



The Netherlands is located in Western Europe, bordering the North Sea between Belgium and Germany. The Netherlands, one of the founding members of the European Union, is a highly developed country that has ranked consistently within the top ten of the Human Development Index.

The Netherlands remained neutral in World War I, but suffered invasion and occupation by Germany in World War II (WWII). A modern, industrialised nation, the Netherlands is also a large exporter of agricultural products. The country was a founding member of the NATO and the European Economic Community (now the European Union), and participated in the introduction of the euro in 1999.

Economy

Since WWII the Netherlands has had a planned market-economy of the Rheinland model. As a trading nation the Netherlands has pursued open market, trade liberalising policies worldwide. It has a prosperous and open economy, which depends heavily on foreign trade. The economy is noted for stable industrial relations, moderate unemployment and inflation and a sizable current account surplus. Netherlands plays an important role as a European transportation hub.

Industrial activity is predominantly in food processing, chemicals, petroleum refining, and electrical machinery. The country continues to be one of the leading European nations for attracting FDI. Economic growth slowed considerably in 2001-04, as part of the global economic slowdown, but for the four years before that, annual growth averaged nearly four percent, well above the EU average.

Competition Law and Institutions

Unlike the United States for example, The Netherlands has up until 1995 always taken a more liberal/flexible

PROFILE	
Population:	16.2 million***
GDP (Current US\$):	511.5 billion***
Per Capita Income: (Current US\$)	26,230 (Atlas method)*** 29,100 (at PPP)**
Surface Area:	41,530 sq. km
Life Expectancy:	78.3 years **
Literacy (%):	998 (of ages 15 and above)**
HDI Rank:	5***
Sources: - World Development Indicators Database, World Bank, 2004 - Human Development Report Statistics, UNDP, 2004 (**) For the year 2002 (***) For the year 2003	

approach to monopolistic business behaviour. One of the main reasons lies in the fact that most businesses were state-owned monopolies (postal and telecommunications services, railways and most public utilities)².

The Netherlands enacted its first competition legislation in 1956. In that year the Act on Economic Competition (*Wet Economische Mededinging*) came into force. This Act allowed the formation of cartels or dominant positions, but forbade abuse consequent to cartel formation or attainment of dominant position. Under the Act, cartels were therefore not prohibited *per se*, but had to be registered in a secret cartel register. The Minister of Economic Affairs could only take action against cartels or undertakings holding a dominant market position if he could prove that their behaviour was detrimental to Dutch public interest. If such a situation arose, he could take three actions:

- Disclose the cartel;
- Give directions as to their behaviour; and
- Ban the cartel.

* Original paper submitted in January 2005. Revised in September 2005 & April 2006

1 Comments received from Mw. mr. A.C.M.P. Le Guellec, Senior Advisor Strategy & Communication Department, Netherlands Competition Authority (NMa) and additional information provided by Machiel van der Velde of Consumentenbond, The Hague

2 The majority has since been privatised, although the government still retains a large share in the railway company.

This so-called ‘abuse’ legislation with respect to cartels was contrary to the ‘prohibitive’ legislation that had been used in the United States since 1890 as well as to the rules of European competition law. This lax approach towards cartels made The Netherlands into, what many conceived to be a ‘cartel paradise’. There were cartels in all sectors and branches of the economy and it is estimated that there were as many unregistered cartels as there were registered cartels with the Ministry of Economic Affairs.

This situation ended when the first ‘purple coalition government’ of free-market liberals, social liberals and social democrats came to power by the end of 1994. The new Minister of Economic Affairs, Hans Wijers soon introduced legislation that amended the 1956 law and eventually promulgated a new Competition Act in 1998. The 1956 Act was scrapped simultaneously.

Box 87.1: An End to Cartel-paradise in The Netherlands

Minister Wijers (Economic Affairs) sent new rules with respect to the prohibition of pricing and market-sharing agreements and concentration control to parliament. With this legislation the position of The Netherlands as a ‘cartel paradise’, will end.

A number of cartels were already prohibited. Since July 01, 1993 horizontal price-fixing is no longer allowed and from now on vertical price-fixing is also prohibited. This means that Douwe Egberts (the largest Dutch coffee company) for example can no longer demand that retailers sell its coffee at a prescribed (minimum) price in their stores.

There are cartels in all shapes and forms. Price-fixing between brokers, movers and notaries are well known. The last list of publicised cartels dates from July 1993 and includes: Organisatie van Nederlandse Tandprotheticici (Dutch Dental Prostodontists); Koninklijke Vereniging van gerechtsdeurwaarders (Royal Bailiffs Association); Koninklijk Notariële Broederschap (Royal Brotherhood of Notaries); American Express, Eurocard and Diners Club; De Bankgirocentrale; NV Luchthaven Schiphol (Schiphol Airport); Vereniging van Rotterdamse Cargadoors (Association of Rotterdam Shipbrokers); Vereniging De Nederlandse Dagbladpers (Dutch Daily Press Association); De Nederlandse Organisatie van Tijdschrift Uitgevers (Dutch Association of Magazine Publishers); Provinciale Bond van Melkhandelaren (Provincial Union of Milk Merchants).

Source: NRC Handelsblad, May 2, 1995

The new Dutch Competition Act (Mededingingswet) came into force on January 01, 1998 and its objective is to promote a system of effective competition thereby avoiding the undesired economic effects of anticompetitive practices. Dynamic and adequately responsive markets are considered essential to an open international market economy as that of The Netherlands. Restrictive practices, abuse of dominant positions and concentrations of economic power are considered harmful and therefore, in principle and unlike under the previous competition regime, forbidden.

European competition law is of paramount importance to Dutch competition law and the Competition Act, 1998 is based on the principles of EC Competition Law. In general, Dutch competition law uses the same concepts and the same system of prohibitions and exemptions as the EC competition law. The basic assumption underlying the Competition Act is that Dutch competition law should be neither stringent nor more lenient than EC competition rules. Articles 81, 82 and 86 (2) of the EC treaty have been almost literally transposed into the Competition Act and the EC group exemptions have also been incorporated.

The main aspects of the 1998 Competition Act are:

- establishment of the Netherlands Competition Authority (Nederlandse Mededingingsautoriteit - NMa);
- prohibition of anticompetitive agreements;
- prohibition of abuse of dominant position;
- concentration control; and
- penalties (fines) for contravention and non-compliance;

The enforcement of the Competition Act 1998 has been entrusted to the Nederlandse Mededingingsautoriteit (NMa), which until recently was headed by a Director General and operated under the direction of the Minister of Economic Affairs. Due to an amendment of the Competition Act 1998, as of July 01, 2005 the Director General of the NMa has been replaced by a Management Board, which has the status of an independent administrative authority.

All decision-making powers have been conferred to the Management Board. Since the Management Board is an independent administrative authority, the Minister of Economic Affairs has lost the power to issue directives in individual competition cases. However, the Minister remains responsible for competition policy and may issue general directives in the form of policy rules on the way in which the Management Board should exercise its powers. These directives have to be published in the Official Gazette. Decisions of the Management Board can be appealed, in the first instance, to the District Court of Rotterdam, and, in the second instance, to the Trade and Industry Appeals Tribunal.

The sectoral regulators for the energy and transport sectors form an integral part of the NMa. These are:

- *The Office of Energy Regulation (DTe)*

DTe's mission is 'to make the energy markets work as effectively as possible and to protect consumers'. DTe realises this mission by contributing to creating conditions under which the market can function as effectively and efficiently as possible and the interests of consumers can be sufficiently guaranteed;

DTe has four main tasks:

- ◆ stimulates the effective functioning of a liberalised energy market;
- ◆ regulates where necessary;
- ◆ supervises parties in the energy sector; and
- ◆ monitors the operation of the energy markets.

- *The Office of Transport Regulation (Vervoerkamer).*

This chamber, which has been set up officially in 2004, exercises sector-specific supervision of (competition in) the railway sector, other public transport, such as trams, metros and bus transport, and Schiphol Airport. This supervision, carried out on the instructions of the Minister of Transport, Public Works and Water Management, focuses on compliance with legally defined standards and obligations with regard to the provision of services in the transport sector. In addition, the Office of Transport Regulation carries out studies into the market behaviour of companies in this sector.

The Office of Transport Regulation derives its authority to intervene from the Railway Act (*Spoorwegwet*), the Aviation Act (*Wet Luchtvaart*) and the Passenger Transport Act of 2000 (*Wet personenvervoer 2000*). These three Acts set out the criteria which the various players in the transport sector must meet in order to ensure that the market operates well.

Anticompetitive Business Practices

Scope of Application

The Competition Act applies to the conduct of all undertakings in the market.

The Act applies to three categories of conduct. These are restrictive practices, abuse of a dominant position and concentration control. Only autonomous conduct of undertakings falls within the scope of the Competition Act. Conduct explicitly prescribed by law falls outside the sphere of the Competition Act. (see boxed text on book retail prices).

The Act adopts the broad concept of an undertaking used in EC competition law as it defines an undertaking as 'an undertaking within the meaning of Article 85(1) of the EC Treaty (ex Article 81(1) of the EC Treaty). With reference to the case law of the European Court of Justice, the Dutch

Competition Authority defines an undertaking 'as every entity engaged in economic activity, regardless of its legal status and the way it is financed'. Therefore, publicly owned entities or even the State itself qualify as undertakings to the extent that they carry out economic activities. Non profit-making organisations, such as hospitals may also constitute undertakings for the purposes of competition law. Local fire brigades are not considered to be undertakings.

The Act applies to conduct which affects competition on the Dutch market or part thereof. The place where the undertakings involved are established is irrelevant. The Dutch Competition Act follows the EC's 'effects doctrine' in solving the question of extra-territorial jurisdiction. The decisive factor with respect to restrictive practices is the

Box 87.2: Fixed Retail Prices of Books

Dutch Parliament has promulgated a legislative proposal that puts fixed book prices into law. The Act is an initiative from D66-MP Boris Dittrich and co-sponsored by two other MPs: Femke Halsema (Green-Left) and Jeltje van Nieuwenhoven (Social Democrat). The law was necessary to retain the practice of fixed book prices in The Netherlands as the general exemption from the Dutch Competition Act comes to an end on January 01, 2005 and only an Act of Parliament could create exemptions to the Competition Act on factors other than economic rationale. The practice of fixed book-prices is based on cultural-political motives

According to Dittrich, fixed book prices guarantee a broad book supply in Dutch and Frisian. 'Publishers can use the financial leeway the fixed book price offers to publish books with a limited print run, such as poetry, essays or the works of debutants. Bookshop are stimulated to compete on the basis of quality over price'. Senator Schouw, although agreeing with the proposal, pointed out that the success of the system depends on the willingness of publishers and bookshops to invest their profits in less-profitable books.

The Dutch Consumers Association (Consumentenbond) is disappointed by the promulgation of the law that is to come into effect on January 01, 2005. In its opinion consumers would benefit greatly from a free book price. It would be more just to have a consumer pay the actual price for a book he or she wants to have instead of inflated artificial prices. As it is in the interest of publishers and bookshops to have a complete supply, a free book price would not lead to a decrease in supply of books.

Source: www.D66.nl and www.consumentenbond.nl

place where the agreement, decision or concerted practice is implemented, not where it is made.

Regulatory Framework

The Competition Act is applicable to all sectors of the economy. It does not contain provisions relating to organisations with exclusive market rights. Sectors in which undertakings entrusted with tasks of general economic interest operate, have a special character but do not fall outside the scope of the Competition Act.

In regulated markets, like telecommunications, energy, broadcasting, public transport and financial markets, a balance must be struck between the competition rules (supervised by the NMa) and specific regulation (normally entrusted to another administrative body), which both apply at the same time.

The general principle is that the specific regulation defines the framework within which the Competition Act applies. Apart from the energy and transport regulators, which form an integral part of the NMa, the other regulators in The Netherlands include:

- The Financial Markets Authority (Autoriteit Financiële Markten AFM);
- The Independent Regulatory Authority for the Telecommunication and Postal Sector (OPTA); and
- The Public Broadcasting Commission.

The regulatory framework both in the telecommunications as well as the energy sector is in conformity with EU legislation. Telecommunications is now dealt with on a more general scale of 'electronic communications', meaning not just telephone lines and numbers but access to content, internet services and so on.

There is a dedicated and independent agency, OPTA, that deals with all consumer as well as competition aspects of e-communications in The Netherlands. The energy market in the country is dealt with by dedicated energy legislation. Some parts of that legislation does contain consumer rights. These rights and the competition elements of the liberalised market for energy (both gas and electricity) are dealt with by a regulatory authority called the DTe which is a department of the general competition agency, the NMa.

Consumer Protection

Dutch consumer protection legislation is in conformity with EU-consumer legislation. There is no consumer legislation directly related to competition matters. Competition legislation as such deals with inter-business relationships to ensure better outcomes of a competitive market. Unfortunately the competitiveness of a market is hardly ever related to benefits for consumers.

Although no specific consumer legislation in relation to competition exists, proper enforcement of consumer legislation is required to ensure that a level playing field exists for all businesses. Once some businesses do not live up to adequate standards there may well be lack of conformity with consumer protection rules in due cases. Therefore, the Dutch Government has decided on the setting up of a consumer regulatory authority, which will deal with general inconsistencies with consumer protection legislation within certain sectors.

The goal of the Competition Act is to ensure that consumers get the best deal by providing fair competition in markets. The regulatory toolbox of NMa is equipped to deal with markets, but not with the position of consumers in markets. Therefore, the minister of Economic Affairs, helped by the European Directive on Fair Trading and pushed by consumer organisations, has agreed to set up a National Consumer Protection Authority by 2007.

This authority, although at first under a limited legislation, will take necessary actions against traders that use unfair commercial practices and thus harm consumers and fair markets. This will enable enhancement of quality and fairness of markets and competition

Concluding Observations and Future Scenario

On May 31, 2002 an evaluation report of the Competition Act was sent to the Dutch Parliament. The report sought to answer three main questions:

- Was the Competition Act able to realise the effects envisaged by its enactment?
- Does the Act provide the NMa enough freedom to effectively carry out its work? and
- Did the NMa uphold and implement the Act in an efficient way?

The main conclusions of the report are that the Competition Act has contributed to the maintenance and improvement of effective competition in The Netherlands and that NMa has evolved into an authoritative competition agency that was able to efficiently implement the Competition Act. The report suggested some improvements and on August 01, 2004 an amended Competition Act came into force.

The Competition Act of 2004 does not do much for consumers. It's main goal is to enhance the effectiveness and efficacy of the NMa by providing more means for investigation like entering a home and empowering it to levy higher penalties to those that break the competition law or do not comply with requests for information and cooperation.

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