



COUNTRY STUDIES

Netherlands – Updated Report 2004

Introduction

This Report examines the state of competition policy in the Netherlands in 2004. It focuses particular attention on developments since the 1998 “Report on the Role of Competition Policy in Regulatory Reform”, prepared as part of a larger OECD study of regulatory reform in the Netherlands.

Overview

Related Topics

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NETHERLANDS - REPORT ON COMPETITION LAW AND INSTITUTIONS (2004)

The attached report updates information on the current state of competition policy in Netherlands. It was edited after the Competition Committee discussion (Item VII) in October 2004, which compared experiences in ten countries. It is circulated FOR INFORMATION.

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English - Or. English

UPDATED REPORT ON COMPETITION LAW AND INSTITUTIONS (2004)

NETHERLANDS

1. The Netherlands was the first country whose competition law and policy received a full peer review under the regulatory reform program, in 1998. The report was published in 1999. Competition was the subject of a special chapter in its latest OECD *Annual Survey*, published earlier in 2004. This report concentrates on developments since the 1999 report, including steps to implement its recommendations.

2. In 1998, the Netherlands had just enacted its first strong national competition law, which set up an entirely new enforcement authority, the NMa. Because the system was still untested, the only recommendation about enforcement in the first report was to do it, vigorously. The other recommendations in the report focused on regulatory issues. Now that there has been some experience with using it, including several major actions against bid rigging cartels in the construction sector, there are plans to improve the enforcement system, with stronger investigation powers and sanctions. A proposal has been before Parliament for some time to make the NMa formally independent. In what may be a response to other aspects of its formative experiences, the NMa promises in its latest *Annual Report* to become more open and accessible in its administrative decision-making, while being more restrained in its communications with the press.

Substantive law

3. The Netherlands follows the EU approach of prohibiting restrictive agreements (subject to criteria for exemption) and abuse of dominance. The 1998 law also adopted the EU approach to applying it. Thus, for its first several years, much of NMa's enforcement effort was devoted to decisions about applications for exemption from the law's prohibitions.

Box 1. Enforcement strategy

The basic recommendation of the 1999 Report was to apply the new law vigorously.

The NMa's first Director General set a straightforward enforcement agenda: to bring significant cases to demonstrate the law's potential and importance. To get results, these cases would be selected to avoid controversies about jurisdiction and difficult, complex, novel legal theories. To show that the law was relevant in the Netherlands, the cases would target anti-competitive codes of "unfair competition" in industry associations and similar groups, because these industry associations and the "PBOs" that organise several sectors of the Dutch economy were important elements of the traditional way of doing business, and their rules were likely to be an important source of constraints on competition. And the NMa sought to do this in a way that would establish a reputation for real and perceived independence and professional competence.

NMa made it a priority to complete the process of transition from the previous regime, which meant deciding over 1000 applications for exemption from the new prohibitions. The unusually large number of applications – four times more than had been expected – demonstrated the wide extent of the Netherlands' traditions of industry self-regulation, consensus and co-operation. Not all of that co-operation impairs competition, of course. The information exchanges and agreements on terms and conditions that are typically found in the rules and operations of industry associations do not usually amount to *per se* violations. Most of the NMa's early enforcement actions were responses to these applications, indicating what kinds of co-operation would no longer be permitted. Exemption applications were handled systematically. Typically, NMa would examine representative agreements in

some sectors and then use the results as a model or as a project for a team to handle together. In determining which kinds of agreements to approve and which to disapprove, the NMa relied more on formal classifications than on careful market analysis, in order to finish the task efficiently.

The NMa succeeded in demonstrating its independence and professional competence in getting through this process and in demonstrating the relevance and importance of effective competition law to the Dutch economy. But because its attention was concentrated on deciding these applications, as late as 2001 the NMa only had 6 investigations of alleged violations. When the construction cartel publicity broke, the NMa was challenged to show that it could apply the law through enforcement action too. By all reports, the NMa is now applying the law vigorously; indeed, some in business complain it is too vigorous.

4. Changing the law in 1998 did not by itself change market behaviour, of course, and habits of non-competitive accommodation persisted. The NMa was caught somewhat by surprise when widespread price fixing was uncovered in the construction industry. The industry had applied for exemptions for some of its bid-calculation agreements. The NMa disapproved these applications, but it did not follow up to find out whether the industry was colluding anyway despite its disapproval. The NMa might not yet have developed the cynical suspicion of a more experienced enforcement agency. And it was concerned to some extent that it did not yet have the resources, skills and experience to take on such a difficult, large-scale enforcement effort. Nonetheless, when evidence surfaced publicly in late 2000 that widespread bid-rigging was persisting even after the new 1998 prohibition, a Parliamentary inquiry criticised the NMa and demanded stronger action.

5. The construction industry's behaviour was deeply rooted in the national tradition of tolerating or encouraging co-operation. Despite the long gestation of the 1998 law and the efforts of the government and the NMa to explain its importance, the industry was surprised to learn that bid rigging was wrong. The documents that were originally offered to expose the cartel dealt mostly with the previous era, when the system had been public.

6. The Dutch experience demonstrates how the characteristic competition policy problems in a relatively small open economy with a tradition of co-operation are found in non-traded services. In the construction business, conditions are particularly favourable to collusion in operations such as application of asphalt and concrete. Transport is a high proportion of the cost for these standardised, low-tech, and perishable products, so their markets are necessarily local, limiting the number of suppliers who need to agree. Industries are vertically integrated, so independents can be punished by cutting off their supply. Competition would be mostly in terms of price – indeed, government procurement rules may even require that price be the only significant competitive consideration. Rules against shopping bids around simplify collusion greatly. Public procurement officials appeared to tolerate and support the industry's arrangements and helped to discourage entry from outside, even from elsewhere in the Netherlands. Foreign firm entry was not a significant threat, as the Dutch industry is better adapted to Dutch construction practices that rely on standardisation, and its pattern of co-operation actively excluded challenge from abroad, sometimes through reciprocal market division and threats of boycott. Claims that firms needed to team up in order to spread risk were unconvincing. Only for a tiny number of projects would combinations be needed to reach efficient scale. Rather, the Parliamentary inquiry showed that firms would sometimes team up, not because they were too small to handle a project alone, but because forming a consortium was a device to clear the firms' cartel pooling accounts with each other.

7. The overall economic impact of the construction industry collusion has not been determined. The scope of the problem was probably greater than the obvious co-ordination of bidding on public projects. Until recently, contractors have reportedly been unwilling to submit competing bids even on small, private projects. Comparing bids submitted in public tenders that only involved cartel members to those submitted where a non-member also participated shows the cartel was increasing prices about 8-9%.

8. To step up enforcement against construction industry cartels, the NMa set up a 30-person task force, including detectives, investigators and information-technology specialists to search computer records. The initial focus was on public projects, following up on the information that had sparked the Parliamentary inquiry: access to one firm's "accounts" of how the market division pool was monitored. Since then, NMa has followed tips, performed dawn raids to examine company records, and commissioned a systematic canvass of large-scale public construction projects to assess the market conditions that support co-operation and make anti-competitive arrangements feasible. The process took about two years, from the time the key evidence became available in December 2000 until sanctions were imposed in the big cases at the end of 2003. The fines against 22 companies for price fixing, market division, and bid rigging in large infrastructure projects, road maintenance, and other areas, totalled EUR 100.5 million. Six firms were fined over EUR 10 million each. One case was small in scale but nonetheless deserved pointed attention because the parties entered their agreement after the Parliamentary inquiry was already underway and after the NMa had publicly announced its intention to take enforcement actions.

9. Enforcement has not been limited to the construction industry. Other sectors in which firms have faced substantial penalties for horizontal collusion include cleaning services (total, EUR 17.0 million), shrimp (total, EUR 13.8 million), mobile phones (between EUR 6 million and EUR 24 million), and veterinarians (between EUR 750 000 and EUR 9.7 million). Most of the NMa's recent formal enforcement initiatives – 14 out of 16 "reports" about violations in 2003 – aimed at horizontal restrictions. A number of vertical restraints have been considered in the context of applications for exemption, and vertical price-fixing and similar practices have drawn fines in a few cases.

10. Abuse of dominance has not been as prominent on the enforcement agenda, except in network industry settings. A refusal to deal in electric power drew a fine of EUR 6.4 million. The NMa has the power to limit monopolists' exploitative prices, which it has done in cases involving cable TV and airport charges. Its latest action, in April 2004, imposed a fine of EUR 30 million against excessive interconnection fees for debit card transactions. NMa has intervened against low prices too, even taking interim measures against price cutting to meet or deter new entry. NMa does not have the power to order structural changes in infringement cases, though. The European Commission now has that power, and there is discussion of incorporating it in Dutch law too.

11. Applying sound economic analysis to merger decisions was an NMa priority from the outset. Merger control, including mandatory pre-notification, was an innovation in the 1998 law. If the NMa determines in its initial investigation that a proposed concentration would create or strengthen a dominant position that significantly restricts competition, it can require a license. NMa has demanded licenses in only a tiny number of cases, though some have been high-profile transactions, in newspapers, supermarkets, and media. The substantive test in the Dutch law is the same as the one in the old EU merger regulation rule. The formulation in the 2004 EU merger regulation might be considered a clarification, rather than a substantial change, in the substantive standard. It may be prudent to adjust the phrasing in Dutch law to conform to the new EU standard, if consistency between the two systems is the goal. Compiling its experience reviewing about 800 transactions since 1998, in July 2004 the NMa released a set of informal rules, produced through a consultation process, to clarify aspects of its practice in handling mergers. These deal with initial contacts prior to formal notification, communication with the notifying parties, involvement of third parties, confidentiality, sector studies initiated by NMa and cooperation with other competition authorities.

12. In interpreting the law and setting priorities, the NMa takes a "consumer welfare" approach. It considers the likely impact on the economy of the conduct being addressed and of correcting it, and the importance to consumers, as well as the "seriousness" of the violation. The principal targets, other than energy, have been non-traded services, in construction, health care, financial services and professions, and tendering. The emphasis on consumer effects and benefits discomfits some small business interests, who

would prefer that enforcement focus on the structure of the economy and the relative positions of larger and smaller market participants. Claims about the alleged power of large buyers are often complaints about commercial disadvantage rather than anti-competitive effects, and the Dutch government is sceptical that these issues require new legislation. Nonetheless, in recognition of the concerns of small business, the NMa agenda for 2004 says it will look seriously into charges that buyer power distorts competition.

13. Despite its “consumer welfare” conception of competition law and enforcement, the NMa does not have any direct responsibilities concerning consumer protection and marketing practices such as misrepresentation. Institutions for consumer protection in the Netherlands are comparatively informal, and may be comparatively ineffective as a result. The present system presumes that consumers and businesses will work out disputes about contracts and quality directly with the aid of “disputes committees”, which are organised by industry. In some sectors, such as energy and banking, permission for a company to operate depends on having a dispute settlement scheme; usually, this means that the company is affiliated with a disputes committee. But some sectors do not have dispute resolution committees, and some are slow. In telecoms, the disputes committee takes more than six months to decide complaints. The government now plans to create a new public enforcement system for consumer protection. The new consumer protection authority will be separate from NMa.

Institutions

14. The NMa has grown over 5 years into a substantial agency. Its total staff is now about 340, of whom about 100 are in the investigation and enforcement unit that deals with cartels and restrictive agreements. About a quarter are in the separate sectoral chambers for energy, transport and now health care.

15. The NMa is still an agency of the Ministry of Economic Affairs, and the Minister has the power to issue instructions in order to preserve the Minister’s responsibility and accountability to Parliament. The Minister stated from the outset the intention not to use that power in individual cases, and no instruction has ever been given. Only once has a party tried to appeal a merger decision to the Minister; the appeal was denied. Because of its role in deciding about infringements of law, the NMa should be independent. Its lack of formal independence has not hindered effective enforcement, but until the situation is formally changed the risk or appearance of influence will present a hurdle. The government approved legislation to change the NMa to an autonomous administrative organisation (in Dutch terms, a “ZBO”) in 2000. The legislation was approved by one chamber, but is still awaiting final action in Parliament despite a plan to have it in place at the beginning of 2004. The legislation would also change the structure of NMa, replacing the single Director General with a 3-person Board of Directors. That structure would provide some assurance against arbitrariness, which may be considered prudent for a more formally independent body.

16. The pace of enforcement has stepped up sharply since 2001. The number of applications for exemption has declined, and the number of findings of violation and application of sanctions has increased.

Table 1. NMa Actions

NMa action	2001	2002	2003
Reports on reasonable suspicion of violation	3	9	16
Cases imposing fines	4	6	14
Total fines (EUR)	159 000	99 600 000	135 500 000
Applications for exemption	165	46	40
Complaints about violations	145	187	219
Concentrations notified	138	77	69
Licences required for concentrations	2	1	2

Source : NMa, Annual Report 2003

Enforcement process

17. Issues of law and legal technique are increasingly important to enforcement effectiveness. To date, the Directors General of NMa have been legal experts, perhaps because of the importance of legal authority and accuracy where important decisions are routinely appealed to the courts. Internal separation of functions within NMa provides for an independent second-look in enforcement decisions. The legal department decides whether, and if so what, sanctions are called for. This function is not done by the same parts of the organisation that investigate and collect evidence about an alleged infringement. The Leniency Officer and the Complaints Officer are also separated internally from the staff that investigates infringements, to assure firms of the integrity of those processes. Parties can take an internal administrative appeal to the Director General of cases imposing a sanction or an order. An Advisory Committee on Administrative Appeals is convened and consulted. This group, whose members may include economists, law professors and judges, may hold hearings, and parties can submit new evidence and argument at that stage. The process can take several months. The administrative appeal process is evidently becoming cumbersome. There were over 140 administrative appeals processed in 2003, most involving energy decisions. Legislation is being prepared to streamline this process, principally by providing means to get cases into the courts more quickly. Appeal goes to the Rotterdam District Court, and from there to the Regulatory Industrial Organisation Appeals Court. Judges are showing increasing interest in the economic motivation and reasoning of competition cases. Their interest may have been piqued by attending course programs that were aimed at educating them about the subject.

18. As the EC is changing its enforcement procedures, the Netherlands is following. Investigations of alleged violations will become even more important, as enforcers will no longer be processing applications for exemption. The NMa's experience in the cartel investigations with tactics of concealment or destruction of evidence revealed weaknesses in its powers to get information and compel compliance. Legislation is in process to adapt to the new system and to increase the NMa's investigation powers. It is not expected to become effective until 2005, though. NMa would be able to enter private homes to obtain evidence; executives were found to have deliberately kept documents in their houses, knowing that NMa did not have power to enter. NMa would be able to seal an office continuously, not just during non-business hours, and to temporarily take documents away if necessary to make copies. Individual executives and officials could be fined for not complying with NMa investigations. Fines for non-compliance, which have been capped at only EUR 4 500 even for a company, will be substantially increased. An immediate administrative fine could be imposed for disrupting an NMa investigation. Sanctions for non-compliance with merger review processes will be brought into line with those in the EC merger regulation. And there would be an immediate effect of some such sanctions, reversing the usual rule that a sanction is suspended pending appeal.

19. The sanctions that are potentially available against actual violations appear generally adequate, with some exceptions. Before it actually imposed significant sanctions against a violation, the NMa

undertook a consultation process to design and promulgate guidelines about determining appropriate sanctions. These provide a general rationale to support its decisions if they are appealed to the courts. The NMa still lacks the power exact a penalty from members of an association for violations by their association. The new EC enforcement regulation includes a pass-through rule for associations, and the Netherlands is likely to follow it. The NMa does not yet hold individual executives accountable for substantive violations. The new legislation may provide for sanctions against individuals who have given instructions to a corporation or organisation to infringe the Competition Act, or have actually given guidance to such an infringement; however, these would apparently apply to infringements involving resisting investigations or complying with orders.

20. After a slow start, the NMa's leniency program has now produced some publicly-announced results in several of the construction cartel cases. To emphasise certainty and create a clear advantage to being the first one to come forward, the first informant is assured of immunity, if it is not the leader of the cartel and the NMa has not yet started an investigation. If the NMa has already started investigating, this first informant is still assured at least a 50% reduction in fine. But for later informants or for the leader, lenient treatment is not guaranteed, and if granted it could amount to no more than a 50% reduction. In a wholesale effort to clear the decks in the construction industry, the NMa set a deadline of 1 May 2004 for firms to notify, and hence to apply for leniency about, their existing restrictive agreements; nearly 400 did so. Enforcement against large-scale restraints is stepping up in neighbouring jurisdictions, and the NMa has become concerned that the interactions of leniency programs could inadvertently hinder these efforts. To improve co-ordination, the NMa chaired a working group of the European competition authorities on national leniency programs.

Coverage of competition law and policy

21. There are still no broad exemptions for particular sectors. The competition law had contained a general provision for exemption of conduct that is authorised by other regulation. This was a transition measure, which lapsed in January 2003. The government has said that it does not believe it is necessary to incorporate any similar provision in the law now. Some specific regulations permit otherwise-prohibited conduct in a few settings. An exemption-regulation that accompanied the 1998 law permits retail promotions by co-operative groups. There is a *de minimis* exemption, which is rarely invoked because its thresholds are comparatively low.

Box 2. Exemptions

Eliminate gaps in coverage by terminating all "temporary" exemptions on or before their planned deadlines.

This recommendation from the 1999 report was drawn directly from the OECD's 1997 Principles of Regulation Reform, to eliminate gaps in coverage. The fate of these special provisions – for price fixing for newspapers and resale price maintenance for books and music, for mergers in the financial sector, and the general "regulatory authorisation" exemption – would measure the seriousness of the Netherlands' commitment.

The most broadly based exemption has lapsed on schedule. But the special treatment of price-setting for publications appears more durable. When the exemptions that permit resale price maintenance for publications expires in 2005, it will be replaced, though by something narrower, such as a "fixed book price" regime similar to those of France and Germany. It would not permit publishers to set prices for school texts.

22. The competition law applies in regulated sectors. Here, the Netherlands has experimented with several institutional models for co-ordinating general competition principles and sector regulation to promote competition. A number of sectoral regulators are formally attached to NMa. Advantages of this

structure include the possibility of pooling teams for particular problems or cases, as well as developing common approaches and usages to common terms and ideas. In electric power, the sector regulator, DTe, is formally a chamber within NMa. A transport chamber became officially functional as of 2004. In health care, as market-based reforms appear a “healthcare supervisory authority” within NMa is envisioned, starting with a “project team” in 2004. This is likely to develop a sector-specific set of rules to govern the transition to a system that is driven more by consumer choices. This body may evolve into a separate chamber, like the transport project team did, and it may eventually be absorbed into NMa as the need for special treatment declines. But plans to make the telecoms regulator, OPTA, a similar chamber connected to NMa have been set aside, due to concerns about the size of the resulting body, the difference between enforcement and regulation cultures, and differences in bureaucratic heritage. The electric power sector was already connected to the Ministry of Economy, but telecoms was not.

23. The transport chamber in NMa shows that the principle of synergy need not be confined by traditional bureaucratic structures, though, for the transport chamber’s powers and funds come from the transport ministry and laws, not the Ministry of Economy. The transport chamber’s principal concern so far has been keeping public operators to the terms of their franchises and preventing unfair competition with private providers. Piloting will be part of this office’s responsibilities as of January 2005, assuming Parliament acts on time. Piloting has been a national monopoly, protected by a 10-year concession grant which expires in 2005.

Box 3. Sector regulators and government entities

Implement recommendations to clarify how competition policy applies in regulated sectors and to reduce problems of unfair competition from government entities.

The 1999 Report endorsed the then-recent 1998 Cabinet recommendations about the relative competencies of NMa and sectoral regulators. They called for general, not sector-specific, competition rules, and for avoiding disagreement about competition policy by giving NMa decisive authority in particular applications. The Report also welcomed the then-recent Cohen report, which provided thorough and sound analysis and recommendations about how the participation of government-related entities may distort normal market competition.

Although the first steps to implement these recommendations and principles looked tentative, experience appears to have built confidence. The system of sector regulators is evolving generally in line with these recommendations, to rely as much as possible on general rules and to co-ordinate sectoral regulation closely with the NMa. The sector where the linkage looked most problematic was telecoms. The plan for a formal connection between NMa and the regulator is on hold, but substantively it appears that telecoms regulation and competition law are being applied consistently with the recommendations.

Unfair competition from government entities continues to receive attention, but action appears slow. Legislation is reportedly still in preparation to deal generally the problems.

24. In regulated professional services, the scope for enforcement attention is narrowing. The remaining restraints generally have some degree of legal authorisation because the rules are approved by the relevant minister. The NMa brought an early test case against the lawyers’ rule against providing services on a “no cure-no pay” basis. The profession had the last word, though, when the lawyers got the legislature to overrule the NMa and maintain their ban.

Advocacy and policy studies

25. NMa has concentrated on law enforcement. Most policy studies and advocacy are being done elsewhere. NMa has issued some statements about network industry issues, though. For example, it recently recommended against giving the historic telecoms incumbent, KPN, licences for wireless local loop service.

Box 4. Advocacy

Authorise NMa to engage in independent advocacy.

The 1999 Report encouraged the new NMa to get involved in advocacy to complement enforcement and as an opportunity for both building and applying sectoral expertise. The report acknowledged that it would be important to choose initiatives that demonstrate benefits and build support while avoiding controversialism that could weaken its enforcement position.

NMa has been involved in policy issues only to a limited extent, such as guidelines, studies and speeches. It is still formally part of the Ministry of Economic Affairs, and it has done some advocacy work in partnership with the Minister, who has chosen the subjects.

26. A new structure has been set up to deal with the competition implications of regulatory programs and actions. The MDW program, of targeted in-depth reviews and reforms, had lost momentum and political support. It was terminated by a new cabinet, for political reasons, and replaced with several new programs, such as one targeting the reduction of administrative burdens. In 2003, an inter-ministry commission at the senior civil-servant level was established to consider the implications of regulatory interventions and programmes on markets and competition. This new group has a somewhat broader political base than the old MDW program, and it may have more effective power too, as the commission was to have the power to reject actions it disapproved.

Box 5. Regulatory reform

Undertake a systematic review of laws and regulations, including those of trade associations and institutions like the PBOs, against the principle that any restriction on competition must be clearly demonstrated to be in the public interest.

This had been the underlying task of the now-defunct MDW project. The 1999 Report urged the Netherlands to expand the review process and make it more systematic. Although the program continued for a few more years, there is no longer a continuous, systematic program of review in place that is concerned about market and economic effects. Rather, the emphasis of current efforts to improve regulatory quality is on government efficiency, the legal system and reducing red tape. Consideration of broader economic effects through the new inter-ministry commission is likely to be *ad hoc*, though it may be effective in particular cases.

27. Dutch experience shows that the transition after liberalisation and deregulation can take longer than expected. Entry is slow against strong incumbents. Consumers are uninterested in changing. And the political process can produce delays and compromises. These experience teach some lessons about the process: Reformers need to know more about expected consumer behaviour. Transition phases should be monitored carefully. Consumer policy should be active. Expectations, of politicians and consumers, must be managed responsibly. And from the outset the public goals of regulatory change must be thoroughly aired.

Further recommendations

28. The recent examination of product market competition in the EDR Committee led to some recommendations for improvements in the competition law enforcement system and institutions. These included making the NMa formally independent, giving the NMa powers to assess fines on members of associations where restraints are imposed through the association and to implement structural remedies against abuse of dominance, and it noted that providing for criminal penalties and individual sanctions would improve enforcement.