before the court, the judge may base its decision on one of two principles. In the first place, the court may apply the logic of reasonableness and judge whether an actor did what was reasonable to expect under that circumstances. This legal concept of reasonableness is increasingly narrowly defined, but the basic premise remains that there are multiple correct ways to act under certain conditions and the court only looks whether a particular type of behavior suits the law. On the other hand, the court may apply a test of correctness. The court then interprets the law and determines the sole correct interpretation. The actor's behavior is then judged retrospectively. Needless to say, the influence of the court is much higher under the second logic. A verdict of the second type also provides more certainty. Therefore, in case of economic questions, a verdict of the second type firmly establishes the court as an institution of economic governance.

The logics applied by the court were analyzed for cases in which the normal executive state power, established in the sectoral regulator (either an independent

agency or a department of a governmental institution), was challenged. This provides information as to whether power shifted from the executive to the legislative branch. The major part of regulatory decisions is reviewed from the standpoint that the court is the sole and correct interpreter of the law. The underlying logic is that in case of absence of clear state regulation, the court fills the gap by giving a single interpretation, which places the court at an important place in the center of economic governance. Note that this trend is absent in the British bus services sector because only one case was observed in which a regulatory decision was challenged.

The increased resolution of conflicts by the regulator also results in the question whether rules made by court through case law themselves become subject to questions of interpretation. This would be a logical process, because once the court has given the correct interpretation of a law, the actors may act reasonably within these boundaries until another conflict emerges that requires further refinement of the correct boundaries. This process is indeed taking place in three of the four markets and is likely to result in a large body of complex laws that requires specialized legal knowledge to work with.

### **9.3 Consequences of juridification**

Evaluations of liberalization policy have mainly focused on expected consequences, and especially on expected economic benefits such as better accessibility of services, higher efficiency, more choice for consumers, higher quality of services, more innovation, etc. Of course, in some cases it turned out that these expected benefits were not reached and that instead prices had increased or service levels decreased, but this still meant that the consequences took place on indicators that were expected to change. The only negative indicator that was frequently measured and that was expected to change was the position of workers. Employment was expected to decline in the short run, as well as the terms of employment.

Juridification as an unexpected consequence has not been evaluated before. Just as the other consequences of liberalization, juridification can be evaluated on the basis of measurable economic criteria as well as political criteria that are less easy to measure but that are still important.

The transaction costs in the sectors studied were measured by taking the costs of the court system, the costs of lawyers, and the costs of legal experts working for regulatory agencies and for service providers. An assumption was that the largest part of these costs needed not to be made before liberalization. The total costs per sector

were then compared to the market size, in order to determine the significance of these costs. The costs were taken from financial reports of service providers, agencies and courts, as well as from interviews with Dutch legal experts.

The total measurable costs of juridification were as follows:

<b>Table 9.4: Transaction costs of juridification per year in the four markets and legal transaction costs as percentage of total turnover</b>		
<i>Sector</i>	<i>Legal transaction costs</i>	<i>% of total turnover<sup>10</sup></i>
Telecommunications NL	<b>€10 Mln.</b>	0.15%
Telecommunications UK	<b>€28 Mln.</b>	0.25%
Bus services NL	<b>€1 Mln.</b>	0.07%
Bus services UK	<b>€2 Mln.</b>	0.03%

The costs of juridification amounted to several Million Euro's in all sectors, but in terms of the market size as measured in the total turnover in the relevant market segments, they are not very significant. Comparing the various sectors, the costs of the telecommunications sectors were higher than in the bussing sectors. The most plausible explanation is that there is far more direct competition for consumers in the telecommunications sectors as opposed to the bussing sectors. Therefore, it is logical that there are more opportunities for conflicts to arise in telecommunications. The large difference between the Dutch and the British sectors originates in the relatively high costs of tendering procedures in the Dutch bussing sector, whereas in the British sector most areas are not put on tender. Thus, it may be concluded that the way of structuring and regulating a liberalized market does have consequences for the costs of juridification.

It should be stressed that these are only the direct costs of juridification. The highest costs are likely the more formalized internal procedures in the companies and governmental agencies, but it is almost impossible to measure these.

<sup>10</sup> Based on 2007 annual reports by BT for Telecom UK, KPN for Bus NL, Connexxion for Bus NL and First for Bus UK. The revenues of these companies in the relevant market segments (fixed voice communications and bussing services in the domestic countries of that company), together with their market shares as reported in chapter 3, give a reliable measure of the total turnover in that market segment.

## 9.4 Generalizability

One aim of the research design, with maximum variation on the independent variable, was to study the effects of the scope and the phasing of liberalization on the dependent variable, juridification. This is essential for the generalizability of the conclusions. If the scope of liberalization led to a particular new type of conflict, it is likely that it will also lead to this type of conflict in markets that were liberalized in a similar way. Therefore, one criterion for the sector selection was the scope of liberalization. Since the mechanism that liberalization led to juridification was observed in both sectors in both countries, it could be concluded that the results can indeed be generalized to other liberalized sectors. The sector structure and way in which this liberalization is carried out determines the type of conflicts that emerge.

The other criterion for market selection was the phase of liberalization. This criterion served another purpose, namely to see whether certain types of conflict remained in the long run, or disappeared over time. This could be called the generalizability of the conclusions over time. The main conclusion here is that the process of re-regulation is cyclical. Every few years, the sector and its body of regulation are evaluated and subsequently existing regulations are specified and new regulations added. Juridification largely follows this policy cycle. Since even in the British markets the regulations are still changing, the mechanism is permanent at least in the middle-long run. Experts estimate that the final body of regulations will take about 40 years.

### 9.4.1 To other sectors

The main predictions that liberalization would lead to increases in risk and uncertainty, that various actors would attempt to reduce these risks, and that these attempts would lead to legal conflict, are confirmed for all four markets. It is therefore plausible that liberalization leads to more legal conflicts. This means that in case of liberalization of another sector, it is very likely that legal conflicts in that sector emerge as well. At a more general level, it is also a confirmation of the more general theory that a particular level of risk-reduction is required in economic sectors in the sense that if one coordination principle no longer provides risk-reduction, actors will search for alternative institutions. The level of risk-reduction required is different for all sectors. For example, it is much lower for a printing paper market than for a

second-hand car market, due to information asymmetries. Moreover, the balance of institutions which provide such risk-reduction also differs. Where trust and reputation are important institutions in one market, another may be controlled by large firms, powerful associations, or state regulation. This study demonstrates the reaction in economic markets if the balance of risk-reducing institutions is disturbed to such a degree that it does not reach the minimum level. Moreover, it presented the court as a possible alternative institution of economic governance and it is likely that the court can fulfill this role in other economic sectors as well.

The main mechanism can therefore be generalized to other sectors. On the other hand, the way in which this mechanism operated differed between the sectors and countries. The main differences were the type of conflicts that emerged, the actors who were engaged in these conflicts, and the costs of juridification. It is questionable to what extent these observations can be generalized.

The type of legal conflict, which means the issue over which dispute has risen, seems to depend largely on the sector-specific topics. The former state corporations all controlled their sectors, but what exactly they controlled differed and therefore also the conflicts differ. The only issues that were observed in all sectors were issues of access and competition policy. For the rest, actors in the telecommunication markets had to cope with technological uncertainty, which led to conflicts over technology and attempts to introduce technology-neutral regulation. It can therefore be assumed that similar types of conflict emerge in innovation-driven network markets such as the energy market. In the bussing sector, the uncertainty was mainly on the side of the public interest, so that many conflicts and regulations focused on protecting the public interest. Such conflicts can also be expected in case of further liberalization of European health-care sectors. Yet these expectations have of course not been verified through this study.

Further differences occurred with regard to the actors engaged in conflicts. The study gives strong indications that this depends on the structure of the liberalized market. In case of the introduction of a sector-specific regulator, such as in the telecommunication market, it is likely that most cases will involve complaints about this regulator. Especially if a party with substantial market power is present, it is likely that the efforts to promote competition by the regulator threaten the dominant position of the former incumbent, which will react by challenging the decisions. Furthermore the telecommunication market is also a market where firms compete directly for consumers. In such a setting, it is likely that the firms continue their competition in the courtroom. As one British judge remarked on the

‘telecommunication wars’: “These companies watch each other like hawks and complain when they can.”

The bussing sectors are an example of a different type of competition, namely through tenders. This resulted not only in different conflicts but also in different parties that engaged in conflict. The target of most cases was the concession owner that organized a tender. All other parties served as plaintiffs more than once. Conflicts between service providers were absent, due to the absence of direct competition. The tendering procedure not only gave rise to litigation, but also to contracts and procedures that continue to grow in size and complexity. The number of legal specialists required to organize such procedures, to translate policy objectives in legal terms, to assist the parties in bidding for the contract, to assist in the evaluation, etc. also increases. This mechanism is not unique for the bussing sector, but can be observed in many other sectors that are based on tendering. For example, governments who tender large ICT projects face a similar form of juridification. These conflicts and organizational adaptations after liberalization are therefore a consequence of the particular choice to liberalize the market through a concession model.

Finally, the impact of the costs of juridification differs between the sectors. It is relatively higher in the bussing than in the telecommunication sectors. The main reason is that the costs of following procedures and lawyering do not differ much, while the size of the sectors differs enormously. There is a part of these costs which is fixed, and therefore the impact of juridification will be relatively smaller in large sectors.

#### 9.4.2 Influence of time

The conclusions of the study can also be generalized over time. The effect could be observed both in the British liberalizations at the beginning of the 1980’s and in the Dutch liberalizations in the second half of the 1990’s. The cycle of juridification starts with new or more specified regulations. Since the new sector-specific regulations have not yet evolved to a more or less stable situation (even in the UK the regulations are still changing every two years), it is likely that also in other sectors the effect of juridification will be at least semi-permanent. Whereas economic liberalization theories talk of sub-optimal transition phases and where many legal sociologists claim that litigation over time goes up and down (Blankenburg, 1989), there are logical reasons to assume that this effect will be permanent. In the first place, many of the

court cases are not the result of the need for legal interpretation (which is likely to disappear after sufficient case law has been created) but are merely a continuation of competition. As long as parties are in strong competition, they will also use the court as a battleground. Secondly, many conflicts over the interpretation of regulations focus on technological issues. Due to constant technological changes, the laws governing technological issues have to change constantly as well. And each time the law is altered, there are new possibilities for dispute over their interpretation. Thirdly, although the increase in litigation may level off at some point in time, the other effects of juridification will not. Procedures become more and more formal and complex in character and legal specialists have successfully ‘colonized’ part of the economic sectors. Such organizational and cultural developments are not part of a transition, but will remain for a much longer time period.

## **9.5 What can be learned?**

The central conclusion of this dissertation is that liberalization has led to juridification and that it has done so in two different ways that can be linked to two different elements of liberalization.

The first element is the introduction of competition. Competition increases risks and uncertainties to those that engage in it. Service providers have to deal with opponents that attempt to put them out of business. Without taking risks, no money can be earned in a liberalized sector. However, in most liberalized markets, regulation is required to create a level playing field, mainly to correct for dominant power positions or information asymmetries. Service providers may engage in competition by improving their business case, but they may as well attempt to challenge the regulations and their interpretation in order to improve their market position. The regulations are still new and it is not at all clear how a judge will interpret them. Furthermore, the regulations in liberalized markets are often initially formulated broadly on purpose, since the basic idea behind liberalization was that there ought to be less political influence on the market. These can be viewed as the facilitating conditions for conflict: Competing market parties that have a direct interest in interpreting market rules to their advantage and a set of new, broad rules that are not yet sufficiently elaborated. However, more in general, the competitive struggle moves to some extent from the market place to the courtroom.

The second element is the protection of public interests. Although many liberalized service markets do not produce public goods, there is often a public

interest involved. The interests of certain parties may be affected by the fact that services are no longer provided by a public provider but by a commercial one. The government sometimes assumes a role as guardian of such parties by creating incentives for the commercial provider, both in the form of sticks and carrots. However, there are still tensions. Service providers see these regulations as opportunities for cost-cutting by minimizing compliance. Many societal groups, on the other hand, find that their interests are not properly guarded by the state and will attempt to increase protection. Both forms tend to produce conflicts.

The existence of both mechanisms in such different markets confirms the communicating vessels hypothesis that there will always need to be a certain level of risk reduction by institutions. If the influence of one institution is reduced - in this case the state as regulator through being service provider - there will be a reaction that leads to an increased importance of other institutions. The sector regulators and the judiciary become the new risk-reducing institutions. The judiciary is called upon to solve conflicts in the markets and to interpret the new market regulations, thus assuming the role of an important market governor. Economic transactions in liberalized markets are henceforth governed not only by the market mechanism and the sector regulator - as may be obvious - but also by the case law formed by judicial interpretations of the new market rules - which might be less immediately obvious. To extend the argument of Stephen Vogel (1996): freer markets do not only lead to more rules, but also to more case law. Juridification of liberalized markets is difficult to prevent. In Teubner's (1987) terms, it can only be channeled, not prevented

This has had an effect on both the judicial and the socio-economic sphere. Courts must take into account that specialized judges are required to create case law that reduces uncertainties in the market over the interpretation of regulations. They must be aware that in the absence of clear rules and case law, it is important to interpret the rules in such a way that the political ideas behind liberalization are being retained. On the other hand, the actors in the market must be aware that the legal environment in which they operate quickly becomes more complicated, to such a degree that only lawyers understand the boundaries of what is allowed and what not. As a result, companies, customers and third parties frequently have to call upon legal experts. In this way, the legal sphere becomes more political and economic, while the economic sphere becomes more legal.

## 10 Appendices

### 10.1 Appendix A: Nederlandse samenvatting

#### Vrijere markten, meer jurisprudentie

##### 10.1.1 Introductie

Het introduceren van marktwerking in de publieke dienstverlening heeft diverse gevolgen gehad. Studies naar deze gevolgen richten zich voornamelijk op directe economische gevolgen. Voorbeelden daarvan zijn de gevolgen op het gebied van de doelmatigheid waarmee publieke middelen worden aangewend, kwaliteit van de dienstverlening, de toegankelijkheid van de diensten en de werkgelegenheid. De concentratie op deze gevolgen is niet vreemd, want voor- en tegenstanders van liberalisering hadden ontwikkelingen op deze gebieden verwacht en de beleidsdoelen daarop gericht. In geval van bovenstaande voorbeelden: Een grotere doelmatigheid, op zijn minst behoud van kwaliteit, betere toegankelijkheid en behoud van werkgelegenheid.

Toch heeft liberalisering ook andere, deels indirecte en onverwachte gevolgen gehad. Maar deze gevolgen zijn moeilijker te herkennen en nog moeilijker meetbaar te maken. De hypothese van dit proefschrift is dat één van die gevolgen juridisering is: Een toegenomen invloed van formeel-juridische instrumenten op het bestuur van deze sectoren. De belangrijkste van deze instrumenten zijn wet- en regelgeving, contracten, toezicht en juridische geschilbeslechting.

Het doel van dit proefschrift is het onderzoeken van de relatie tussen liberalisering en juridisering. Leidt liberalisering tot juridisering? Daarbij wordt aandacht besteed aan de vragen hoe dit verband tot stand komt (als het er is) en wat de gevolgen daarvan zijn.

Het onderzoeken van indirecte en onverwachte gevolgen van liberalisering is moeilijker dan het meten van directe en verwachte gevolgen. Toch is het niet onbelangrijk. Als door liberalisering juridisering ontstaat, heeft dit bijvoorbeeld invloed op de transactiekosten die in een sector gemaakt worden. Maar ook de manier waarop de overheid het ingrijpen in de economie legitimeert, verandert, net als de wijze waarop zij daarvoor verantwoording afdraagt. Juridisering heeft zelfs gevolgen

voor de manier waarop overheid, marktpartijen en andere belanghebbenden zoals consumenten en werknemers met elkaar omgaan. Deze effecten kunnen zowel positief als negatief beoordeeld worden, maar het is in ieder geval van belang om ze zo goed mogelijk in kaart te brengen.

Daarnaast ligt er wetenschappelijk en praktisch belang in het verbinden van twee ontwikkelingen die normaal gesproken door verschillende werelden bekeken worden. Liberalisering is vooral een onderwerp van studie voor economen, politicologen en bestuurskundigen en voor organisaties die zich bezig houden met economisch beleid. Juridisering wordt vooral bestudeerd door juristen en rechtssociologen en door organisaties die bezig zijn met juridisch beleid. Het verbinden van deze twee kan een nieuw inzicht bieden aan elk van de twee kanten.

### 10.1.2 Juridisering

#### Definitie

Juridisering in de breedste zin betekent dat relaties juridischer van aard worden. Dat is vrij abstract en het is daarom nuttig om van verschillende dimensies van juridisering te spreken. Er zijn vijf van zulke dimensies te onderscheiden: 1) De rechtsstaat ontwikkelt zich waardoor politieke besluitvorming, burgerlijke vrijheden en de macht van verschillende staatsonderdelen in toenemende mate juridisch verankerd zijn; 2) Er wordt nieuwe wet- en regelgeving van kracht of bestaande wet- en regelgeving wordt gespecificeerd; 3) Geschillen worden in toenemende mate op juridische wijze beslecht, bijvoorbeeld door de rechter; 4) De rechter en de advocatuur krijgen een grotere vrijheid in het interpreteren van wet- en regelgeving, bijvoorbeeld door onduidelijkheid of door complexiteit daarvan; 5) Mensen zien zaken in toenemende mate op een juridische manier (Blichner & Molander 2008). Deze verschillende dimensies van juridisering kunnen elkaar natuurlijk ook weer veroorzaken of tenietdoen. Precieze wetgeving kan bijvoorbeeld de invloed van de rechter inperken.

In de context van economische markten zijn niet al deze dimensies even interessant. De rechtsstaat wordt bijvoorbeeld nauwelijks beïnvloed door economisch beleid. Met name van belang is de ontwikkeling waarbij actoren op economische markten in toenemende mate door formele, juridische instituties bestuurd worden. Deze definitie sluit aan op zowel een toename en differentiatie van wet- en regelgeving, op een toename van juridische geschilbeslechting, als op een toename in de invloed van rechters en advocaten.

De focus in deze studie ligt op de toename van juridische geschilbeslechting en specifiek op het ontstaan van nieuwe rechtszaken. De belangrijkste reden daarvoor is dat alle andere ontwikkelingen een rol spelen in het ontstaan en oplossen van juridische conflicten: Wetgeving, toezicht, rechterlijke macht en advocatuur spelen allemaal een rol. Met het beschrijven en het verklaren van het ontstaan en het oplossen van juridische conflicten wordt het grootste deel van de juridisering bestreken.

## Oorzaken

Bij de oorzaken van juridisering moet in de eerste plaats een onderscheid worden gemaakt tussen twee ontwikkelingen: 1) Een toename in het aantal (potentieel juridische) conflicten; en 2) een toegenomen neiging om juridische conflicten voor de rechter te brengen. Een juridisch conflict is een probleem tussen twee partijen dat potentieel op juridische wijze opgelost zou kunnen worden. Het eerste punt, een toename in juridische conflicten, zou het gevolg kunnen zijn van het ontstaan van meer conflicten, maar ook van de toegenomen mogelijkheden om die conflicten juridisch op te lossen. Meer conflicten zouden bijvoorbeeld kunnen ontstaan door een lagere sociale cohesie, een slechter draaiende economie, bevolkingsgroei of een toename van het aantal motorvoertuigen. De potentiële hoeveelheid juridische conflicten wordt vooral bepaald door de aanwezigheid van wet- en regelgeving op dat gebied. Juridische ontwikkelingen bepalen deze factor dus voornamelijk.

Het tweede punt, de ontwikkeling om conflicten daadwerkelijk voor de rechter te brengen in plaats van ze op een andere manier op te lossen, kan onder meer beïnvloed worden door de efficiëntie van de rechterlijke macht, de alternatieve mogelijkheden voor geschilbeslechting, het aantal rechtsbijstandverzekeringen, het opleidingsniveau of de cultuur waar de actoren vandaan komen. Kortom, er zijn zeer veel mogelijke verklaringen voor een toename in het aantal rechtszaken, variërend van heel juridisch specifieke tot brede maatschappelijke ontwikkelingen. De in deze studie bestudeerde verklaring, liberalisering, behoort tot die laatste categorie.

### 10.1.3 Liberalisering

#### Definitie

Liberalisering is letterlijk het ‘bevrijden’ van markten van staatsbemoeienis. Dit kan bestaan uit een aantal verschillende elementen.

Allereerst wordt met liberalisering van markten vaak bedoeld dat er competitie wordt geïntroduceerd op een markt die daarvoor door een staatsmonopolie bediend werd. Dit kan zowel in de vorm van concurrentie op de markt, waarbij meerdere partijen direct om de gunst van de klant strijden, als in de vorm van concurrentie om de markt, waarbij via een aanbesteding partijen kunnen meedingen naar een concessie om de dienst gedurende een bepaalde tijd in een bepaald gebied exclusief te verzorgen.

Het tweede element, privatisering van een staatsbedrijf, wordt daar vaak aan gekoppeld. Deze koppeling is noodzakelijk omdat er anders oneerlijke concurrentie zou ontstaan en private partijen misschien helemaal niet bereid zouden zijn te investeren in de geliberaliseerde markt. Privatisering gaat vaak in fasen waarbij de juridische status van de organisatie en haar medewerkers verandert en de staat daarna haar aandelen verkoopt.

Het derde element is herregulering. Het introduceren van competitie geeft vaak de noodzaak tot het instellen van nieuwe regelgeving om die competitie in goede banen te leiden. Voorbeelden zijn de mededingingswetgeving, regelgeving die netwerkeigenaren verplichten toegang te verlenen aan andere dienstverleners en regelgeving die publieke belangen of werknemersbelangen moeten waarborgen. Onderdeel van deze herregulering is ook de oprichting van toezichhouders. Deze organisaties werken vaak min of meer autonoom en richten zich op één specifieke sector.

Deze verschillende elementen zijn dus vaak onderdeel van één beleidsproces, maar kunnen verschillende gevolgen hebben.

#### Gevolgen

Voor- en tegenstanders van liberalisering verwachtten een aantal gevolgen van dit beleid. Voorstanders verwachtten een toename in de doelmatigheid van de besteding van publieke middelen. Door toegenomen efficiëntie zou de overheid minder geld

kwijt zijn aan dienstverlening. Verder verwachtte men een breder aanbod voor consumenten en lagere prijzen. Tegenstanders verwachtten gevolgen voor de kwaliteit van de dienstverlening. In een poging om de laagst mogelijke prijs te bieden zouden commerciële dienstverleners gaan bezuinigen op kwaliteit. Om diezelfde reden zouden de lonen van werknemers en de werkgelegenheid onder druk komen te staan. Verder vreesde men voor de toegankelijkheid van bepaalde diensten voor mensen in landelijke gebieden.

Veel evaluaties van liberalisering hebben zich geconcentreerd op deze verwachtte gevolgen. Deze studies laten een gematigd positief beeld zien waarin de marktwerking nog niet haar beloftes heeft waargemaakt maar waar de nadelen ook niet zo groot zijn als door tegenstanders verwacht.

### Juridisering als gevolg van liberalisering

Liberalisering kan beschouwd worden als een terugdringing van de instituties die de economische sectoren besturen. Volgens Van Waarden (2002a, 2002b) zijn er meerdere van zulke instituties en is een belangrijk doel ervan het reduceren van risico's en onzekerheden. Voorbeelden zijn gemeenschappen (reduceren risico's en onzekerheden door het bestaan van vertrouwen tussen de leden), verenigingen (reduceren risico's en onzekerheden door zelfregulering), bedrijfshiërarchieën (reduceren risico's en onzekerheden door interne hiërarchie), rechtbanken (reduceren risico's en onzekerheden door het oplossen van conflicten en het interpreteren van regels) en staten (reduceren risico's en onzekerheden door regulering). Daarnaast heeft de markt commerciële organisaties die risico's en onzekerheden verminderen, bijvoorbeeld ratingbureaus die de kredietwaardigheid bepalen en juridische dienstverleners die afspraken vastleggen in contracten. Een belangrijk kenmerk van deze instituties is dat ze als communicerende vaten werken. Als een bepaalde institutie wordt teruggedrongen terwijl de noodzaak van het terugdringen van risico's en onzekerheden niet wordt verminderd dan zullen marktpartijen naar alternatieven zoeken.

In het geval van liberalisering wordt de staat als institutie een stuk teruggedrongen. In plaats zelf de dienstverlening te verzorgen geven overheden nu alleen nog de kaders aan. De risico's en onzekerheden voor dienstverleners, maar ook voor klanten, werknemers en andere belanghebbenden, nemen hierdoor toe (ofwel: ze worden niet langer gereduceerd). Als deze partijen op zoek gaan naar alternatieven zijn er maar een paar mogelijkheden. Gemeenschappen op basis van vertrouwen werken slecht in internationale economische sectoren. Zelfregulering door bedrijven

is in de meeste gevallen verboden in de mededingingswetgeving. Hiërarchieën worden door de liberalisering juist vaak doorbroken door meerdere markten te creëren.

Rechtbanken zijn onder het nieuwe systeem juist wel geschikt als risicoverlagende instituties. Oude en nieuwe marktpartijen zullen met elkaar in conflict raken en soms zullen deze conflicten door de rechter opgelost kunnen worden. Ook de interpretatie van de nieuwe sectorspecifieke wet- en regelgeving kan door de rechter gedaan worden.

Volgens de communicerende vaten theorie is dus te verwachten dat liberalisering tot juridisering leidt. Doel van deze studie is om te onderzoeken of de risico's en onzekerheden inderdaad toenemen na liberalisering, welke risico's en onzekerheden dat zijn, of actoren proberen deze te reduceren, of en zij hierbij in toenemende mate een beroep op de rechter doen.

#### 10.1.4 Methode

##### Opzet

De relatie tussen liberalisering en juridisering kan het best onderzocht worden in de context van specifieke markten. De vorm en mate van liberalisering verschillen sterk per sector. Waarschijnlijk heeft dit gevolgen voor de relatie tussen die liberalisering en juridisering. Door verschillende sectoren met elkaar te vergelijken kan niet alleen de vraag beantwoord worden of er inderdaad sprake is van een causaal verband, maar kan bovendien worden onderzocht hoe die relatie precies tot stand komt. De keuze van sectoren werd gemaakt met als doel een zo groot mogelijke variatie op de onafhankelijke variabele, liberalisering, te krijgen.

In de eerste plaats speelt de vorm van liberalisering een rol. Aan de ene kant kan het gaan om concurrentie op de markt, waarbij partijen elkaar direct om de klant beconcurreren. Aan de andere kant staat concurrentie om de markt, waarbij er maar een korte fase van concurrentie is. Als sectoren werd hierom gekozen voor telecommunicatie (concurrentie op de markt) en regionaal openbaar personenvervoer (concurrentie om de markt).

In de tweede plaats kan de fase van liberalisering van invloed zijn. De gevolgen van liberalisering voor juridisering kunnen op korte termijn behoorlijk verschillen van die op lange termijn. Het ligt voor de hand om de twee sectoren in twee verschillende landen te vergelijken, omdat landen vaak meerdere sectoren binnen korte termijn

liberaliseren. Gekozen is voor Nederland (liberalisering ongeveer 5-10 jaar geleden) en het Verenigd Koninkrijk (liberalisering ongeveer 25 jaar geleden).

## Rechtszaken

De dimensie van juridisering die de meeste aandacht zal krijgen in deze studie is die van juridische geschillen die voor de rechtbank zijn gekomen. Het lijkt logisch om het verband tussen liberalisering en juridisering allereerst statistisch te onderzoeken, bijvoorbeeld door middel van een tijdreeksanalyse. Er kan dan bekeken worden of het aantal rechtszaken of een trend daarin voor liberalisering significant verschilt met daarna. Om een aantal redenen bleek dit niet mogelijk. Ten eerste zijn er zeer veel theoretische verklaringen voor het aantal rechtszaken. In een goed model zouden die allemaal als variabele moeten worden opgenomen. Gezien het relatief klein aantal zaken in de sectoren (vergeleken met bijvoorbeeld het totaal aantal rechtszaken in een land) is het niet mogelijk de invloed van liberalisering tussen zoveel andere variabelen statistisch te bepalen.

Ten tweede zijn de data niet volledig. Recente zaken zijn allemaal terug te vinden in elektronisch doorzoekbare archieven, maar oudere zaken zijn niet per sector of onderwerp gerangschikt. De totale populatie van rechtszaken is dus niet te achterhalen en de bekende populatie is bevooroordeeld. Ten derde zijn er te weinig tijdstippen voor een statistische analyse met zo weinig zaken. Daarnaast spelen nog andere punten mee. Het nut van het tellen van rechtszaken is bijvoorbeeld discutabel, omdat ze enorm verschillen qua omvang en belang.

Er is daarom gekozen voor een kwalitatieve benadering, waarin rechtszaken worden bestudeerd op logische verbanden met een element van liberalisering. Eerst wordt een analyse gemaakt van de actoren en hun relaties in de nieuwe geliberaliseerde markten. Daarna wordt gekeken naar de risico's en onzekerheden die deze actoren tegenkomen als gevolg van liberalisering en welke strategieën ze volgen om deze te verminderen. Daarna wordt logisch beredeneerd welke strategieën tot spanningen tussen bepaalde partijen leiden, waarmee een kader wordt verkregen waar conflicten in geplaatst kunnen worden. In een volgende stap wordt de empirische werkelijkheid van rechtszaken geanalyseerd en gekeken of de thema's en de motieven van de partijen inderdaad een gevolg zijn van één van de mechanismen die in het kader werden beschreven.

Het voordeel van deze benadering is dat inzicht wordt verkregen in de mechanismen waardoor liberalisering tot rechtszaken kan leiden. Het nadeel is dat niet gezegd kan worden in welke mate liberalisering juridisering verklaart. Het doel

van het proefschrift is daarmee het uitwerken van een theorie en het plausibel maken van een relatie.

#### 10.1.5 Achtergrond

Liberalisering heeft een aantal verwachte gevolgen gehad, die direct een toename in het aantal conflicten op deze markten verklaren.

Eén van de gevolgen van liberalisering is dat er meer markten zijn ontstaan. De voormalige staatsbedrijven waren vaak hiërarchieën waarin het volledige proces van dienstverlening als één dienst werd gezien. Na de liberalisering zijn deze hiërarchieën opgebroken, waardoor meerdere markten zijn ontstaan. Op de telecommunicatiemarkt zijn bijvoorbeeld netwerkbeheer en dienstverlening twee aparte markten geworden, terwijl ze vroeger als één werden gezien. Dit heeft geleid tot meer relaties tussen de partijen.

Daarnaast zijn er meer partijen op de geliberaliseerde markten actief. Met het invoeren van marktwerking zijn een aantal nieuwe aanbieders actief. Ook dit heeft natuurlijk geleid tot meer relaties. Aangezien er dus meer actoren en relaties op deze markten zijn, is de kans dat er tussen sommige van deze actoren conflicten ontstaan groter.

Behalve dat er meer relaties op geliberaliseerde markten zijn, zijn veel relaties ook formeler en zakelijker van aard geworden. Toen het volledige proces van dienstverlening nog een staatsaangelegenheid was, waren alle werknemers collega's van elkaar, van beleidsmakers tot uitvoerders. Als een beleidsmaker een verandering in de busroute doorgevoerd wilde hebben, kon dat met een telefoontje afgehandeld worden. In de huidige, meer formele, structuur is dat ondenkbaar. Dit heeft als gevolg dat problemen in veel mindere mate informeel tussen partijen opgelost kunnen worden. In plaats daarvan is de kans dat een probleem op formele wijze beslecht moet worden, veel groter geworden.

#### 10.1.6 Risico's en onzekerheden

De toename van het aantal partijen en de verzakelijking van hun relaties zijn op zich al redenen waarom liberalisering tot meer conflicten kan leiden, maar er is nog een andere trend die deze relatie verklaart. Dat is de toename van risico's en onzekerheden voor verschillende actoren in die markten. Sommige van deze risico's zijn hetzelfde in alle geliberaliseerde markten. Alle dienstverleners zijn onzekerder

over hun voortbestaan, alle klanten lopen een verhoogd risico van dalende serviceniveaus in onrendabele delen van de markt en alle overheden moeten omgaan met de onzekerheid van regulering onder veranderende omstandigheden. Daarnaast zijn er sectorspecifieke risico's.

De belangrijkste conclusie over risico's en de manieren waarop actoren hiermee omgaan is dat een aantal ervan tot spanningen tussen de partijen leiden. In de telecommunicatie liggen de belangrijkste spanningsvelden tussen de voormalige monopolisten en de toezichthouders, en tussen de voormalige monopolisten en nieuwkomers op de markten. In het openbaar busvervoer lag het belangrijkste spanningsveld tussen de dienstverleners en de aanbestedende overheden. In deze laatste markt is er geen directe concurrentie tussen de marktpartijen, zodat dit spanningsveld juist vrij klein is. Veel van deze spanningen hebben uiteindelijk ook tot juridische conflicten geleid.

Tabellen 10.1 en 10.2 vormen een samenvatting van alle marktpartijen, alle mogelijke risico's en onzekerheden na liberalisering en gevolgde strategieën om ze te verminderen.

**Tabel 10.1: Actoren, risico's en onzekerheden, en strategieën om ze te verminderen in de telecommunicatie**

<i>Actoren</i>	<i>Risico's en onzekerheden</i>	<i>Strategieën</i>
Voormalig monopolist	<p><b>Samenwerken met concurrenten</b>                      Als eigenaar van het belangrijkste netwerk moet de voormalig monopolist interconnectie en CPS faciliteren. Daardoor ontstaat de noodzaak om samen te werken met concurrenten</p>	<p>Zo weinig mogelijk medewerking verlenen. De voormalig monopolist heeft sterke redenen om de juridische verplichtingen op een minimale manier te interpreteren om kosten te besparen en de concurrentie niet teveel te helpen.</p>
	<p><b>Concurrentie door prijsvechters</b>                      Nieuwkomers op de markt kunnen een relatief eenvoudige organisatie opzetten om zo tegen lagere kosten te werken dan de grote concurrent.</p>	<p>Eén gevolgde strategie is het benadrukken van de sterke reputatie in marketingcampagnes. Een andere strategie is het aanpassen van de tariefstructuur. Omdat deze op zeer veel punten kan verschillen, is het lastig voor consumenten om de goedkoopste aanbieder te selecteren.</p>
	<p><b>Acties van de toezichthouder</b>                      De missie van de toezichthouders houdt onder andere het bevorderen van de marktwerking in. Dit zal tot botsingen leiden met het belang van de voormalig monopolist.</p>	<p>Het benutten van alle mogelijkheden voor bezwaar en beroep. Soms kan dit tot een verzwakking van de beslissing leiden, maar het levert ook tijdswinst op omdat zulke procedures lang kunnen duren.</p>

**Tabel 10.1 (vervolg): Actoren, risico's en onzekerheden, en strategieën om ze te verminderen in de telecommunicatie**

<i>Actoren</i>	<i>Risico's en onzekerheden</i>	<i>Strategieën</i>
Nieuwe toetreders	<p><b>Afhankelijkheid van het netwerk</b> Nieuwe toetreders hebben geen keus dan samen te werken met de eigenaar van het belangrijkste netwerk</p>	Lobbyen voor gunstige regelgeving in het belang van een gelijk speelveld voor alle partijen. Daarnaast kan men aanklachten indienen tegen misbruik van marktmacht.
Werknemers	<p><b>De omslag naar een privaat bedrijf</b> Door de privatisering verloren medewerkers hun status als ambtenaar, waardoor ze kwetsbaarder werden op de arbeidsmarkt. Daarnaast noodzaak de invoering van concurrentie reorganisaties.</p>	Via vakbonden proberen baangaranties af te dwingen.
Anderen	<p><b>Aanleggen van en onderhoud aan het netwerk</b> Onduidelijkheid over de rechten van netwerkeigenaren en bedrijven die nieuwe netwerken willen aanleggen.</p>	Onderhandelen en lobbyen voor betere regelgeving.

**Tabel 10.2: Actoren, risico's en onzekerheden, en strategieën om ze te verminderen in het busvervoer**

<i>Actoren</i>	<i>Risico's en onzekerheden</i>	<i>Strategieën</i>
Dienstverlener	<p><b>Aanbesteding</b> Een dienstverlener kan van het één op het andere moment heel veel of geen werk hebben. Hoewel dit een normaal bedrijfsrisico is, moet wel aangetekend worden dat er maar een paar aanbestedingen per jaar zijn en dat het risico van verlies dus zeer groot is.</p>	Wanneer een aanbesteding wordt verloren, altijd bezwaar aantekenen. De mogelijke baten zijn bijna altijd hoger dan de kosten.
	<p><b>Toekomstige marktontwikkelingen (terwijl contract vastligt)</b> Bedrijven moeten een offerte indienen terwijl niet duidelijk is hoe de markt zich gaat ontwikkelen. Ook dit kan als een normaal bedrijfsrisico gezien worden, maar de onzekerheid is groot door de lange contractduur en de vele factoren.</p>	Alleen aanbiedingen doen in geval van de mogelijkheid een flexibel contract overeen te komen, waar belangrijke ontwikkelingen kunnen worden gecompenseerd.

**Tabel 10.2 (vervolg): Actoren, risico's en onzekerheden, en strategieën om ze te verminderen in het busvervoer**

<i>Actoren</i>	<i>Risico's en onzekerheden</i>	<i>Strategieën</i>
Dienstverleners	<p><b>Overnemen van personeel</b> Nieuwe concessiehouders zijn verplicht het personeel op die concessie over te nemen, maar ze hebben vaak onvolledige informatie over dat personeel.</p>	<p>Bedrijven kunnen extra informatie opvragen en een zaak aanspannen als de huidige concessiehouder, bijvoorbeeld omdat het om gevoelige informatie gaat, weigert om de gevraagde informatie te verstrekken.</p>
	<p><b>Afhankelijkheid van een bepaalde regio</b> Certain bus service providers have historically focused on one particular area. That area could become a concession area.</p>	<p>If the particular area becomes part of a concession contract, the company is almost forced to submit a very low offer, since losing the tender would in many cases be the end of its existence. Another strategy could be to lobby for not putting public transport in the area on tender.</p>
Consumenten	<p><b>Verlies van invloed op de kwaliteit van dienstverlening</b> Hoewel consumenten meestal een sterkere positie krijgen na liberalisering, hoeft dat in een aanbestedingsmarkt niet het geval te zijn, omdat consumenten alleen indirect invloed uit kunnen oefenen op de kwaliteit.</p>	<p>Consumenten organiseren zich in belangenverenigingen die in formele procedures proberen invloed uit te oefenen op de kwaliteit voorafgaand aan aanbestedingen.</p>

**Tabel 10.2 (vervolg): Actoren, risico's en onzekerheden, en strategieën om ze te verminderen in het busvervoer**

<i>Actoren</i>	<i>Risico's en onzekerheden</i>	<i>Strategieën</i>
Omwonenden	<p><b>Verlies van invloed op halteplaatsen, routes en rijschema's</b>                      Zolang een vervoerder zich aan het contract houdt, kunnen omwonenden weinig invloed uitoefenen op de plaats van haltes, de routes en de reistijden.</p>	De enige mogelijkheid is proberen invloed uit te oefenen bij het opstellen van de aanbestedingsdocumenten, waar omwonenden duidelijk moeten maken dat het om een algemeen belang gaat en niet alleen hun eigen belang.
Aanbestedende overheden	<p><b>Vertalen van beleidsdoelstellingen in juridische aanbestedingsdocumenten</b>                      Het is lastig om de aanbestedingdocumenten zo te formuleren dat uiteindelijk de beleidsdoelen bereikt worden en ze niet op een andere manier geïnterpreteerd kunnen worden.</p>	Het inhuren van juridische expertise, omdat veel overheden niet over de juiste juridische kennis beschikken.
	<p><b>Toekomstige marktontwikkelingen (terwijl contract vastligt)</b>                      Idem aan het risico voor dienstverleners.</p>	Proberen flexibele contracten op te stellen.

**Tabel 10.2 (vervolg): Actoren, risico's en onzekerheden, en strategieën om ze te verminderen in het busvervoer**

<i>Actoren</i>	<i>Risico 's en onzekerheden</i>	<i>Strategieën</i>
Aanbestedende overheden	<p><b>Verplichten tot naleven van de contractverplichtingen</b>                      Veel diensverleners zullen de contracten op een minimale manier proberen te interpreteren om zo hun inkomsten te verhogen. Er zijn immers niet veel andere mogelijkheden in de markt om dat te doen.</p>	<p>Wederom het juridisch dusdanig opstellen van contracten dat slechts één interpretatie mogelijk is. Dit gaat alleen vaak ten koste van de flexibiliteit.</p>
	<p><b>Geen of weinig geïnteresseerde partijen</b>                      Als de concessie niet interessant genoeg wordt gevonden, kan het voorkomen dat er geen partijen zijn.</p>	<p>De concessie-eigenaar kan proberen een 'aantrekkelijke' aanbesteding te organiseren door veel ruimte voor ondernemers te laten in het contract. Dit gaat echter vaak ten koste van de zekerheid dat de beleidsdoelstellingen gehaald worden.</p>
Werknemers	<p><b>Omslag naar een commercieel bedrijf</b>                      Door de privatisering verloren medewerkers hun status als ambtenaar, waardoor ze kwetsbaarder werden op de arbeidsmarkt.                      Daarnaast noodzaak de invoering van concurrentie reorganisaties.</p>	<p>Via vakbonden proberen baangaranties af te dwingen.</p>

**Tabel 10.2 (vervolg): Actoren, risico's en onzekerheden, en strategieën om ze te verminderen in het busvervoer**

<i>Actoren</i>	<i>Risico's en onzekerheden</i>	<i>Strategieën</i>
Andere overheden	<p><b>Belangenconflicten tussen overheden in of grenzend aan het aanbestedingsgebied</b></p> <p>Verschillende overheden kunnen verschillende belangen hebben in geval van openbaar vervoer. Elke overheid zal proberen de eigen bevolking het gunstigst vertegenwoordigd te laten zijn in het aanbestedingscontract.</p>	<p>Formeel en informeel invloed uitoefenen op de aanbesteding, om zo bijvoorbeeld een bepaalde lijn of een minimum aantal bussen naar de eigen regio proberen te krijgen.</p> <p>Aangrenzende regio's moeten afspraken maken over grensoverschrijdende lijnen.</p>

### 10.1.7 Conflicten als gevolg van concurrentie

De strijd tussen concurrerende marktpartijen kan direct tot juridische conflicten leiden. De juridische strijd is dan eigenlijk een voortzetting van de zakelijke strijd. In de telecommunicatie waren dit vooral zaken over vergelijkende reclame over tarieven. Tariefstructuren waren zo complex, dat het moeilijk was om op voorhand te bepalen of een claim daarover wel of niet terecht was. Marktpartijen baseerden algemene stellingen als “wij zijn goedkoper dan X” op deze ingewikkelde structuren, waarbij helemaal niet evident was dat die claim terecht was. Andere bedrijven hadden dan ook meer dan genoeg reden om deze claims aan te vechten. In een aantal van deze zaken gaf de rechter ook aan dat het onderdeel van het spelletje leek te zijn om reclames altijd aan te vechten, ongeacht de winkans.

In die gedeeltes van het openbaar busvervoer waar een concessiesysteem gehanteerd werd, waren er veel juridische conflicten over de correctheid van de gevolgde procedures. Hier viel eigenlijk altijd wel iets op af te dingen en vanwege de commerciële belangen werd ieder mogelijk punt aangegrepen door de verliezende partij om een procedure aan te spannen. In de uitvoeringsfase van een concessie

waren er conflicten met omwonenden, die als belanghebbenden nauwelijks aan het aanbestedingsproces deelnemen. Sommigen ondervonden overlast van teveel bussen, anderen klaagden juist dat een bushalte verdween. Zaken hierover werden vrijwel altijd door de omwonenden verloren, zolang de overheid maar de juiste procedures had gevolgd.

#### 10.1.8 Conflicten als gevolg van het beschermen van het publiek belang en het belang van derden

Daarnaast is er een tweede mechanisme actief waardoor liberalisering tot juridisering leidt. De oorsprong hiervan ligt in het publieke karakter van de diensten die geliberaliseerd werden. Zowel telecommunicatie en busvervoer zijn belangrijk voor de economie in het algemeen. Wanneer deze diensten met een publiek karakter uitgevoerd gaan worden door commerciële partijen, ligt het voor de hand dat deze partijen uitsluitend naar het directe belang van hun klanten zullen kijken en weinig naar de indirecte belangen van andere partijen. Dit is te voorkomen door het invoeren van regelgeving die het algemeen belang of de belangen van specifieke partijen beschermt. De noodzaak tot het beschermen van het publieke belang na liberalisering leidde op twee manieren tot conflicten. In de eerste plaats werden niet alle belangen in regelgeving vastgelegd. Partijen die van mening waren dat de commerciële dienstverleners tegen hun belang handelden stapten naar de rechter om bescherming af te dwingen. In de tweede plaats ontstonden conflicten over de interpretatie van nieuwe regelgeving die bestemd was om publieke belangen te dienen.

Een goed voorbeeld van de eerste soort in het busvervoer waren de belangrijkste groepen: Passagiers en omwonenden. (Passagiers worden hier gerekend tot derde partijen, omdat de ‘markt’ in het busvervoer de transactie tussen busmaatschappij en de aanbestedende overheid is.) Beide groepen hadden geen invloed op het veranderen van busroutes, halteplaatsen en rijschema’s. Dit kan voor deze groepen grote gevolgen hebben. Soms omdat men bijvoorbeeld graag een bushalte in de buurt heeft, soms omdat men daarvan juist overlast ondervindt. Voorbeelden zijn bijvoorbeeld ziekenhuizen die het van belang achten een halteplaats te hebben of wijkbewoners die een busroute te gevaarlijk voor hun kinderen vinden. De enige bescherming die hiertegen bestond was het inbouwen van clausules in de aanbestedingsdocumenten via formele inspraakmechanismen, maar het is lastig om het algemeen belang aan te tonen tijdens een dergelijke procedure en bovendien was het nu juist het doel om ondernemers op dit soort punten meer vrijheid te geven.

Een goed voorbeeld van het tweede mechanisme is de bescherming van werknemers. Zij verloren met de liberalisering hun status als ambtenaar en eisten daar garanties voor terug. In het busvervoer leidde dit tot de verplichting voor een nieuwe concessiehouder om het personeel van de vorige over te nemen. De interpretatie van deze regelgeving leidde tot veel onduidelijkheid, want wanneer wordt iemand tot een concessie gerekend en wanneer niet? Veel bedrijven waren bang dat zij als nieuwe concessiehouder het minder goed presterende gedeelte van het personeel kregen. Bovendien leidde de bescherming van het personeel, net als in het geval van de halteplaatsen en routes, tot een kleinere vrijheid voor ondernemers.

Opvallend was dat dergelijke conflicten ook in de telecommunicatie voorkwamen, maar zeker tot minder problemen leidden dan in het busvervoer. De verklaring hiervoor moet zijn dat ondernemers en dienstverleners rechtstreeks zaken met elkaar doen en er weinig derde partijen geschaad worden in hun belangen. Wel ontstonden conflicten over het aanleggen en onderhouden van het netwerk door private partijen in publiek grondgebied.

Behalve regelgeving omvat het beschermen van het algemeen belang ook het toezicht houden door specifieke toezichthouders. Deze toezichthouders hadden niet alleen tot taak de bovenstaande regelgeving te handhaven, maar ook om actief de concurrentie te bevorderen binnen de wettelijke mogelijkheden. Met deze missie in het achterhoofd lag het voor de toezichthouders voor de hand om wetten op een bepaalde manier te interpreteren, die tot conflicten met de voormalige monopolist leidden.

In sommige markten combineert de toezichthouder daarmee eigenlijk drie rollen die elk in een ander deel van de trias politica vallen. Ze maken regels binnen de wettelijke kaders (die vanwege de hoge mate van expertise behoorlijk gezaghebbend zijn), houden toezicht op de naleving ervan en lossen conflicten tussen marktpartijen op.

### 10.1.9 Evaluatie

Het toegenomen belang van juridische besturingsmethoden heeft zowel economische als bestuurlijke gevolgen gehad.

Het belangrijkste economische gevolg was een toename van transactiekosten. Het hele systeem van rechtspraak, toezichthouders, advocatuur en juridisch adviseurs kan gezien worden als een systeem dat economische transacties faciliteert. Er is

blijkbaar een toename in belangrijkheid van dat systeem, waardoor de transactiekosten stijgen.

In de vier onderzochte markten zijn transactiekosten gemeten door te kijken naar de kosten van rechtspraak, advocatuur en het juridisch gedeelte van toezichthouders. Deze kosten zijn gebaseerd op jaarverslagen van vele partijen en interviews in Nederland.

De totale kosten van juridisering in de vier markten zijn als volgt:

<b>Tabel 10.3: Totale transactiekosten van juridisering</b>		
<i>Sector</i>	<i>Juridische transactiekosten</i>	<i>Als % van de totale omzet in deze sector</i>
Telecommunicatie NL	<b>€10 Mln.</b>	0.15%
Telecommunicatie VK	<b>€28 Mln.</b>	0.25%
Openbaar busvervoer NL	<b>€1 Mln.</b>	0.07%
Openbaar busvervoer VK	<b>€2 Mln.</b>	0.03%

Wel zij opgemerkt dat deze berekening niet alle transactiekosten in aanmerking neemt. Sterker nog, de grootste kosten worden waarschijnlijk veroorzaakt door de interne formalisering die actoren doorvoeren als reactie op de toegenomen kans op een rechtszaak. Deze kosten zijn echter zeer moeilijk meetbaar.

De toename van juridisering heeft ook zijn weerslag gehad op de manier waarop dienstverleners en bestuurders verantwoording afleggen over hun prestaties. Voor de liberalisering waren deze verantwoordingsmechanismen vooral professioneel en politiek/democratisch van aard. Professioneel omdat alle vormen van dienstverlening binnen de hiërarchie van één organisatie plaatsvonden. Politiek omdat bestuurders verantwoording aan een volksvertegenwoordiging moesten afleggen over de prestaties van de publieke dienstverleners en over de prestaties van de beleidsafdelingen die actief waren in deze sectoren.

Liberalisering en juridisering hadden drie effecten op deze verantwoordingsmechanismen. Het eerste effect was bedoeld en verwacht, namelijk een toegenomen rol van de consument. Vooral in de telecommunicatie worden dienstverleners afgerekend via de markt. In het vrije gedeelte van de Britse busmarkt is ook concurrentie, maar wordt het mechanisme beperkt gebruikt.

Het tweede effect is dat sommige mechanismen minder belangrijk zijn geworden. Bestuurders zijn bijvoorbeeld in veel mindere mate verantwoordelijk voor

de dienstverlening. Niet alleen is deze in handen van commerciële bedrijven, maar ook de toezichthouders zijn tot op bepaalde hoogte onafhankelijk. Het is in ieder geval niet vanzelfsprekend dat een bestuurder politieke verantwoordelijkheid zou nemen voor fouten die door een dergelijke onafhankelijke toezichthouder worden gemaakt. Bovendien hebben toezichthouders zoveel expertise, dat het moeilijk is voor andere organisaties om een oordeel over hun werk te geven.

Dat is één van de aanleidingen voor het derde effect, namelijk dat het belang van juridische verantwoording is toegenomen. De rechter wordt namelijk wel geacht een oordeel te geven over de werkwijze van beleidsmakers en toezichthouders. Deze toetsing kan inhoudelijk zijn (is de wet correct geïnterpreteerd) of procedureel (zijn de juiste procedures gevolgd bij het toepassen van de wet). In de telecommunicatie is vooral inhoudelijke toetsing in belang toegenomen. In het openbaar busvervoer ligt de nadruk juist meer op de gevolgde procedures.

In het aanbestede gedeelte van de markt voor openbaar busvervoer is nog een andere vorm van het juridisch verantwoording afleggen van belang, namelijk het concessiecontract. Burgers, zowel passagiers als omwonenden, konden zich vroeger tot te overheid wenden als ze een probleem met het openbaar vervoer hadden. In het concessiesysteem is dit niet langer mogelijk, omdat de overheid alle afspraken met de vervoerder al juridisch heeft vastgelegd. Klagen bij de overheid heeft op kortere termijn dus weinig zin, want de vervoerder hoeft zijn gedrag niet aan te passen zolang hij binnen het contract blijft. De enige manier om een vervoerder verantwoordelijk te houden is wederom via de juridische weg.

#### 10.1.10 Conclusie

Samenvattend moet worden geconcludeerd dat liberalisering als onbedoeld gevolg heeft gehad dat risico's en onzekerheden voor verschillende actoren zijn toegenomen. De strategieën die deze actoren volgden om hun risico's en onzekerheden te verminderen leidde tot spanningen, die vaak alleen via de rechtbank opgelost konden worden. Omdat dit mechanisme in vier zeer verschillende markten is geobserveerd, is het aannemelijk dat dit voor alle geliberaliseerde (en eventueel nog te liberaliseren markten) geldt. Omdat de belangrijkste verklaringen de concurrentie en herregulering zijn, zal een groot gedeelte van die juridisering waarschijnlijk blijvend zijn op de middellange termijn. Concurrentie zal immers blijven en de ontwikkeling van wet- en regelgeving is een continu proces.

Deze juridisering heeft een toename in transactiekosten tot gevolg gehad. Deze waren vooral significant in het openbaar busvervoer, waar ongeveer 10% van de winst aan extra juridische transactiekosten opgegaan is.



## 10.2 Appendix B: Interviews

J. Ayres	Ofcom	Compliance officer
T. van Eck	ROVER	Regional transport committee member
J. Groenendijk (Jaap)	Twynstra Gudde	Consultant
J. Groenendijk (Jeroen)	HTM	Director of strategy
G. van Kesteren	KpVV	Senior advisor
R. Leijenaar	NMa	Policymaker
C. van der Maas	Dutch Ministry of Transport	Senior policymaker
G.J. Nijnsink	Province of Noord-Holland	Policy advisor
A. Ottow	OPTA	Board member
H.J. de Ru	Allen & Overy	Partner
H.M. Sasse	Province of Noord Brabant	Concerncontroller
F. Sickinghe	Bird & Bird	Legal consultant
M. Sloot	KpVV	Senior advisor
F. Stoffels	Province of Noord Brabant	Member of Provincial Parliament
E. Wijvenkate	SRE	Policymaker

All interviews were conducted face to face, except for Ofcom, which was written. Standardized questionnaires were not used.



### 10.3 Appendix C: List of court cases

- (1983) Bromley London Borough Council v. Greater London Council. House of Lords. A.C. 768.
- (1984) Mercury Communications Ltd. v. Scott-Garner and Another. Court of Appeal (Civil division). [1984] I.C.R. 74.
- (1994) Mercury Communications Plc. v. Director General of Telecommunications and British Telecommunications Plc. Court of Appeal (Civil Division). C.L.C. 1125 CA.
- (1995) Mercury Communications Plc. v. Director General of Telecommunications and British Telecommunications Plc. House of Lords. C.L.C. 266 HL.
- (1998) Cable & Wireless Plc and Another v. British Telecommunications Plc. High Court of Justice, Chancery Division. [1998] F.S.R. 383.
- (2000) A., B., and C. v. College van Burgemeester en Wethouders van Leiden. College van Beroep voor het bedrijfsleven. AWB 00/674. LJN AB0529.
- (2000) A., B., and C. v. College van Burgemeester en Wethouders van Nijefurd. Rechtbank Leeuwarden. 99/1137. LJN AA4595.
- (2000) British Telecommunications Plc v. Director General of Telecommunications. CO/1506/2000.
- (2000) British Telecommunications Plc v. Humber Bridge Board. High Court of Justice (Chancery Division). No. 1994 B No 484A.
- (2000) KPN Telecom BV. v. College van de Onafhankelijke Post en Telecommunicatie Autoriteit. Rechtbank Rotterdam. VWET 00/1558-RIP. LJN AA7314.

- (2000) Nextcall Telecom PLC v. British Telecommunications PLC. High Court of Justice (Queen's Bench Division). HQ 0005840.
- (2001) A.-C. v. Gedeputeerde Staten van Drenthe. College van Beroep voor het Bedrijfsleven. AWB 01/481. LJN AB3009.
- (2001) OR BBA v. BBA. Rechtbank Amsterdam. 733/2001 OK.
- (2001) A. v. Dagelijks Bestuur van het Samenwerkingsverband Regio Eindhoven College van Beroep voor het bedrijfsleven. AWB 00/802. LJN AD8491.
- (2001) Yorkshire Traction Company Ltd. v. Vehicle Inspectorate. High Court of Justice (Queen's Bench Division). [2001] EWHC Admin 190.
- (2002) BT Ignite Nederland B.V. v. KPN Telecom B.V. Rechtbank 's-Gravenhage. KG 02/248. LJN AI1311.
- (2002) College van Burgemeester en Wethouders van de Gemeente Westland v. College van de Onafhankelijke Post- en Telecommunicatie Autoriteit Court of Rotterdam. TELEC 02/1470 STRN LJN AV2656.
- (2002) Connexxion Openbaar Vervoer N.V. v. Bestuur Regio Utrecht. College van Beroep voor het Bedrijfsleven. AWB 02/1447. LJN AE8314.
- (2002) FNV Bondgenoten and CNV Bedrijvenbond v. Arriva Nederland B.V. Rechtbank Arnhem. 94236 / KG ZA 02. LJN AF2758.
- (2002) KPN Telecom B.V. v. Onafhankelijke Post en Telecommunicatie Autoriteit. Rechtbank Rotterdam. VTELEC 02/327-SIMO. LJN AE2874.
- (2002) KPN Telecom B.V. v. Tele2 Netherlands B.V. Rechtbank Amsterdam. KG 02/309 JRB. LJN AD9353.
- (2002) Stichting Deventer Ziekenhuis Sint Geertruiden-Sint Jozef v. Gedeputeerde Staten van Overijssel. College van Beroep voor het bedrijfsleven. AWB 01/959. LJN AF0352.

- (2002) A. v. Gedeputeerde Staten van Zeeland. College van Beroep voor het bedrijfsleven. AWB 00/185. LJN AD9446.
- (2002) Vereniging Werkgevers Openbaar Vervoer v. CNV Bedrijvenbond and FNV Bondgenoten. Rechtbank Utrecht. 144312 / KG ZA 02-368. LJN AE1383.
- (2003) A. and 46 Others v. Dagelijks Bestuur van het Stadsgewest Haaglanden. College van Beroep voor het bedrijfsleven. AWB 01/870. LJN AF4102, .
- (2003) College van Burgemeester en Wethouders van de Gemeente Purmerend v. Dagelijks Bestuur van het Regionaal Orgaan Amsterdam. College van Beroep voor het Bedrijfsleven. AWB 02/616. LJN AK3411.
- (2003) Connexxion v. Groningen (Province), Drenthe, Groningen (Municipality) and Arriva. Court of Leeuwarden. 59971 / KG ZA 03-262.
- (2003) Groningen v. Arriva. Court of Leeuwarden. 60274 / KG ZA 03-294.
- (2003) KPN Telecom BV. v. College van de Onafhankelijke Post en Telecommunicatie Autoriteit. Court of The Hague. 03/1374. LJN AT3883.
- (2003) Novio Express B.V. v. Gedeputeerde Staten van Overijssel. College van Beroep voor het Bedrijfsleven. AWB 03/1027. LJN AM1475.
- (2003) A. v. College van Burgemeester en Wethouders van de Gemeente Amersfoort. College van Beroep voor het Bedrijfsleven. AWB 03/283. LJN AO6367.
- (2003) A. v. Dagelijks Bestuur van het Samenwerkingsverband Regio Eindhoven. College van Beroep voor het Bedrijfsleven. AWB 01/807. LJN AF4118.
- (2003) A. v. Gedeputeerde Staten van Noord-Holland. College van Beroep voor het Bedrijfsleven. AWB 02/1670. LJN AL1184.
- (2004) Alison Jones t/a Shamrock Coaches v. Department of Transport Welsh Traffic Office. Court of Appeal (Civil Division). EWCA Civ 58.

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- (2004) Gwynedd Council v. British Telecommunications Plc. Court of Appeal (Civil Division). [2004] EWCA Civ 942.
- (2004) KPN Telecom B.V. v. Onafhankelijke Post en Telecommunicatie Autoriteit. Rechtbank Rotterdam. 03/3646 VTELEC LJN AO2740.
- (2004) Vereniging King en Queen v. Dagelijks Bestuur van het Regionaal Orgaan Amsterdam. Voorzieningenrechter College van Beroep voor het bedrijfsleven. AWB 04/32. LJN AO8261.
- (2005) A. and B. v. Arriva Openbaar Vervoer N.V. Rechtbank Leeuwarden. 179717 / CV EXPL 05-1896. LJN AU5618.
- (2005) Arriva Openbaar Vervoer N.V. v. Ondernemingsraad van Arriva Openbaar Vervoer Nederland N.V. and FNV Bondgenoten. Rechtbank Leeuwarden. 170711 / VZ VERZ 05-126. LJN AU0814.
- (2005) Arriva Personenvervoer N.V. v. Gedeputeerde Staten van de Provincie Noord-Holland and Connexxion N.V. College van Beroep voor het Bedrijfsleven. AWB 03/652 and 04/24. LJN AU4027
- (2005) BBA Personenvervoer N.V. v. Gedeputeerde Staten van de Provincie Noord-Brabant. College van Beroep voor het Bedrijfsleven. AWB 05/565. LJN AU4408.
- (2005) Koninklijke KPN N.V. and KPN Telecom B.V. v. College van de Onafhankelijke Post en Telecommunicatie Autoriteit. Court of Rotterdam. TELEC 04/1430, 04/1431, 04/1432, 04/1433, 04/1434, 04/2038, 05/1093, 05/1094 and 05/1095-WILD. LJN: AV2337.
- (2005) KPN Telecom B.V. v. College van de Onafhankelijke Post en Telecommunicatie Autoriteit. Court of Rotterdam. TELEC 05/1484-WILD. LJN AV7341.

- (2005) Lijbrandt Telecom Nederland B.V. v. College van Burgemeester en Wethouders van de Gemeente Haarlem. Rechtbank Rotterdam. TELEC 03/3730-HRK LJV AT5247.
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- (2006) KPN Telecom B.V. v. College van Burgemeester en Wethouders van Rotterdam College van Beroep voor het bedrijfsleven. AWB 05/599. LJV AX0123.
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- (2006) Pretium Telecom B.V. v. KPN Telecom B.V. Rechtbank Amsterdam. 336465 / KG 06-368 AB. LJV AX9399.
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