



The Netherlands ❖

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

After declaring independence from Spain in 1579, the Netherlands became a leading seafaring and commercial power, with settlements and colonies around the world. After a 20-year French occupation, a Kingdom of the Netherlands was formed in 1815. In 1830 Belgium seceded and formed a separate kingdom. The Netherlands remained neutral in World War I, but suffered invasion and occupation by Germany in World War II. The Netherlands is a modern, industrialised country and also a large exporter of agricultural products. The Netherlands was a founding member of NATO and the EEC (now the EU), and participated in the introduction of the euro in 1999.

Economy

The Dutch economy is the fifth-largest economy in the euro-zone and is noted for its stable industrial relations, moderate unemployment and inflation, a sizable trade surplus, and an important role as a European transportation hub. Industrial activity is predominantly in food processing, chemicals, petroleum refining, and electrical machinery. A highly mechanised agricultural sector employs only 2 percent of the labour force but provides large surpluses for the food-processing industry and for exports. After 26 years of uninterrupted economic growth, the Dutch economy - highly dependent on an international financial sector and international trade – slowed down as a result of the global financial crisis.

The government of Prime Minister Mark Rutte began implementing fiscal consolidation measures in early 2011, mainly reductions in expenditures, which resulted in an improved budget deficit in 2011. In 2012 tax revenues dropped nearly 9 percent, GDP contracted, and the budget

PROFILE	
Population:	16,804,224*
GDP (Current US\$):	\$800,2 bn*
Per Capita Income: (Current US\$)	\$47,617 (Atlas method)*
Surface Area:	41540**
Life Expectancy:	81 years**
Literacy (%):	99 (of ages 15 and above)*
HDI Rank:	3
<i>Sources:</i> * World Development Indicators Database, World Bank, 2013 ** World Development Indicators Database, World Bank, 2012	

deficit deteriorated. Although jobless claims continued to grow, the unemployment rate remained relatively low at 6.8 percent.

Competition Law and Institutions

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: (1) Disclose the cartel; (2) Give directions as to their behaviour; and (3) Ban the cartel.

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

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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, abolishing the 1956 Act.

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 101, 102 and 106(2) of the EC treaty are closely mirrored by the provisions of 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 (NMa);
- prohibition of anticompetitive agreements;
- prohibition of abuse of dominant position;
- merger control; and
- penalties (fines) for contravention and non-compliance.

In 2007 the Dutch Competition Act was significantly amended. The main purpose of the amendments was to increase the effectiveness and efficiency of the Act. That became necessary after an evaluation of the Act showed that its enforcement was not effective on all points. It was also established that the NMa needed more instruments to perform its task effectively. The amendments to the Act have provided the NMa with more investigative and enforcement powers. The legislative amendments were also intended to bring the Dutch Competition legislation in line

with current European competition rules. The merger control rules, in particular, were amended in order to remain in line with the recently amended European rules. The Dutch merger control system therefore also changed from the substantial lessening of competition to the significant impediment of effective competition (SIEC). After the amendments to the European competition law in 2004, the NMa moved away from a system of granting exemptions towards a system of self-assessment.

The enforcement of the Competition Act 1998 was entrusted to the NMa, which was headed by a Board of Directors and had the status of an independent administrative authority. The Board of Directors possessed all decision making powers. The Minister of Economic Affairs, Agriculture and Innovation no longer had the power to issue directives in individual competition cases. Decisions of the Board of Directors could 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 formed an integral part of the NMa. In 2009 they were combined into one department, The Office of Energy and Transport Regulation (DREV).

Many parts of the energy and transport markets were and are not completely liberalised. The NMa therefore set tariffs, so that consumers would not pay too much, as well as ensured that companies providing their essential services, met their legal obligations in these markets. The NMa also enforced compliance with the Dutch Competition Act.

With regard to transport, DREV regulated the rail market, aviation market, public transport markets, and the pilotage industry. DREV also enforced the laws that the Ministry of Infrastructure and the Environment passed. Oversight on the energy markets focused on the national network operators, the regional network operators, energy suppliers and energy traders.

Authority for Consumers and Markets

In April 2013 the NMa merged with the Regulatory Authority for the Telecommunication and Postal Sector (OPTA) and the Netherlands Consumer Authority to form a new entity called the Authority for Consumers and Markets (ACM).

The new authority aims to ensure that markets work in order to protect consumer interests. To this end, the ACM will focus on three main themes:

- Consumer protection;
- Industry-specific regulation; and
- Competition oversight.

ACM is comprised of an independent board and six departments. ACM is an autonomous administrative authority under the ministry of Economic Affairs. Chris Fonteijn, former Chairman of the Commission of OPTA and Chairman of NMa, was appointed Chairman of the Board of ACM.

The merger was forecast to generate savings of EUR 3 million a year. One-time costs associated with the merger were roughly estimated as EUR 3.5 million. In addition, ACM had to make additional cutbacks as part of the national government's austerity measures.

ACM's mission is to create opportunities and options for businesses and consumers. The desired result is sustainable welfare growth in the broader sense of the word. This includes welfare growth as a result of financial and qualitative effects for consumers, in the short run and in the long run.

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 namely (1) anticompetitive agreements, (2) abuse of a dominant position and (3) merger control. Only autonomous conduct of undertakings falls within the scope of the Competition Act. Conduct explicitly prescribed by law falls outside the scope of the Competition Act.

The Act adopts the broad concept of an undertaking used in EU competition law as it defines an undertaking as an undertaking within the meaning of Article 105(1) of the TFEU. With reference to the case law of the European Court of Justice, ACM 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, including the State, 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 EU's 'effects doctrine' in solving the question of extra-territorial jurisdiction. The decisive factor with respect to restrictive practices and abuse of dominance is the 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.

Since July 01, 2012, local governments competing with private companies must comply with new rules to prevent unfair competition with businesses. These rules have been laid down in the Dutch Act on Government and Free Markets. The ability to impose fines on government organisations has been omitted from this Dutch Act on Government and Free Markets as it was considered prudent to prevent one administrative body from having the power to impose penalties on another. ACM, therefore, does not have the power to enforce competition law on government organisations by means of a penalty.

In regulated markets, like telecommunications, energy, broadcasting, public transport and financial markets, a balance must be struck between the competition rules (supervised by the ACM) and specific regulation (either entrusted to ACM or to other administrative bodies), which are both relevant.

The general principle is that the specific regulation defines the framework within which the Competition Act applies. Regulators in The Netherlands outside ACM include:

- The Netherlands Authority for the Financial Markets (AFM);
- The Dutch data Protection Authority (CBP);
- The Netherlands Gaming Authority (Ksa);
- The Dutch Central Bank (DNB); and
- The Dutch Healthcare Authority (NZA).

The regulatory framework in the telecommunications and in 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.

The regulatory oversight in the telecom and postal sectors that has been integrated in ACM, and was formerly carried out by OPTA, includes:

1. preventing the commission of offences;
2. stimulating investments in fibre optic networks;
3. boosting competition in the business market;
4. increasing choice in the cable television sector;
5. achieving reasonable call tariffs in Europe;
6. securing Internet safety;
7. reducing annoyance occasioned by undesirable telemarketing calls;
8. combating the misuse of paid information numbers.

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 for a competitive market for the benefit of consumers.

The regulatory toolbox of NMa used to be equipped to deal with markets, but not with the position of consumers in markets. Therefore, in 2007, the Minister of Economic Affairs, and the European Directive on Fair Trading and pushed by consumer organisations, established the Netherlands Consumer Authority (CA).

From January 01, 2007, the CA enforced compliance with consumer protection laws in the Netherlands, promoting fair business practices between businesses and consumers. Its most important tasks were: taking action against collective violations of consumer protection laws, and stimulating consumers and businesses to increase their knowledge about their rights and obligations. As set out above, this authority was one of the constituent merging parties of ACM in April 2013. As its legal successor, ACM has thus acquired all of the CA's statutory tasks.

International cooperation

ACM regularly works together with fellow regulators and other agencies outside the Netherlands. Problems of consumers and businesses do not stop at the border. The Netherlands has an open economy that is strongly influenced by international developments. International cooperation is aimed at the exchange of knowledge and experience at an international level. Regulators help each other by exchanging experiences about how to tackle oversight problems.

Among other networks, ACM participates in collaborative networks of European and international competition authorities (ECN and ICN respectively), of telecom

regulators (BEREC), of regulators on the electricity and natural-gas markets in the Member States of the European Union (ACER and CEER), and of consumer protection authorities (ICPEN and CPC).

Bringing together consumer protection as well as competition oversight and sector-specific regulation is unique in Europe. In addition, ACM aims to be a frontrunner in several other areas, for example, consumer empowerment, behavioural economics and effect calculation. ACM is often asked to speak about its multidisciplinary problem-solving oversight philosophy at international conferences.

For ACM, 2013 has been a year of transition, in which a great deal of effort and resources were devoted to establishing the new organisation. Nevertheless, the Global Competition Review praises ACM for the way in which it has handled the merger, which did not lead to disruption, nor changed the nature of their interactions with the agency. With 3.5 stars, ACM is ranked among the best authorities in Europe.

Concluding Observations and Future Scenario

To commemorate ACM's first year, ACM hosted an international conference on 20 June 2014 in The Hague. ACM was honoured to have HM Queen Máxima opening the conference in her capacity as United Nations Secretary-General's Special Advocate for Inclusive Finance for Development (UNSGSA).

The theme for this conference was "Innovation in Oversight/ Oversight and Innovation", a theme very close to the heart of what the new agency hopes to achieve as a result of the merger process. Innovation in the methods which the ACM utilises in order to regulate and oversee industries, and as a result innovation within those industries, increases ACM's ability to create opportunities and options for businesses and consumers.

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