

Regulatory Reform in the Netherlands

**The Role of Competition Policy in Regulatory
Reform**



ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

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FOREWORD

Regulatory reform has emerged as an important policy area in OECD and non-OECD countries. For regulatory reforms to be beneficial, the regulatory regimes need to be transparent, coherent, and comprehensive, spanning from establishing the appropriate institutional framework to liberalising network industries, advocating and enforcing competition policy and law and opening external and internal markets to trade and investment.

This report on *The Role of Competition Policy in Regulatory Reform* analyses the institutional set-up and use of policy instruments in the Netherlands. It also includes the country-specific policy recommendations developed by the OECD during the review process.

The report was prepared for *The OECD Review of Regulatory Reform in the Netherlands* published in 1999. The Review is one of a series of country reports carried out under the OECD's Regulatory Reform Programme, in response to the 1997 mandate by OECD Ministers.

Since then, the OECD has assessed regulatory policies in 16 member countries as part of its Regulatory Reform programme. The Programme aims at assisting governments to improve regulatory quality — that is, to reform regulations to foster competition, innovation, economic growth and important social objectives. It assesses country's progresses relative to the principles endorsed by member countries in the 1997 *OECD Report on Regulatory Reform*.

The country reviews follow a multi-disciplinary approach and focus on the government's capacity to manage regulatory reform, on competition policy and enforcement, on market openness, specific sectors such as telecommunications, and on the domestic macro-economic context.

This report was prepared by Michael Wise in the Directorate for Financial and Fiscal Affairs of the OECD. It benefited from extensive comments provided by colleagues throughout the OECD Secretariat, as well as close consultations with a wide range of government officials, parliamentarians, business and trade union representatives, consumer groups, and academic experts in the Netherlands. The report was peer-reviewed by the 30 member countries of the OECD. It is published under the authority of the OECD Secretary-General.

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Executive Summary

Background Report on The Role of Competition Policy in Regulatory Reform

Is competition policy sufficiently integrated into the general policy framework for regulation? Competition policy is central to regulatory reform, because (as Chapter 2 shows) its principles and analysis provide a benchmark for assessing the quality of economic and social regulations, as well as motivate the application of the laws that protect competition. Moreover, as regulatory reform stimulates structural change, vigorous enforcement of competition policy is needed to prevent private market abuses from reversing the benefits of reform. A complement to competition enforcement is competition advocacy, the promotion of competitive, market principles in policy and regulatory processes. This chapter addresses two basic questions. First, is the Netherlands' conception of competition policy, which will depend on its own history and culture, adequate to support pro-competitive reform? Second, do national institutions have the right tools to promote competition policy effectively? That is, are the competition laws and enforcement structures sufficient to prevent or correct collusion, monopoly, and unfair practices, now and after reform? And can competition law and policy institutions encourage reform?

The government's reform programme has been based on competition principles. Coinciding with the programme to review and improve regulation, enforcement of the law about competition was strengthened. These efforts culminated in the adoption as of January 1998 of a completely new competition statute, modelled on the competition law of the EU, and a new enforcement structure, designed to be independent and thus to reinforce the new approach, of prohibiting private arrangements that prevent competition. These new institutions face important tests of how the different values incorporated in the conception of "competition principles" will be applied in practice. The new enforcement agency must demonstrate its competence and independence, by applying sound, consistent competition policies without unnecessary compromise to accommodate other interests. The Ministry of Economic Affairs has been a strong advocate of drawing a better balance between desirable competition and necessary regulation. But the Netherlands has long promoted co-operation, and competition law has been weak as a result. Other interests have resisted change, successfully defending existing arrangements in some cases. Challenges remain, as the Netherlands continues to debate the relative importance of competition policy and other regulatory goals.

1. THE CONCEPTS OF COMPETITION POLICY IN THE NETHERLANDS: FOUNDATIONS AND CONTEXT

Netherlands competition policy and law have evolved substantially over the past decade. The competition law passed in 1958, but its apparent prohibitions of price agreements, of market sharing agreements, and of collusive tendering were notoriously unenforced, leading to the Netherlands' increasing reputation as tolerant of cartels. A 1992 article claimed that some forty per cent of the important cartel cases in EC competition enforcement were Dutch.¹ The government's register of cartels — maintained in secret—contained some 245 agreements to divide markets and nearly 270 agreements to fix prices, in addition to nearly 50 exclusive dealing agreements and over 200 agreements to control competition in distribution.² The combination of lax enforcement with widespread private agreements and private and public regulations controlling entry and administering prices meant that the intensity of market competition was relatively low in many sectors, particularly those sheltered from import competition. Meanwhile, the European Commission brought many cases against market-wide bid-rigging and exclusive dealing agreements that prevented competition in Dutch industries.³

By the late 1980s, though, the government began moving to correct the situation. Enforcement of the existing competition law was stepped up and extended to cover liberal professions and informal agreements. Measures were adopted for greater transparency, improved supervisory powers and stronger sanctions. The government tried to ban the most harmful kinds of cartel behaviour, as far as that was possible under the existing legal structure. As of July 1993, price fixing was officially prohibited, marking

something of a revolution in Netherlands competition policy. In 1994, market division and collusive tendering were banned, too. At about the same time, it was decided to move toward adopting a completely new legislative basis for competition policy, based on the law of the EU. In addition to these actions already underway to strengthen the basic institutions of competition law enforcement, the new cabinet in 1994 included competition policy as a fundamental element of its MDW regulatory reform program, described above in Chapter 2. The new competition law became effective and the new enforcement agency, the *Nederlandse Mededingingsautoriteit* (NMa) came into official being on 1 January 1998. This chapter will concentrate on these recent, fundamental changes in the explicit structure and basis for competition policy in the Netherlands, to integrate the discussion of how competition policy has affected regulatory reform.

Box 1. Competition policy's roles in regulatory reform

In addition to the threshold, general issue, whether regulatory policy is **consistent** with the conception and purpose of competition policy, there are four particular ways in which competition policy and regulatory problems interact:

- Regulation can **contradict** competition policy. Regulations may have encouraged, or even required, conduct or conditions that would otherwise be in violation of the competition law. For example, regulations may have permitted price co-ordination, prevented advertising or other avenues of competition, or required territorial market division. When such regulations are changed or removed, firms affected must change their habits and expectations.
- Regulation can **replace** competition policy. Especially where monopoly has appeared inevitable, regulation may try to control market power directly, by setting prices and controlling entry and access. Changes in technology and other institutions may lead to reconsideration of the basic premise in support of regulation, that competition policy and institutions would be inadequate to the task of preventing monopoly and the exercise of market power.
- Regulation can **reproduce** competition policy. Rules and regulators may have tried to prevent co-ordination or abuse in an industry, just as competition policy does. For example, regulations may set standards of fair competition or tendering rules to ensure competitive bidding. Different regulators may apply different standards, though, and changes in regulatory institutions may reveal that seemingly duplicate policies may have led to different practical outcomes.
- Regulation can **use** competition policy methods. Instruments to achieve regulatory objectives can be designed to take advantage of market incentives and competitive dynamics. Co-ordination may be necessary, to ensure that these instruments work as intended in the context of competition law requirements.

The Netherlands' principal reason for strengthening competition policy, reflected in the law's very form, is to respond to the increasing interconnection of national economies by harmonising with European law and the competition rules applicable under the Treaty of Rome. This desire is motivated in turn by recognition that national prosperity requires the capacity to respond to international developments. European unification, the adaptation of Member States to EU law, the globalisation of economic relations, the speed of technological development, the progressive removal of remaining obstacles to trade, and the availability of advanced communications technologies all signal that a national economy cannot be separated from the international one. These general reasons to look outward apply equally to competition policy. Tolerating domestic cartels and concentrations of economic power ultimately handicaps a nation's ability to adjust and contributes to structural problems of employment and low growth. Enterprises operating in sheltered sectors that are unable to respond to intensified competitive relationships as markets open will lose ground to imports or foreign direct investments, and will lose out on opportunities in the wider market too. As Europe has integrated, and as European institutions have demonstrated the importance and the value of promoting and protecting competition, the Netherlands has found it necessary, and expedient, to follow that direction too.

The second principal motivation for the Netherlands' competition policy is a generalisation of the first one: the encouragement of dynamic market responsiveness. The government's statements about the foundation of the Netherlands' new competition policy emphasise dynamic factors: "Healthy competition between companies trains an economy, as it were, in adaptive capacities."⁴ Impairing static and dynamic efficiency, by restricting free pricing, production, or market access, not only raises prices and costs, but also, and perhaps more importantly, prevents the market mechanism from serving its functions of steering resources and of stimulating and disciplining producers, and reduces quality consciousness and innovation. Government statements point to economic research showing that consumers and producers can potentially gain hundreds of millions of guilders by strengthening competitive forces. But the principal arguments offered in favour of the change in approach are not based on that kind of quantification, but on the importance of dynamic adaptability.

In all these senses, tougher competition is said to lead to greater consumer welfare. This formulation does not use "consumer welfare" in the sense of economic static equilibrium analysis, of maximising consumer surplus or total surplus. Rather, it emphasises that the interests against which policy is to be measured are those of ultimate consumers, as informed participants in an open market economy. Fairness, growth, and the protection of small and medium sized enterprises are said not to be explicit goals of competition policy in the Netherlands, although they may result from application of an efficiency-based policy. The stated purposes of the Netherlands' competition policy are consistent with the purposes usually ascribed to the competition policy of the EU, which the Netherlands law is intended to model. There too, the emphasis is on aspects of process and dynamic efficiency, rather than static equilibrium welfare effects.⁵

Concerns about fairness, distribution, and small business may not be explicit factors in the government's announced policy, but they are strong elements of the Netherlands' social traditions. Indeed, it is these concerns that probably delayed the implementation of effective competition policy for so many years. Small and medium sized businesses believed they benefited from the regime of registered cartels, and their resistance resulted in several compromises in the final legislation. These include an explicit "bagatelle" exemption in the law and special block exemptions for aspects of distribution. The principal impetus for the reform evidently came from other directions. Larger businesses with greater experience of foreign trade have become increasingly aware of the need to adapt to changing conditions in a larger context, and have learned to be more comfortable dealing with competition policies through their experience in other jurisdictions. These interests have backed the reforms. In addition, the major consumer organisation, *Consumentenbond*, has also supported the reform programme and the adoption of the new law and enforcement structure. And the Social and Economic Council (SER) supported the approach of new law, although it expressed some reservations about aspects of it.

Although competition has been vigorous for products exposed to international trade, and firms engaged at that scale have become efficient and competitive, the story is different for products and services traded only in local markets. Yet for perhaps three-fourths of Dutch consumers' purchases, it is domestic, not international, competition that determines prices and quality. Much of the economy, in sectors such as construction, utilities, financial transactions, transport, retail trade, and consumer and professional services, has been insulated from imports. Because the market is small, competition in some of these sectors (where there are some economies of scale) must be achieved among a relatively small number of undertakings or providers. This will be a challenge, because it is in these sectors that the national tradition of protecting established positions is strongest. Continuity, tradition, and alliances have taken priority over individual risk-taking and entrepreneurship. The new competition policy is a central element of a "cultural turnaround" that the Netherlands must make to ensure its economic health in the new global market economy.

Box 2. Regulation by industry and trade organisations

In the Netherlands, co-operation is institutionalised. In addition to associations of professionals with substantial legally delegated powers of self-regulation, in the Netherlands there are comparable self-regulatory institutions for agriculture, trade, and smaller service businesses. These 38 “statutory industrial organisation bodies,” or PBOs, are composed of representatives of business organisations and unions. There are two kinds of PBOs, “commodity boards,” which combine the vertically-related stages of production, and “industry boards,” which are horizontally organised at a particular level, such as retail or wholesale trade. PBOs are most significant in sectors dominated by small businesses, though some of them, particularly the commodity boards, include very large firms. The major commodity boards include those for horticulture, agriculture, livestock, meat and eggs, dairy products, and beverages. Industrial boards include those for retail trade, wholesale trade in agricultural products, hotels and restaurants, retail-level services (such as opticians and bakeries), and house painters. The half-million enterprises covered by PBOs employ about a quarter of the people working in industry, trade and agriculture. The total number of PBOs has declined. Thirty years ago, there were 55; more consolidation is planned, so that 18 will remain by 2000.

Authorised by the Industrial Organisation Act of 1950, the PBOs have legal powers to regulate and promote their sectors’ interests. On request of the government they can implement national and European policies in their sectors, too. PBOs “tax” their sectors to pay for their operations, which can include research projects, vocational training, and promotional campaigns. Their regulations are subject to the approval of the SER and the government (and the EU, if they might interfere with EU policies). Most of the mandatory regulations are found in the commodity boards. These typically cover quality control and inspection, disease prevention, additives, import-export processes, and consumer information. In addition, PBO regulations may implement national and EU policies. For example, some PBOs are responsible for implementation of EU agricultural regulations.

The Industrial Organisation Act requires that PBOs not impede fair competition. PBOs are not to authorise enterprises to enter, expand, or exit the market, and are not to regulate prices. The Act was recently reviewed, in part to ensure the protection of competition. Under the current law, the SER is responsible for authorising PBOs and plays the most active role in supervising their regulations. The government proposed that in the future the minister would be charged with that supervision and that he would judge those regulations according to the principles on which the Competition Act is based. The legislature rejected this proposal, and also defeated a proposed amendment to have the NMa share responsibility. Existing PBO regulations are also being reviewed, and it is still the intention that SER judge PBO regulation according to the principles of the Competition Act. But the effectiveness of competition policy here is at best unclear. NMa could still refuse to exempt agreements among PBO members that might violate the competition law’s prohibitions, and it could take enforcement action against prohibited agreements that are not exempted. But it would be more consistent to have the agency charged with expertise in interpreting and applying the Competition Act also participate in applying it to such actions as the formation of these organisations and their regulations.

The competition law reform is complementary to (although not itself part of) the “MDW” deregulation programme. Achieving a balance between necessary regulation and desirable competition will be a particular challenge in the Netherlands, because of the country’s long tradition of self-regulatory structures. Some of the motivations for this “private regulation” are plausible and defensible, and some of the results appear likely to be efficient: co-operating to overcome market failures and magnify the effects of research and development, realising economies of scale, and protecting reputation and quality through protecting trademarks, curbing deceptive marketing, and redressing consumer complaints. It is less clear, though that such self-regulation is a useful way to “counteract the excesses of unrestrained competition,” as the Ministry of Economic Affairs has suggested in trying to describe the proper role for industry self-regulation.⁶ Even if the “excesses” refer only to deceptive or unscrupulous marketing practices or monopolising tactics, it would be more prudent and effective to leave their correction to public enforcement and redress actions by consumers and customers, for a purpose phrased this broadly could also include protecting competitors against vigorous, efficient, innovative competition. The supposed benefits of privately imposed restraints on competition are rarely justified by the costs they impose, and the problems are not self-correcting because the costs are typically borne by unorganised consumers.⁷

The new statute, the new agency, and the overall reform programme clearly embody an intention to move toward a regime of stronger competition, enforced by law and embodied in more market-oriented regulation. But success is not assured. Many of the Netherlands' collective, corporatist structures of self-regulation can be expected to resist change. Different parties' understandings of what reform means conflict, with some concerned that the new law does too little to protect competitors from each other or to protect incumbent firms against "unfair" competition from unfamiliar sources. If these interests feel that the competition law does not protect them, or that the change in focus threatens their interests, they will support continued anti-competitive regulation.

2. THE SUBSTANTIVE TOOL-KIT: CONTENT OF THE COMPETITION LAW

If regulatory reform is to yield its full benefits, the competition law must be effective in protecting the public interest in markets where regulatory reform enhances the scope for competition. The legal criteria and available sanctions under the competition laws should be able to address competition problems that may have been required or encouraged by old regulations that no longer apply, or problems that will appear as regulatory structures change. The general competition law can then constitute a substantive foundation for reform based on market principles. In the Netherlands a major element of the regulatory reform process is the creation of a strong competition law. Thus it is particularly important to assess how well that aspiration is likely to succeed. Will the new law provide a strong foundation for a different kind of competition policy than the Netherlands has seen in the past? Or can it be manipulated in ways that duplicate the old practices? And if so, is there a political will to resist that course?

The new competition law is said to be based on the "nature," not just the "legal form," of relationships.⁸ Yet the most obvious change in the new law is formal. The "abuse" system of the old act has been replaced by a system of prohibitions matching the EU approach. Under the previous system, the enforcer, which in the Netherlands was the Ministry of Economic Affairs, had to demonstrate in each particular case that an agreement or action violated the law's standard. The enforcer had the burden of proof, and it was difficult to establish principles or rules that would apply in different, but similar, cases. A prohibition system reverses the burden, so that it is the company that must demonstrate that agreements or behaviour which correspond to the law's prohibitions nonetheless do *not* conflict with the applicable standard. The major difference between the "abuse" and the "prohibition" approaches is administrative, in the differing presumptions and assignments of burden. The same results can be reached under either, if the basic substantive criteria are the same. Debate and discussion about the change in the law has made much of this shift in administrative basis. Perhaps that emphasis serves a valuable function of symbolising determination to change a fundamental attitude about competition policy. But the difference in formal administrative method, by itself, is unlikely to have such a profound effect.

Changes in underlying substantive standards and in enforcement competence are as important as the administrative shift from "abuse" to "prohibition." The old competition law's fundamental substantive criterion was simply the "general interest," which by itself is nearly devoid of content or guidance for decisions. Determining whether conduct was contrary to the general interest required consultation with other ministries, which were often sympathetic to aspects of the general interest other than competition policy. Every case could become an occasion for fundamental debate about the relative importance of competition policy, and for many years competition policy evidently lost. The new law's use of explicit prohibitions changes the terms and scope of that debate, in a way that could make enforcement more efficient. It is still possible to claim that conduct which the law prohibits should nonetheless be permitted; however, the law begins with a presumption that the conduct is illegal. The law limits, to some extent, the kinds of factors that can be considered in the balance. And it creates a new, less politicised process for considering them. Even in these respects, though, the differences between the old system and the new one

are not profound. The criteria under the new law for granting exemptions for agreements could embrace most of what the old law considered under the “general interest.” What matters most are the clarity of the conceptions and goals underlying competition policy, and the strength of the political and social forces supporting, or opposing, that policy. A pattern of generous exemptions under a prohibition system could reach the same practical result as a pattern of generous balancing-test applications under an abuse system.

Box 3. The competition policy toolkit

General competition laws usually address the problems of monopoly power in three formal settings: relationships and agreements among otherwise independent firms, actions by a single firm, and structural combinations of independent firms. The first category, **agreements**, is often subdivided for analytic purposes into two groups: “horizontal” agreements among firms that do the same things, and “vertical” agreements among firms at different stages of production or distribution. The second category is termed “**monopolisation**” in some laws, and “**abuse of dominant position**” in others; the legal systems that use different labels have developed somewhat different approaches to the problem of single-firm economic power. The third category, often called “**mergers**” or “**concentrations**,” usually includes other kinds of structural combination, such as share or asset acquisitions, joint ventures, cross-shareholdings and interlocking directorates.

Agreements may permit the group of firms acting together to achieve some of the attributes of monopoly, of raising prices, limiting output, and preventing entry or innovation. The most troublesome **horizontal** agreements are those that prevent rivalry about the fundamental dynamics of market competition, price and output. Most contemporary competition laws treat naked agreements to fix prices, limit output, rig bids, or divide markets very harshly. To enforce such agreements, competitors may also agree on tactics to prevent new competition or to discipline firms that do not go along; thus, the laws also try to prevent and punish boycotts. Horizontal co-operation on other issues, such as product standards, research, and quality, may also affect competition, but whether the effect is positive or negative can depend on market conditions. Thus, most laws deal with these other kinds of agreement by assessing a larger range of possible benefits and harms, or by trying to design more detailed rules to identify and exempt beneficial conduct.

Vertical agreements try to control aspects of distribution. The reasons for concern are the same—that the agreements might lead to increased prices, lower quantity (or poorer quality), or prevention of entry and innovation. Because the competitive effects of vertical agreements can be more complex than those of horizontal agreements, the legal treatment of different kinds of vertical agreements varies even more than for horizontal agreements. One basic type of agreement is resale price maintenance: vertical agreements can control minimum, or maximum, prices. In some settings, the result can be to curb market abuses by distributors; in others, though, it can be to duplicate or enforce a horizontal cartel. Agreements granting exclusive dealing rights or territories can encourage greater effort to sell the supplier’s product, or they can protect distributors from competition or prevent entry by other suppliers. Franchising often involves a complex of vertical agreements with potential competitive significance: a franchise agreement may contain provisions about competition within geographic territories, about exclusive dealing for supplies, and about rights to intellectual property such as trademarks.

Abuse of dominance or **monopolisation** are categories that are concerned principally with the conduct and circumstances of individual firms. A true monopoly, which faces no competition or threat of competition, will charge higher prices and produce less or lower quality output. It may also be less likely to introduce more efficient methods or innovative products. Laws against monopolisation are typically aimed at exclusionary tactics by which firms might try to obtain or protect monopoly positions. Laws against abuse of dominance address the same issues, and may also try to address the actual exercise of market power. For example under some abuse of dominance laws, charging unreasonably high prices can be a violation of the law.

Merger control tries to prevent the creation, through corporate restructurings, of undertakings that will have the incentive and ability to exercise market power. In some cases, the test of legality is derived from the laws about dominance or restraints; in others, there is a separate test phrased in terms of likely effect on competition generally. The analytic process applied typically calls for characterising the products that compete, the firms that might offer competition, and the relative shares and strategic importance of those firms with respect to the product markets. An important factor is the likelihood of new entry and the existence of effective barriers to new entry. Most systems apply some form of market share test, either to guide further investigation or as a presumption about legality. Mergers in unusually concentrated markets, or that create firms with unusually high market shares, are usually thought more likely to affect competition. And most systems specify procedures for pre-notification to enforcement authorities in advance of larger, more important transactions, and special processes for expedited investigation, so problems can be identified and resolved before the restructuring is actually undertaken.

Applying a prohibition system introduces a new set of potential problems. A prohibition system supports, and leads naturally to, a system of detailed rules. These rules would not usually include explicitly any element of judgement about actual competitive effect, since the administrative reason for a prohibition system is to shift the burden to the parties, to demonstrate that their conduct does not have such an effect. To deal with the kinds of conduct whose effect may be ambiguous, rules under a prohibition system may become highly complex and formalistic. And despite the desire for efficiency, applying them may actually be time-consuming, as the decision-maker must parse the rules' fine distinctions when dealing with parties applying for waivers. Much of the doctrine of EU competition law is contained in the detailed structure of exemptions and their attendant prescriptions and prohibitions. Their application is sometimes delayed or obscured by time-consuming and non-transparent processes. That is, the competition law about restrictive business practices can itself look much like other kinds of regulation, with their commonly encountered problems of fair and cost-effective implementation.

The attraction of a prohibition system is the clarity and certainty of explicit rules. The risk is that those rules will become formalistic and overbroad. The challenge is to develop and apply a system of general prohibitions that still permits sensitivity to case-by-case variations in actual economic and competitive significance.

Box 4. The EU competition law toolkit

The Dutch law follows closely the basic elements of competition law that have developed under the Treaty of Rome:

- **Agreements:** Article 85 prohibits agreements that have the effect or intent of preventing, restricting, or distorting competition. The term "agreement" is understood broadly, so that the prohibition extends to concerted actions and other arrangements that fall short of formal contracts enforceable at civil law. Some prohibited agreements are identified explicitly: direct or indirect fixing of prices or trading conditions, limitation or control of production, markets, investment, or technical development; sharing of markets or suppliers, discrimination that places trading parties at a competitive disadvantage, and tying or imposing non-germane conditions under contracts. And decisions have further clarified the scope of Article 85's coverage. Joint purchasing has been permitted (in some market conditions) because of resulting efficiencies, but joint selling usually has been forbidden because it amounts to a cartel. All forms of agreements to divide markets and control prices, including profit pooling and mark-up agreements and private "fair trade practice" rules, are rejected. Exchange of price information is permitted only after time has passed, and only if the exchange does not permit identification of particular enterprises. Exclusionary devices like aggregate rebate cartels are disallowed, even if they make some allowance for dealings with third parties.

- **Exemptions:** An agreement that would otherwise be prohibited may nonetheless be permitted, if it improves production or distribution or promotes technical or economic progress and allows consumers a fair share of the benefit, imposes only such restrictions as are indispensable to attaining the beneficial objectives, and does not permit the elimination of competition for a substantial part of the products in question. Exemptions may be granted in response to particular case-by-case applications. In addition, there are generally applicable “block” exemptions, which specify conditions or criteria for permitted agreements, including clauses that either may or may not appear in agreements (the “white lists” and “black lists”). Any agreement that meets those conditions is exempt, without need for particular application. Some of the most important exemptions apply to types of vertical relationships, including exclusive distribution, exclusive purchasing, and franchising.
- **Abuse of dominance:** Article 86 prohibits the abuse of a dominant position, and lists some acts that would be considered abuse of dominance: imposing unfair purchase or selling prices or trading conditions (either directly or indirectly), limiting production, markets, or technological development in ways that harm consumers, discrimination that places trading parties at a competitive disadvantage, and imposing non-germane contract conditions. In the presence of dominance, many types of conduct that disadvantage other parties in the market might be considered abuse. Dominance is often presumed at market shares over 50 percent, and may be found at lower levels depending on other factors. The prohibition can extend to abuse by several firms acting together, even if no single firm had such a high market share itself.

2.1. Horizontal agreements: rules to prevent anti-competition co-ordination, including that fostered by regulation

Article 6 of the new competition law parallels Article 85 of the Treaty of Rome in its treatment of all kinds of agreements. The NMa intends to look to the EU institutions for substantive guidance in interpreting it. The Dutch law, unlike the Treaty of Rome, does not include in the text the examples of particular kinds of prohibited agreements. The list of prohibitions was omitted from the statute and placed instead in the regulations. To the extent the Dutch law is interpreted consistently with the EU’s guiding principles, it is likely to be a strong tool for preventing and correcting the most serious horizontally-imposed constraints.

General prohibition in Article 6 is subject to conditions and procedures for exemptions and dispensations⁹ which also parallel the EU system. The Dutch law borrows or incorporates all of the EU block exemptions for general types of agreement or restraint, exemptions for particular sectors, and exemptions for particular agreements.¹⁰ Incorporation is “dynamic”; that is, Dutch law incorporates not just those exemptions already adopted but also those that will be adopted in the future.¹¹ The grounds for exemption or dispensation under the Dutch law are the same as under Article 85 of the Treaty.¹² The result of using the EU prohibition-exemption system is that formal criteria, rather than case-by-case economic analysis, will usually determine legality, except in the consideration of individual dispensation applications.

The new Dutch law permitted parties to apply for dispensation for agreements that were already in existence. NMa was flooded with dispensation requests—over a thousand—at the deadline, 1 April 1998.¹³ These filings afford a small degree of protection to these already-existing agreements, which remain legal until NMa can act on the individual applications (unless they would have been illegal under the superseded Economic Competition Act).¹⁴ A large proportion appear to be simply “insurance” filings, submitted out of an abundance of caution for agreements that would obviously not be prohibited. Many are in retail and construction, two sectors subject to specific exemptions under the new law. Some represent continuation of existing controversies under the new procedures. How the new agency applies the new law to these old problems will be a critical test of its seriousness and effectiveness.

Even under the previous abuse system, the government had introduced *per se* rules about price fixing and market division. A “general invalidation of horizontal price maintenance” was adopted in 1993.¹⁵ In important substantive details and procedures, including the coverage, basic prohibition and provisions for exemptions based on national and EU legislation and for *de minimis* cases, this 1993 decree foreshadowed the new law. About 50 applications for dispensation were submitted even before it went into effect.¹⁶ Similar decrees tried to ban market sharing and collusive tendering. But only one final judgement was reached under the “abuse” system, while about five additional cases were concluded with settlements. The fact that some continuing controversies were not resolved, but instead postponed by granting explicit exemptions in the course of approving the new law, measures the depth of the cultural aversion to competition, and thus the magnitude of the cultural revolution that is required. A prime example is newspapers, which asked for dispensation for their horizontal and vertical price-fixing and received a formal exemption (for a term of years) when the new law was passed.

Applying the old law generally required a consultation within the government. Not all of those consultations prevented action. Recently, at least, other ministries have gone along with more vigorous competition policy. Dispensation was denied for a national market-division for emergency tow truck operators, because the worthy goals of clearing wrecks quickly and preventing pileups could be accomplished by less anti-competitive means. Dispensation was denied in a number of cases involving “private regulation”: a minimum price agreement among ship brokers, a pharmacists’ association’s price-fixing agreement for non-prescription drugs, an insurance agents’ agreement about remuneration, a football league agreement to control its members’ broadcast rights, a pharmacist association’s rules controlling soliciting or accepting new patients, and a joint boycott by associations of estate agents and notaries.¹⁷

Despite these occasional successes, the need to establish intra-government consensus in each case about the “general interest” no doubt made it difficult to apply the old law effectively to many horizontal agreements in sectors subject to reform or in efforts to promote reform. It is clearly anticipated that the new law will help overcome those problems. It has evidently been taken seriously enough to bring some old cartels out into the open. Some of the April applications are for existing agreements that the decree under the old law had prohibited, but for which no application for dispensation had previously been submitted.

2.2. Vertical agreements: rules to prevent anti-competitive arrangements in supply and distribution, including those fostered by regulation

Like the EU law on which it is based, the text of the competition law draws no distinction between horizontal and vertical agreements. Vertical agreements affecting competition are in principle prohibited. The Ministry and NMa recognise that the law must permit some scope to admit restraints that are not harmful, and that indeed may be essential for useful co-operation, efficient distribution, or marketing support. The principal means for attempting to do so is incorporation of the EU exemptions scheme, supplemented by additional general exemptions specific to the Netherlands.

The “prohibition” policy for vertical price agreements, like that for horizontal ones, was foreshadowed in efforts to apply the old law more strictly. The 1993 order also expanded the prohibition of resale price maintenance. An application for dispensation for bicycles was rejected; however, one for books and music was allowed, and has even been extended for seven years under the new law. Rules about credit card surcharges were treated as horizontal, that is, an industry-wide arrangement to impose a vertical constraint. “Shelf-space” agreements for magazines, which claimed space based on share but then increased the allowed margin for more space, were rejected because they excluded competitors. Demonstrating sensitivity to context and effect, no problem was found with Apple Computer’s selective distribution system. And demonstrating sensitivity to the concerns of small business, an investigation was

opened in response to a complaint from MKB-Nederland (the association of small and medium-sized enterprise) about the identical unit charges applied by BeaNet, an alliance of Dutch banks, for Chipknip (chipcard) transactions.¹⁸

The new law's relatively stringent treatment of vertical agreements, although consistent with long-standing EU law, is inconsistent with the trend in many OECD countries toward case-by-case, economically-based analysis for vertical restraints (except for minimum resale price maintenance), and away from detailed, formal rules.¹⁹ Now the European Commission too is considering whether to modify its own practice in order to pay closer attention to actual economic effects in different settings, perhaps by introducing market share tests for some kinds of conduct.²⁰ Many Dutch businesses advocated continuing to treat vertical agreements under the "abuse" principle, so that anti-competitive effect would have to be demonstrated in each particular case. But the government resisted that approach, in part because it wanted to adopt consistent, across-the-board rules and thus emphasise the magnitude of the cultural shift involved in changing the law. Strict treatment seems to follow from a definition of "competition" that necessarily entails independent action. Under that conception, any constraint on independent action, even one agreed to voluntarily by vertically related parties who do not compete against each other in a particular market, might be considered a constraint on competition and thus presumptively prohibited. And strict treatment may also be a particular response to the Netherlands' history of industry-wide vertical exclusive dealing agreements used to prevent competition.

The government's defence of its policy included three generalisations about economic effects of vertical agreements. The first is that all vertical agreements have a "horizontal" effect because they restrict an entity's ability to respond to actions by its horizontal competitors. But whether that effect is desirable or not depends on what the horizontal competitors are doing. If they are attempting to agree on prices or output, a vertical constraint that prevents going along with them could be pro-competitive. If they are unable to agree among themselves, but their suppliers "require" them all to agree, then the vertical constraint could accomplish a horizontal, monopolising effect. That is, whether the vertical restraint actually impairs beneficial market competition depends on case-by-case assessment of the actual market conditions in which it appears. The second is that vertical agreements often implement horizontal constraints by other means. This may well have been true in the Netherlands, if many upstream suppliers entered agreements with their distributors that were similar, not only within each supplier's distribution system, but across brands as well, and the effect was to prevent horizontal competition at either or both levels. If so, then enforcement efficiency may call for a stricter presumption, at least until that historical pattern is completely corrected. But it would be better, to avoid unnecessarily impairing innocuous arrangements, to limit the presumption to the clearest market-foreclosure settings. And even that may require basing the legal test on market share analysis, not just on the legal form of the agreements' terms. The third is that intra-brand competition is as important as competition between branded products because vertical "alliances" are increasing. The argument seems to be that, because these alliances do not compete with each other, competition within them must be preserved. But the degree and competitive importance of brand differentiation is also an empirical matter, and it is doubtful that strong presumptions about it are either necessary or efficient bases for enforcement rules.

The treatment of vertical agreements tests, in two ways, the relationship between the purposes of competition policy and the commitment to regulatory reform. Careful attention to the actual competitive effects of vertical arrangements is a necessary part of a market-oriented reform effort. Poorly designed regulations sometimes prohibit efficient vertical arrangements, or require inefficient ones, and such rules should be identified and corrected. But trying to do this through a prohibition-based competition policy can itself lead to elaborate, detailed, prescriptive regulation (or to obscure and difficult legal doctrines). At a minimum, the complexity can impose compliance burdens. Moreover, the doctrines may end up preventing or inhibiting desirable and efficient agreements. Rules based on legal formality will inevitably

miss economically important factors. Thoroughgoing attention to the goals of reform counsels a close inquiry, whether the costs imposed justify the benefits of this particular kind of “regulation”. The abuse system of applying the old law, whatever its other defects, had the capacity to be sensitive to actual economic effects. Deliberate adoption of a general-prohibition administrative basis for the new law should not be allowed to undermine that sensitivity to case-by-case variations in economically relevant contexts.

The principal motivation of the new Dutch law is to respond to globalisation, and the principal means is by harmonising its law with the European one. Consistency is surely desirable, so that businesses are not caught between confusing and potentially inconsistent demands. That factor, and the possibility that the Netherlands’ history of unusually exclusionary vertical relationships demands an unusually clear presumption against them, could support treating them as prohibited. But if the EU too moves toward a more modern treatment of vertical restraints, the Dutch law might profit from the intention to attend to EU practice as it evolves.

2.3. Abuse of dominance: rules to prevent or remedy market power, especially arising from reform-related restructuring

The new law’s text about abuse of dominance²¹ is based on Article 86 of the Treaty of Rome. Like the law about agreements, it omits the Treaty’s detailed examples. The definition of “dominance” is taken from the decisions of the European Court of Justice. Applications to the problem of network access would also derive from EU principles. An undertaking that has a dominant position because of its control over the network is obliged to offer objective, transparent, reasonable and non-discriminatory prices and other conditions for network access. (Under the EU’s telecommunications reform legislation, there is a presumption of market power, and thus a requirement to afford access, at a market share of 25 percent.)

The new competition law may play only a limited role in ensuring access and restructuring traditionally regulated network monopolies. Proposals to handle these problems exclusively through general competition law have been rejected in favour of some form of continuing sector-specific regulation. An illustration is the cable TV industry. In early 1997 the Minister of Economic Affairs, along with the Ministers of Transport and Public Works and of Education, Culture and Sciences, proposed that controversies about access to cable systems be handled under the new general competition law. The temporary supervisory powers of the Media Commissariat over this issue would expire, leaving NMa with the responsibility, to be exercised in consultation with the Media Commissariat and the Independent Post and Telecommunications Authority (OPTA).²² But in April 1998 Parliament rejected this solution, and instead assigned the task to OPTA, without specifying standards for performing it. In other aspects of telecommunications and in electric power, too, it appears that important competition-policy elements of restructuring and reform will not be done under the general competition law, but under other, sector-specific regulatory bodies and laws. Evidently, NMa is to be consulted and have some approval authority about the sectoral regulators’ general rules and interpretations of competition policy terms, but it will have no role in particular decisions or applications. The division of responsibility is to be reviewed in four years, but in the meantime the competition agency’s participation in actions with significant competitive impacts is likely to be limited. This delay would be unfortunate, if sectoral regulators interpret and apply competition principles in ways that are more consistent with the sector’s historic way of doing business, rather than in ways that encourage the rapid development of more competitive alternatives.

2.4. Mergers: rules to prevent competition problems arising from corporate restructuring, including responses to regulatory change

Merger policy too parallels the EU standards and methods, seeking to prevent proposed mergers that are likely to create or strengthen a position of economic dominance which would significantly restrict free and fair competition on some or all of the Dutch market. The substantive prohibition is based on dominance, so mergers that increase the likelihood of concerted action must be analysed as though the result were collective dominance. EU policy and jurisprudence are used for the purposes of delineating the market. As under the EU Merger Regulation, there is a mandatory pre-merger filing, jurisdiction is determined by reference to turnover, and there is a two stage investigation, subject to deadlines for decision, during which the parties cannot consummate the transaction. The notification thresholds are at the average level for Member countries with premerger notification programs: combined aggregate worldwide turnover of at least 250 million guilders (approximately US\$125 million), and annual turnover within the Netherlands of at least 30 million guilders (approximately US\$15 million) for at least two of the undertakings involved. Mergers involving foreign firms are also subject to review provided these thresholds are met. NMa has four weeks from the filing date to decide whether the concentration can create or strengthen a dominant position, and if so, to require the parties to apply for a licence. NMa must then make a final decision within an additional thirteen weeks after receiving the application for a licence. If NMa refuses to grant a licence, the parties have four weeks to apply to the Minister of Economic Affairs, in effect appealing NMa's refusal. Failure to notify or to apply for a licence if required voids the transaction and subjects the parties to administrative fines of up to 50 000 guilders (approximately US\$25 000) or periodic penalty payments. In its first three months of operation, NMa received about 34 merger filings, issued 17 phase-one clearance decisions, and issued 2 decisions requesting an application for a licence. This pace is about double what had been expected.

In principle, NMa will decide based only on the strength of competition-based considerations, in accordance with the model specified by the EU Merger Regulation. In practice, EU decisions will sometimes also consider efficiency gains, and NMa might do so as well. The most significant source of balancing against other policy values, though, will be the Ministerial appeal. The Minister of Economic Affairs can grant a license, after discussions with the Council of Ministers, if there are significant public interests at stake. Such public interest considerations could include the companies' (international) competitive position and anticipated cost savings. The Minister of Economic Affairs has often stated that the overruling option is to be used with restraint, because the aim is to not base merger evaluations on political value judgements. Since the new law took effect, no such occasion has arisen. One threatened conflict was fortunately avoided, but the circumstances undercut the Ministry's announced intentions about NMa's independence. The Ministry of Economic Affairs supported a major combination of electric generating firms, before NMa indicated it had concerns about the merger's competitive effects by requiring the parties to apply for a license. But the parties could not reach final agreement on their deal and thus called it off. By signalling its support, the Ministry presented NMa with a serious dilemma. If NMa had ultimately issued the license, the new agency would have been suspected of yielding to the Ministry's implied threat of overruling it. If NMa had denied the licence and then the Ministry had granted it, the process would have demonstrated that legal criteria were less important than political ones. Either outcome would have compromised NMa's apparent independence of enforcement authority. By calling off the transaction, the parties denied NMa and the Ministry the chance to demonstrate that independence by permitting NMa's denial of a license to stand.

2.5. Competitor protection: relationship to rules of “unfair competition”

There is no general prohibition of unfair competition in the Dutch Competition Act, although predatory pricing and disparagement might be prohibited if they amounted to abuse of a dominant position. But other laws establish traditional competitor-protection rules of unfair competition that could support private civil actions, and business or professional organisations have internal rules about unfair competition. As elsewhere, some of these, such as constraints on pricing and advertising competition, are likely to be inconsistent with the general competition law. Part of the programme to strengthen enforcement under the old law was to challenge some of these constraints. NMa should continue such actions. Some business groups wanted a new competition law that could be used to challenge what they consider unfair acts by their rivals. Most of these groups comprise smaller and medium sized firms that feel they lack the resources to compete directly with larger, more efficient rivals. So far, the only obvious concession to these concerns is the government’s promise that the new agency will “closely monitor potential predatory pricing through sales below cost-price.” It is encouraging that neither the government nor NMa has indicated any intention to do more than monitor closely.

Also of interest in the context of regulatory reform is the concern about unfair competition from government entities and privatised firms, not only through abuse of dominance but also through other advantages derived from the undertaking’s relationship to the government, such as financial or tax advantages, cross-subsidies, or the power to regulate its competitors. A blue-ribbon commission examined this problem and made recommendations about dealing with it, discussed below in Section 4.1.

2.6. Consumer protection: consistency with competition law and policy

The Dutch reform programme is based on consumer interests. This treatment of competition and consumer policies as mutually supportive provides a strong, integrating political base for reform. It has attracted useful allies: the major national consumer organisation, *Consumentenbond*, has supported the general reform efforts and the adoption of the new competition law. Government descriptions of its consumer policy emphasise that it is not so much about protecting consumers, as it is about enabling them to participate in the market as independent actors. Competition policy aims at ensuring that companies do not restrict or distort competition and thus limit consumer choice, while consumer policy aims at ensuring that consumers, by free and informed choices, can spur companies to improve their performance and respond to demand.

The Dutch government recognises the importance of using competition- and market-based instruments of regulation in pursuing consumer policies. Some intervention in the market may be necessary to protect such interests as public health and safety, and intervention may also improve information-based market problems such as consumers’ lack of information (as in financial services) or relative inability to assess quality (as in professional or legal services). Interventions, where required, should not unnecessarily restrict competition or encumber suppliers, because in the long run such constraints will harm consumers too. The Netherlands relies strongly on self-regulation by industry bodies and groups such as the PBOs to implement consumer policies. Especially if consumer interests are represented in the process as well, parties in the market may well find better solutions for market imperfections than government regulatory intervention. Examples of such instruments are the system of private arbitration boards for consumer dispute settlement, the determination of the content of general contract terms under the Civil Code in several market sectors in consultation with *Consumentenbond*, and more recently the conclusion of a code of conduct for the insurance sector, also in consultation with *Consumentenbond*. But it is important for the government to prevent self-regulation to protect consumer interests from shading into self-regulation to protect producer and competitor interests.

This integrated consumer and competition policy position is in some tension with the Netherlands' neighbours. Most Dutch consumer legislation is based on legislation of the EU. The Netherlands has nonetheless advocated an integrated, market-based approach in the field of EU consumer policy, though not always successfully. At a 1997 debate about the principles of consumer policy held during the Dutch presidency of the EU Consumer Council, only a few Member States supported the Dutch approach. A majority emphasised that an active policy aimed at protecting consumers in areas such as health, safety, food, financial services and advertising and at increasing market transparency and consumer information is still very much necessary.

3. INSTITUTIONAL TOOLS: ENFORCEMENT IN SUPPORT OF REGULATORY REFORM

Reform of economic regulation can be less beneficial or even harmful if the competition authority does not act vigorously to prevent abuses in developing markets. The new authority has every intention of demonstrating its effectiveness promptly. Much depends on its success.

3.1. *Competition policy institutions*

Implementation of the new Competition Act is entrusted to the new Dutch Competition Authority (NMa), an entity within, but separated from, the Ministry of Economic Affairs. Decisional authority rests in NMa's Director General. NMa itself is a law enforcement agency, and does not deal with competition policy, regulatory issues, or relationships with other ministries, functions which are the responsibility of the Ministry of Economic Affairs. The Dutch have chosen to assign top priority to establishing the clarity of the new prohibition system, entrusting it to a self-consciously independent enforcer whose discretion is limited to the parameters set by law and who will be perceived as outside the political process.

To embody its intended independence, NMa has its own legal powers, separate from the Ministry of which it formally a part. Other features of its organisation encourage or support that independence. NMa is located in a separate building, at a considerable distance from the Ministry. The first Director General, Mr. A.W. Kist, is an experienced lawyer who did not come from the Ministry. The Minister's responsibility is formally preserved, and Parliament can call the Minister to account for that responsibility. The Minister lacks the legal power to take decisions himself, so, to make the responsibility meaningful, the Minister has the power to issue instructions to the Director General, either in general or in particular cases. But the Minister has stated that the power is to be exercised with "maximum restraint." The intention is that NMa's status resemble the Bundeskartellamt, in that ministerial oversight, though theoretically possible, is (virtually) never actually implemented.²³ To maintain distance and encourage actual independence, the relationship between the Minister and NMa is to be transparent. If the Minister of Economic Affairs does issue instructions to grant an exemption in a specific individual case, that instruction must be in writing and included in the dossier. In merger cases, NMa is responsible only for applying the law. If other, political considerations come into play, the Minister must do that personally and publicly. This separation and publicity may prove an effective check; at least, it will expose Ministerial intervention to political and public oversight. The Minister has recently announced the intention to give NMa the independent status of a "ZBO," comparable to OPTA's, as soon as possible, which will mean that the minister would lose the power to issue instructions in individual cases.

NMa's independence should be promoted further by authorising it to engage in advocacy about policy proposals and other decisions that affect competition. Advocacy demonstrates that the enforcer speaks and thus acts as an independent, expert body. Advice about competitive impacts of legislation or regulation can gain credibility if it comes from a relatively non-political source that is knowledgeable about how markets work. A reason often given for separating advocacy from enforcement is that the credibility of law enforcement positions would suffer from connection to the policy process. But this is only a risk if it appears that the enforcer's policy views were subject to political pressure, and that the pressure affected its enforcement decisions. Denying NMa any advocacy role choice was not essential in order to establish its independence; on the contrary, an advocacy role should re-enforce it. Of course, there is a risk that NMa's positions will differ from the government's. But that difference would demonstrate, and represent, the desired independence. And in any event, there is already concern that effective independence will be difficult to establish while NMa remains formally within the Ministry, regardless of the intentions of both the Ministry and NMa and regardless of whether it has advocacy responsibilities. In the debates over the assignment of responsibility for competition regulation in sectors being restructured, some have argued, persuasively, that a truly independent sectoral regulator would be preferable to the competition agency because the latter, still formally within the Ministry and subject to Ministerial instruction, is not independent enough.

3.2. *Competition law enforcement*

Application and enforcement now uses administrative methods. By contrast, the decrees under the old law prohibiting price agreements and market division were enforced by criminal processes. Much of the process involves reviewing and deciding about applications for exemption or dispensation from the law's prohibitions. In gathering necessary information, NMa has the usual enforcement powers available under Dutch administrative law. NMa can respond to complaints or act on its own initiative. Its officials can require answers to written or oral questions and carry out inspections of premises and documents, with or without previous notice. If access is refused, NMa can obtain the assistance of the police to enter. The powers are subject to generally applicable limits, as well. Use of investigative powers is subject to the general civil law principle of proportionality. Investigating officials may not demand entry to private houses nor take possession of a firm's documents without permission (though they can take copies). Privileged documents are protected from disclosure, and there is a right against self-incrimination, for undertakings as well as individuals. Failure to co-operate with an investigation or provide requested information can lead to administrative fines up to 10 000 guilders or periodic penalty payments. Inaccurate or incomplete information when notifying or requesting a licence for a concentration can lead to administrative fines up to 50 000 guilders. Fines for substantive violations can be up to NLG 1 million or 10 per cent of turnover (whichever is higher). The agency is young, so its uses of these powers have not all been tested yet.

There has so far been little opportunity for NMa itself to demonstrate the virtue of decisional predictability. Additional sources of guidance, while companies wait for NMa to establish a record of its own, come from the EU's standards, on which national standards are based, and the decisions and procedures of the EU and the European Court of Justice. If a company disagrees with a decision, it can submit a formal objection to the Director General of NMa. If the objection is turned down, the company can appeal to the district court, and from there to the Companies Appeals Court.

Deadlines in the Competition Act are intended to ensure expedition. The initial decision whether to require a license application for a merger must be made within four weeks of the initial notice, and the final decision, within thirteen weeks after the license application. An application for an exemption from the prohibition of Article 6 must be decided within four months. Within ten weeks of receiving the

request, however, the Director General can extend the term for a further four months. The total time taken to consider such a request should therefore not exceed eight months. If NMa does not respond within this term, the request is regarded as having been rejected. The applicant can then appeal. This allocation of presumption emphasises the law's prohibitory intention, perhaps too much so. Because the consequence of inaction is simply to transfer decision responsibility to another body, it may also fail to encourage prompt decisions. Nonetheless, the new NMa Director General has made it a priority to respond to applications in a timely fashion. If NMa succeeds in doing so, that will reduce concern about this presumption's potential for misuse.

Box 5. Enforcement powers in the Netherlands

Does the agency have the power to take action on its own initiative? NMa, like most Member country agencies (19), has power to issue prohibitory orders on its own initiative. Unlike the agencies in about half of Member countries, it cannot assess financial penalties directly, but instead must go to court.

Does the agency publish its decisions and the reasons for them? Like virtually all Member country enforcement agencies, NMa publishes its decisions.

Are the agency's decisions subject to substantive review and correction by a court? All Member country competition agencies must defend their actions in court if necessary.

Can private parties also bring their own suits about competition issues? Some kind of privately initiated suit about competition issues is possible in nearly all Member countries. One reason for shifting the basis of the competition law to a prohibition system was to support civil actions under it; before, such actions could only be brought based on violations of the EC competition rules.

3.3. Other enforcement methods

The principal additional source of competition policy affecting the Netherlands is, of course, the EU. One advantage of bringing Dutch law into line with EU law, besides simplicity and transparency for Dutch business, will be that consistency should encourage the EU to leave local competition issues to local settlement, as called for by the principle of subsidiarity.²⁴ Merger enforcement illustrates this principle. Because the Netherlands lacked a merger law of its own at the time, the European Commission was asked in 1997 to investigate Blokker's proposed take-over of the Dutch branches of Toys 'R Us. The request was authorised by the EU Merger Regulation's so-called "Dutch clause,"²⁵ letting the Commission take action, on request, against a merger within one Member State's territory. The Commission declared the acquisition incompatible with the common European market and ordered Blokker to sell the Toys 'R Us branches to an independent third party. The EU competition rules also contain the converse of the "Dutch clause," namely the "German clause"²⁶ under which the Commission can refer a proposed merger to the qualified Member State authorities. Now that the Netherlands has its own law, it has already invoked this clause to investigate the proposed combination of the KBB and Vendex retail chains.

Private actions under national law procedures will also be available now that the law is based on prohibition. The nullity of prohibited competition agreements and of concentrations that violate reporting and license requirements can support civil actions for damages or an injunction. The possibility of auxiliary private action could lead to more effective enforcement, by bringing additional resources to the task. But permitting private actions is not without risk. Parties can sometimes invoke formal rules in court proceedings in order to prevent competition, rather than protect it, unless judges have the discretion to reject claims based on lack of actual anti-competitive effect in the particular circumstances. If judges do have that discretion, then they become important sources of competition policy. Private actions based on the Treaty of Rome prohibitions are infrequent, but one has already been filed, and decided, under the new Dutch law. It demonstrates how quickly the courts can move. In emergency cases such as this, the

president of a district court can rule in summary proceedings within about five weeks. It also shows the court's willingness to defer to the new competition enforcer about substantive issues. An insurer arranged for a discount programme from opticians; in response, another optical firm advertised that its prices were better than those under its competitors' discount program. The insurer sued to stop the comparative advertising, and the optical firm counter-sued, claiming that the deal on discounts amounted to price-fixing. In a preliminary proceeding, the court granted both claims, provisionally, pending a decision by NMa about the competition issue.

An alternative to private, independent action is private initiative at the enforcement agency. A private party has some rights of complaint, participation and appeal in the administrative law process. An aggrieved party may ask NMa to take action. The Director General must explain his decision, including a decision not to act. A dissatisfied complainant may file an objection to the decision with the Director General, who must respond within eight weeks, after having heard an advisory commission. If the Director General decides not to revoke his decision, the complainant may appeal to the courts. Here again, this process makes it likely that the courts will have an important influence on competition policy.

3.4. *International trade issues in competition policy and enforcement*

The Dutch law takes a generally neutral approach to problems raised by foreign trade and by foreign firm participation in the Dutch market and administrative process. Restrictive practices that obstruct access to a relevant market in the Netherlands may violate the law, regardless of whether the obstruction affects Dutch firms or foreign firms. Merger control also applies regardless of the nationality of the parties or the locus of the transaction, if the turnover thresholds are met. These include one based on turnover in the Dutch market, so foreign firms are unlikely to be affected unless they or their prospective merger partners are already present in the market. Issues such as market openness, foreign supply or likelihood of entry into the Dutch market are taken into account when defining the geographic scope of the relevant market and analysing the effects on competition, under the EU analytic methods that the Dutch are using. The Dutch Competition Act only applies to effects in the Dutch market, though. Dutch firms that are affected by restrictive practices abroad cannot invoke the Dutch competition rules. And Dutch firms engaged in restrictive practices outside the Netherlands (that do not affect a market in the Netherlands) cannot be subject to sanction under the Dutch Competition Act.

The Competition Act applies to all firms engaged in economic activities in the Netherlands, even if they are established abroad. Enforcement abroad will be difficult, of course, in the absence of legal powers to counter obstruction of investigations and refusal to pay fines. In general NMa will address a foreign firm's subsidiaries or branches established in the Netherlands. If effective enforcement by NMa is not possible the case can be transferred to another national competition authority or to the European Commission. The competition law permits the exchange of information with other competition authorities, if the information is used to apply competition rules (and with other parts of the Dutch government, where their responsibilities are related to competition policy).²⁷ The new agency's processes for co-operation with other competition authorities are still being established, and it is not yet a party to any formal co-operation agreements. In these respects NMa should follow the 1995 OECD Council Recommendations on notification and co-ordination, and the increasing adoption of formal co-operation agreements among national enforcers.

Foreign firms receive national treatment, that is, they have the same rights as domestic ones to apply for exemptions or licenses, to submit views or objections concerning applications by others, to bring complaints to NMa, to take action if dissatisfied with how those complaints are resolved, or to bring private actions. Under the old law, some foreign firms had complained that wholesale-level exclusive-

dealing cartels had excluded them from access to the Dutch market. NMa is prepared to examine similar claims under the new law. The law does contain a procedural provision that could be especially useful to foreign firms, either as respondents or as complainants. Where presentations are made orally, a party who does not adequately understand Dutch may request an interpreter, and the Director General is to ensure that one is appointed (unless the request appears unreasonable).²⁸

Box 6. International co-operation agreements

Eight Member countries have entered one or more formal agreements to co-operate in competition enforcement matters: Australia, Canada, Czech Republic, Hungary, Korea, New Zealand, Poland, and the US. And the EC has done so as well.

3.5. Agency resources, actions, and implied priorities

The top priority for the new enforcement agency is to establish itself as an institution, supporting the “cultural transformation” toward greater reliance on competitive markets. The new Director General believes it is most important that NMa be, and appear to be, independent in its decision-making. NMa must show the public how the law can be applied in its interest, by bringing a significant and successful enforcement action early in its history. At the same time, he believes it very important to establish a reputation for professionalism, by meeting deadlines, responding promptly to inquiries, and avoiding bureaucratic disputes and embarrassments. Because it is so important to establish substantive credibility, it is unlikely that NMa will take on cases that attempt to test the outer limits of doctrine. Rather, it will be focusing now on cases it can uphold against a challenge in court, and targeting places where problems are likely to be found, such as services and other sectors that had been sheltered from international competition. Together, these steps appear to comprise an optimal strategy for a new enforcement agency.

NMa’s staff of about 70 consists of one staff section and three operational sections. The largest, the Investigations, Supervision and Dispensations (OTO) section, is chiefly responsible for supervising compliance and investigating possible violations. OTO handles applications for dispensation and investigates prohibited competition agreements and abuses of dominant positions. The second section, Control of Concentrations (CoCo), with about a dozen staff, is responsible for determining whether concentrations require licenses. The third section, Decisions, Objections and Appeals (BBB), is responsible for handling objections and issuing decisions about breaches of sanctions, and it represents NMa’s Director General in appeal hearings.

The change in law has been accompanied by a very large increase in resources. NMa’s staffing level represents more than three times the number of staff that had been assigned to the predecessor office in the Ministry. The budget has also increased substantially, although the exact increase is unclear (the data in the following table for the years 1993-1997 are not strictly comparable with the 1998 data for NMa). The personnel for NMa represent about 0.01 per cent of total government employment, and the budget, about .006 per cent of non-defence government spending. (By comparison, in the US, personnel in the federal government competition enforcement agencies account for about 0.08 per cent of employment, and the budgets for about 0.015 per cent of spending). Commitment of these significant additional resources demonstrates that the intention to strengthen enforcement is indeed serious.

Table 1. Resources devoted to competition enforcement by the Ministry of Economic Affairs (1993-1997) and the Dutch Competition Authority (NMa) (1998)

	Competition Policy Person-years ¹	Competition Policy Expenditures ²
1998	73	20.0
1997	18	6.9
1996	19	10.7
1995	20	8.3
1994	20	9.8
1993	20	n.a.

1. *Person-years*: number of persons employed in competition policy departments of directorate for Market Policy including 8 persons employed in the Economic Investigations Agency (ECD).

2. *Expenditure (in million of guilders)*: for 1993-1997, expenditures for research and subsidies from the Market Policy directorate, excluding rent, wages and other costs, but including work on other policies besides competition policy. For 1998, the total budgeted expenditures for the Dutch Competition Authority, including rent, wages, and overhead.

Source: Responses to the OECD Review Questionnaire.

The level of activity had increased markedly even before the new law became effective, with nearly twice as many matters opened in the latest period, compared to those preceding. Most of these matters are evidently requests for exemption or dispensation from the ban on agreements and bid rigging.

Table 2. Trends in Competition Policy Actions

	Horizontal Agreements	Vertical Agreements	Abuse Of Dominance	Other ^{1,3}
1996-1997 : investigations or matters opened	116	2	14	68
sanctions or orders sought ²	31	1	3	
pecuniary sanctions imposed				1
1995-1996 : investigations or matters opened	70	2	3	68
sanctions or orders sought ²	29		1	1
pecuniary sanctions imposed				1
1994-1995 : investigations or matters opened	41		2	72
sanctions or orders sought ²	3		1	
pecuniary sanctions imposed				
1993-1994 : investigations or matters opened	59			74
sanctions or orders sought ²	20			
pecuniary sanctions imposed				

1. *Matters opened*: "other" column includes investigations done by the Economic Investigations Agency (ECD), estimated at between 25 and 50 matters during 1993-1997.

2. *Sanctions or orders sought*: decisions taken, negative as well as positive.

3. *Other*: cases with a combination of the above elements.

Source: Annual reports on competition policy; Responses to the OECD Review Questionnaire.

One reason relatively few matters concluded with a decision under the old system was that companies often corrected their conduct before the decision issued. Under the old law, that meant there was no longer any basis for action. And the main reason very few sanctions were imposed was that the principal means of enforcing the ban on horizontal agreements was through the criminal law. Prosecutors brought few cases. The proportion of cases leading to orders and sanctions should increase, now that the law is being enforced through administrative procedures.

4. THE LIMITS OF COMPETITION POLICY FOR REGULATORY REFORM

4.1. *Economy-wide exemptions or special treatments*

Two general exemptions will be relevant to regulatory reform. First is a broad “regulatory authorisation” exemption that casts doubt on the strength of the commitment to reform based on competition principles. The law’s prohibitions do not apply to agreements that are subject to the approval of an administrative agency pursuant to other legislation, that could be declared invalid or prohibited by another agency, or that have arisen pursuant to another statutory requirement.²⁹ Competition law thus stands at the end of the priority line. Even the mere potential for conflict, such as the possibility that another agency could approve, or even disapprove, the conduct, could mean that the competition law does not apply. The exemption is set to lapse in 2003, and in the meantime debate will continue about how to set policy priorities. The kinds of potentially conflicting regulatory requirements that are under review include minimum price setting for natural gas, mandatory co-operation for small utility companies, government-set landing fees and passenger transport rates, mandatory agreements for regional broadcasts, and mandatory agreements about surface mineral production. Even without the statutory exemption, a court might not accord the competition law precedence over a potentially conflicting regulatory system. But if that indeed happened, the decision could presumably be corrected by legislation. The blanket exemption decides all those conflicts in advance, and decides them contrary to the interests of competition policy. The competition law will be more effective as a tool for reform when this exemption expires—if it is indeed allowed to expire. Facing the deadline, the various ministries may focus on the need to set out the relative priorities more explicitly. Or they may find it expedient just to extend the exemption when the deadline comes, leaving competition policy as the lowest priority in the event of conflict. That would be a major impediment to using the competition law in the reform process.

Second, there is a partial exemption from all aspects of the law for entities or associations entrusted with services of general economic interest, that is, utilities and other public service undertakings.³⁰ This exemption parallels precisely the similar exemption in Article 90 of the Treaty of Rome. These entities are technically subject to the prohibitions against agreements and abuse of dominance, but not if applying the prohibition would prevent performance of their special tasks. This exemption extends not only to these entities themselves, but to agreements to which one of them is a party or decisions by associations of which it is a member, at least to the extent of the necessity. Much will depend on how broadly NMA interprets the possibility of “preventing” the performance of their tasks. The parallel to the EU, and the intention to follow EU principles and interpretations, suggest that this exemption will be applied narrowly, because Article 90 has generally been applied narrowly. So far, there has been no occasion to apply the exemption under the new Dutch law. But the likelihood of keeping the exemption narrow is supported by the enforcement record under the old law. The old law was applicable to publicly owned or managed enterprises, and proceedings or complaints were lodged against exclusive dealing and excessive charges in cable television, excessive tariffs for water supply, distortion of competition by energy distributors, and unfair cross-subsidisation of package delivery by the postal service.³¹

Unfair competition from entities related to the government has received considerable attention. It was the subject of a 1997 report by a panel of appointed experts, the “Market and Government” Working Group (also known as the Cohen Working Group after its Chairman, Professor M. J. Cohen). The report outlines a conceptual framework for (semi-) government organisations that compete in the market with private companies. These entities, which the report termed “organisations with exclusive or special market rights”, or OEMs, often enjoy an exclusive position, such as a monopoly, granted in order to perform their public tasks. The report concluded that market operations by these entities are undesirable, because it is not possible to prevent distortion of competition. The report concluded that in principle, commercial activities should be segregated and divested, although some exceptions to this rule of structural separation might be admitted: commercial activities intrinsic to the OEM’s public duties, commercial activities relating to scientific research, activities to support maintaining a minimum physical plant capacity, or a situation of competition for the public duties, such as for electricity distribution. Even for these exceptions, the report called for rules of conduct applied by a new, independent supervisory authority to achieve equal competitive conditions. The Cabinet endorsed the report’s main points and took some preparatory steps toward implementation. Several particular OEMs were set for investigation, anticipating the issuance of new regulations or instructions for them. A list of all central government OEMs was made, as a basis for further investigation and reform. Suggestions include making competitive OEM commercial activities liable for corporation tax, and discussions between the government and municipal and provincial authorities about how the report’s conceptual framework could be applied. The Cohen report is well-conceived and, despite its reticence about making particular policy recommendations, usefully concrete. But implementation has been only tentative; stronger action is needed.

Small and medium sized enterprises receive special treatment. Smaller firms are not usually thought likely to exercise market power, although in small enough markets, small enterprises may effectively agree to eliminate competition. Nevertheless, the competition law includes an explicit, partial exemption for small businesses.³² The “bagatelle” exemption covers agreements among small groups (eight or fewer participants) of limited economic importance (total turnover of 10 million guilders for sales, or two million for services). Although the agreements are not subject to the general prohibition, NMa may order small firms to terminate them in particular cases if they are found to have a significant detrimental effect on competition. The somewhat similar *de minimis* provision of EU competition policy is a statement of intention that is not binding on the courts. The Netherlands put the exemption into the text of the law, in part to satisfy objections and demands from small business groups that the exemption be even larger. The exemption’s stated purpose is to remove the threat of prohibition and legal nullity from agreements which are of minor significance. But whether their competitive impact is minor depends on the market setting, not just on the firms’ size. The partial exemption raises the costs of enforcement against anti-competitive actions by smaller firms. It would be unfortunate if the cost of enforcement meant that the law had to tolerate retail price fixing among small enterprises in small towns. Here a more tightly drawn exemption, which continued to prohibit horizontal price fixing and market division while according “abuse” treatment to other kinds of agreements, might strike a better cost-benefit balance. Perhaps that result can be reached without amending the law by establishing such a rule *de facto* through a targeted enforcement program.

Some other provisions of the law might particularly benefit small and medium sized enterprises, although they do not amount to exemption or special treatment. For example, some forms of agreement that may particularly benefit small and medium sized enterprises are not considered to be prohibited, or are exempted, under standard EU applications and exemptions. Joint market research, joint research and development, joint customer and repair services, joint advertising and joint quality certificates are not regarded as competitive restraints and thus are not prohibited at all. Block exemptions that may be important for small and medium sized enterprises include the block exemption for franchise agreements and the supplementary Dutch block exemptions for price co-ordination in conjunction with joint

advertising and certain exclusive selling agreements. These aim to permit useful forms of co-operation between independent retailers, to strengthen their position against chain organisations. They are not exclusively meant for small and medium sized undertakings, but many of those undertakings may profit from them.

Box 7. **Scope of competition policy**

Is there an exemption from liability under the general competition law for conduct that is required or authorised by other government authority? Like most Member countries (15 out of the 27 reporting), the Netherlands provides an exemption from the general competition law for conduct under the jurisdiction of another regulation or government authority.

Does the general competition law apply to public enterprises? Like all Member countries except the US and Portugal, the Netherlands' general competition law is applicable to the commercial actions of public enterprises; however, this potential application is narrowed some by the exemption, following the EC's doctrines, for utilities and other public service undertakings.

Is there an exemption, in law or enforcement policy, for small and medium sized enterprises? The Netherlands, like its neighbours Belgium, France, and Germany, provides a form of special treatment, more lenient treatment for certain agreements among small businesses.

4.2. *Sector-specific exclusions, rules and exemptions*

The government has announced sound principles to guide the relationship between sector-specific regulation and competition policy, which would make competition rules effective tools for reform. It has been less successful implementing these principles. In January 1998 the Dutch Cabinet issued a statement about how to supervise privatised utilities to prevent fragmented oversight and inconsistent application of competition concepts. In particular, the Cabinet called for restraint in the introduction of specific competition rules. If the desired result can be realised through the general competition regime, no sector-specific rules are necessary. If sector-specific rules are unavoidable, the Cabinet held that they should overlap as little as possible with the general competition regime, their relationship to general rules should be defined as accurately as possible, they should be reassessed periodically, and they should be applied in co-ordination with NMa. If NMa itself or a chamber within NMa is not directly responsible, then the sectoral supervisor must reach agreement with NMa on how the general competition terms in sector-specific rules should be interpreted in individual cases.

In practice, however, the framework being put in place appears to fall short of these sound principles. Parliament has assigned exclusive responsibility for access to cable TV networks to the new telecommunication regulator, OPTA, rather than to NMa. OPTA will also evidently have exclusive responsibility for telecommunications. While competition law will still apply in principle, actions taken pursuant to OPTA's authority or potential authority could be exempt under Article 16. In electric power transmission, there will be a hybrid organisation structure, with a sector regulatory office or responsibility located within NMa.

In addition, the framework being established does not contain an explicit "forbearance" procedure to reassess, on the basis of whether incumbents have substantial market power, the need for sector specific regulation. In telecommunications, the regulator plans to follow the suggestion of the EU and apply a "25 percent" rule of thumb (although OPTA retains the discretion not to find market power at higher share levels, and even to find market power at lower ones). Unless applied with sensitivity, such a blanket rule raises a significant danger that regulation will be maintained where the marginal benefit of its

safeguards is outweighed by the costs, of administrative burden, reduced pricing flexibility, and diminished incentive to innovate and bring new products to the market. Rather than a general rule of thumb set at such a low market share level, it would be better to establish a process for assessing market power, and thus the need for continued regulation, in specific fact situations.

The framework does provide that sector-specific rules are to be applied in consultation with NMa. The sectoral agencies and NMa are trying to establish a good continuing working relationship. Still, it is unclear that mechanisms for consultation can assure an accurate and consistent correspondence between sectoral regulatory decisions and generally applicable competition concepts. Where, as in telecommunications, NMa itself or a chamber within NMa is not directly responsible, it would be best if the sectoral supervisor could reach agreement with NMa on how general competition terms in sector specific rules should be interpreted in individual cases. As it stands, there is no independent assessment of the competition policy implications or effects. If the sector-specific regulator is charged with making the ultimate decision based on public interest grounds, it is important that an independent competition assessment be undertaken, so that the extent of the regulator's deviation from competition policy principles is transparent.

Several special sectoral rules and exemptions were maintained or established in connection with the enactment of the new law. These evidently represent political compromises. The block exemptions for franchising and certain joint actions in retailing and distribution may reassure those sectors about the exact bounds of permissible behaviour in their competition with integrated chain operations. But others, notably those for publishing, are more problematic. That is, it is doubtful that no less anti-competitive way could be found to achieve the policy goal. Several of the items noted below are not technically exemptions from the competition law, but are potentially anti-competitive regulations or requirements that are beyond the reach of the law because of the "regulatory authorisation" exemption. There may be others whose potential conflict is not as obvious. Between now and when the general "regulatory authorisation" exemption is set to expire, potential conflicts will be subject to further study, in a effort to resolve them so the general exemption can be eliminated. That study, though necessary, addresses only the most obvious way that regulation and competition policy might conflict. A more comprehensive review should examine systematically the competitive implications of all existing legislation. Such a study, similar to that undertaken in connection with reform in Australia, would be concerned not just to identify and correct clear conflicts between competition law and other regulatory requirements, but also laws and regulations that unnecessarily impair competition in other ways.

Retail maximum resale price maintenance: A group exemption applies to two types of agreements between chains of independent small retailers and their members: maximum price-fixing agreements during short-term advertisement campaigns, and minimum purchase requirements. (Chains of independent small retailers that are also subject to the EU competition rules cannot take advantage of this exemption.) The exemption is subject to several conditions, which may tend to ensure that it is employed to promote efficiency rather than to inhibit inter-firm competition. First, the firms involved must be doing business under a common formula, which includes the same requirements as "franchise" in the EU block exemption for franchise-agreements. (The Dutch exemption, unlike the EU franchise exemption, does not include or depend on exclusive territories, but only on common business format and financial relationship). Agreements on maximum prices must be in conjunction with a joint advertising campaign, limited in duration to eight weeks, and limited to at most five per cent of the assortment of goods that the franchiser, wholesaler or buying co-operative supplies to the retailers involved. Agreements that oblige a retailer to buy goods from a franchiser, wholesaler or buying co-operative require that the retailer have a financial obligation to the supplier concerning the exploitation of its undertaking, and must be limited to no more than ten years and no more than sixty per cent of the assortment of goods which the retailer offers to consumers. There is also a non-discrimination requirement: the franchiser, wholesaler or buying co-

operative is not allowed to demand less favourable prices or conditions than would apply for a buyer without the obligation. The purpose of the exemptions, which are evidently used widely, is to enable chains of independent retailers to compete effectively with integrated chains, by allowing them to co-ordinate some of their marketing and to establish long-term supply relationships within franchise-like or co-operative structures. Provided that the retailers do not actually have market power in local markets, the actions that the exemption permits may indeed lead to stronger, more effective competition with integrated operations. Because of the Netherlands' history of retail-level cartels, though, the actual use and effect of these exemptions ought to be monitored carefully.

Joint tendering: Exemptions for contractor agreements have been complicated by a long history of controversy with the EU about bid rigging. Under the previous law, decision was deferred to the EU, which generally ruled against the Dutch constraints, failing to find any grounds for exemption. A group exemption is now part of the regime under the new law. The group exemption applies to agreements by two or more enterprises to bid jointly for a tender and, if their bid is successful, share the work and the rewards. The exemption covers only agreements for a single tender, to prevent long-term co-operation leading to *de facto* mergers. The rationale is to increase effective competition between large companies on one hand and combinations of smaller ones on the other. Here too, the rationale is plausible, but the Netherlands' history of wide-spread construction bid-rigging and rotation call for careful scrutiny of the exemption's actual effects.

Shopping centre leases: A block exemption permits a shopping centre operator to guarantee retailer tenants that no similar outlets will be established in the centre during its first six years of operation. Ensuring a limited degree of exclusivity can encourage investment; on the other hand, exclusive positions can be hard to dislodge, if space usage changes slowly. Despite the plausibility of the evident purpose, the history of retail cartels again suggests that its actual impact should be followed, to determine whether the exemption is serving that purpose well.

Banking and insurance: For now, the Minister of Finance, rather than NMa, is responsible for reviewing proposed mergers between banks and insurers. The evaluation concentrates first on solvency and second on market effect. In other respects, the Competition Act applies to these sectors, and the special provision about mergers is to expire in two years. There is some risk here as in other settings that the sector regulator will be more responsive to arguments about the need for large size and broad integration, and less aware of the dimension of competition policy. Already, there has been consolidation in the banking sector. If competitively troubling mergers are permitted during the transition period, their effects will be difficult to undo later.

Newspapers: The Minister of Economic Affairs committed to permitting horizontal price-fixing agreement about increases in subscription charges until 1 July 1999, pursuant to an agreement with the State Secretary for Education, Culture and Sciences. This will maintain an industry price-fixing agreement approved in 1997; at that time, others about introductory discounts, increases in advertising rates, and advertising agency margins were rejected. Moreover, there is also a national block exemption for resale price maintenance for news-stand sales of Dutch newspapers. This exemption is also said to be temporary, but it will run all the way until 1 January 2003. The justification proffered for both types of price fixing is maintaining viewpoint diversity, as well as avoiding a sudden shock of changing the system before it has had time to adapt. But the new law has been in preparation for many years, so there has been plenty of time to prepare for it without too much shock. These exemptions look more like politically expedient compromises, entered to forestall editorial objections to the change in the competition policy regime.

Book and music retailing: In 1997, a dispensation for resale price maintenance for books and sheet music was granted, which will remain in force under the new Competition Act until 1 January 2005. The rationale for continuing this long-standing exemption is said to be solely the need for consistency with past concessions and representations to Parliament dating from 1985. Consistency is a weak reason to maintain a policy for over 15 years, if the policy is mistaken. An evaluation of the dispensation's costs and benefits, including the purported support for viewpoint plurality and distributional effects, is to be done from 2000 to 2005.³³ The claimed justification, of maintaining diversity, is only modestly supported, at best, in other jurisdictions' experience.³⁴ Mandatory resale price maintenance in France has kept a large number of publishers in business, but has also evidently kept book prices high. Countries that have a long experience without resale price maintenance for books have not reported declines in availability or number of titles. This is true even where the language base is limited. Sweden has banned resale price maintenance for more than 20 years, and book sales have not suffered, although there has been change in some distribution methods, with mail order and book clubs becoming more important.

Electric power: Long-term liberalisation plans continue to be implemented, as discussed further in Chapter 5. The assignment of responsibility for competition-policy issues in the liberalised functions leaves competition issues in transmission in the hands of a separate regulator, DTE. That regulator will be a chamber in NMa, although it will report to the Ministry of Economic Affairs. NMa must be consulted about transmission tariffs and rules for access, and evidently may also be involved in particular decisions on those issues if necessary. Substantial overcapacity makes the Dutch market unattractive to new entrants and imports, so it is important to guard against anti-competitive effects in a domestic market. The four major domestic generating companies and the co-ordinating firm, SEP, which handled planning and pooling, at one point announced plans to merge into a single company. The combined entity may have had a dominant position within the Netherlands, and studies suggested that blocking the combination could have benefited consumers.³⁵ The NMa indicated it intended to take a close look at the transaction, and the parties later abandoned their plans to combine. But the near-miss experience highlights the importance of independent competition policy oversight responsibility. The issue will recur, as NMa's responsibilities concerning agreements as well as mergers may bring it into conflict with Ministry views when the industry's vertical exclusive supply agreements are submitted for dispensation under the competition law.

Natural gas: Although some competition issues are under the jurisdiction of NMa, the market is subject to significant economic controls, particularly concerning prices. For now, prices in this sector are subject to the Natural Gas Prices Act, under which the Minister sets a minimum price for natural gas, both domestically and for export. And under the Energy Distribution Act, if two or more legal entities are providing electricity, gas and heat to at least 5 000 of the same users, they must enter into a co-operation agreement approved by the Minister, which is exempt from the competition law. The exemption is understandable, as both of these regimes seem inconsistent with competition-based regulation. The question for regulatory policy is, why are these potentially anti-competitive systems maintained. Less anti-competitive means are probably available to raise revenue or discourage use, and to permit efficient sharing of facilities while also permitting inter-fuel competition. Both of these exemptions are being reviewed.

Telecommunications: Parliament has determined that this sector will be supervised by a separate, independent regulator. The competition law will still apply in principle, but actions taken pursuant to the regulator's authority or potential authority could be exempt under Article 16 of the Competition Act. There will be no independent assessment of competitive effects in particular cases. These issues are treated in more detail in Chapter 6.

Aviation: Under the Aviation Act, landing fees charged by airports must be approved by the Minister, in accordance with the Chicago Aviation Treaty. This arrangement is evidently being reconsidered, as part of the process that should lead to the termination of the “regulatory authorisation” exemption.

Transportation: Under the Passenger Transport Act, the Minister must approve the rates and forms of transport passes. In addition, special EU rules and exemptions affect the application of the competition law here.

5. COMPETITION ADVOCACY FOR REGULATORY REFORM

Promoting competitive, market policies is the role of the Ministry of Economic Affairs, which has had major responsibility for the MDW programme described in more detail in Chapter 2. The MDW effort has included such competition-promoting projects as relaxing the 1976 Shop Hours Act, an interdepartmental study of regulation of drugs, which may offer lessons for other health care subjects, a similar examination of the liberal professions, and a government decision to introduce greater competition in public transport. Recent projects in this programme have proposed to encourage greater pricing flexibility and availability of paraprofessional services in health care, to limit to larger companies the mandatory use of an auditor for financial statements (and review the public-law status of the accountants’ organisations), to limit the use of “non-compete” clauses in employment contracts, and to reduce the scope of the bailiffs’ monopoly. The current, fourth tranche of the MDW programme is examining real estate agents, supervision and co-operation in collection of copyright, electronic signatures, urban regulations, business licensing, risk-bearing health insurance, and pilotage service. It is not clear how many of these other, more recent proposals are actually being implemented, or how soon. The subjects are well-chosen, and the proposed reforms are very sound from a competition policy perspective. But the program’s four year effort, taking on four or five new projects per year, had only produced four actual changes in regulation by the beginning of its fourth year. The length of time it is taking to implement these proposals implies that organized interests are still resisting change strongly. And it also reflects the inevitable realities of the Netherlands’ consensus-based decision process.

NMa has no advocacy role at present. Its public outreach has been limited to publicising and explaining the new law and its own enforcement responsibilities. This limitation of its role may be rationalised as necessary to establish its enforcement competence and independence. But an active advocacy role could promote and solidify its actual and perceived independence. It could also contribute a strong and effective voice to the public debate about reform. And advocacy is a valuable complement to enforcement. Enforcement experience leads to familiarity with industry realities, which can make the enforcement body a more credible and authoritative advocate. Enforcement experience can also reveal where competition law remedies are limited and constrained by other regulatory or legal mandates. This too can focus advocacy attention on concrete problems.³⁶ NMa may feel that its resources are still insufficient to support advocacy, especially as it must deal with the unexpectedly large workload of merger filings and applications for dispensation. But a well-conceived, focused advocacy programme can take advantage of enforcement experience to achieve significant benefits with only a modest resource commitment.

6. CONCLUSIONS AND RECOMMENDATIONS

6.1. *General assessment of current strengths and weaknesses*

Competition policy has been a central theme in a long-running programme of regulatory reform. The modernisation of the Netherlands' basic competition law, by harmonising it with European law and introducing merger control, is obviously an important element of that larger reform process. This continual government commitment, the clear, modern law that it has produced, and the well-designed new enforcement agency with strong leadership represent the principal strengths on which further reform can build. The law's purposes, to encourage the economy's ability to adapt to challenge and change and to integrate more closely with EU competition policy, and are consistent with reform. And the integration of complementary consumer and competition policy principles should go far to making reform saleable to the general public. The problems of balancing sectoral regulation and competition enforcement and of eliminating problems of unfair competition from government enterprise are well understood. More broadly, aspects of the Dutch society and economy seem congenial to competition-based reform. Its markets have long been relatively open, there is a tradition of self-organising entrepreneurship, and there are many strong, independent business firms that have succeeded in the discipline of market competition.

The greatest threat to continued reform remains the strong corporatist tradition that had given the Netherlands its "cartel paradise" reputation. The institutionalisation of this structure through processes of consultation and consensus-building affords opportunities for delay and perhaps excessive compromise. On the other hand, this structure can be used to promote reform, if some of the institutional participants use it to promote competitive outcomes. Despite the government's enthusiasm for reform, there is reason to wonder whether support is very broad or deep, either in the public or among organised interests. Parliament has declined to implement some of the pro-competitive recommendations. Compromises about exemptions were necessary to get the competition law passed. The new enforcement agency's less than clear independence suggests that not all parties want to remove enforcement from the possibility of political influence by organised interests.

The Netherlands' current laws and institutions are too new to evaluate their actual performance against the substantive and process goals of reform. Their novelty constitutes both a strength and a weakness for competition policy. They embody a conscious rejection of the weakness of the old regime. But because they are untested, their real powers and intentions are unknown. Despite the change in administrative basis, the new law's substantive content and provisions for exemption and dispensation are not radically different from those available under the old one. Overall, the national commitment to competition policy approaches appears mixed and uncertain. Much will depend on strength and success of the new competition enforcement agency.

6.2. *The dynamic view: the pace and direction of change*

The direction of change is clear and appropriate. Perhaps that is because competition policy in the Netherlands had been so weak, there was only one direction left to take. Still, the progress has been considerable. The Netherlands has made a conscious effort to reject and correct what it believes were the flaws in the old system that led to its ineffectiveness. The pace, however, has been slow, though perhaps a better description might be "deliberate." After a long period of gestation, the new institutions were born in 1998. It has been about ten years since the government decided to step up enforcement, five years since formal steps were taken to ban price fixing, bid rigging, and market division, and almost as long since the government undertook a systematic programme of regulatory reform.

The challenge now is for the new institutions to demonstrate that they will indeed achieve significantly different policy results than the old structures did. Further change in the basic legislation is quite unlikely for the next several years. Rather, the important benchmarks for the next few years will be in institutional performance: NMa's treatment of the host of initial dispensation requests, its success at identifying, investigating and taking action against abuses of dominance and unfilled, anti-competitive agreements, and its success at establishing its authority and independence, through court affirmations of its decisions, Ministerial abstinence from exercising its theoretical powers of instruction, and emancipation, as planned, from the Ministry itself.

More remains to be done to integrate stronger competition principles into the national regulatory system. At present, the competition authority's own role in that process is unnecessarily limited to enforcement. Moreover, because of the broad "regulatory authorisation" exemption, it will be even more limited. Another benchmark for progress in implementing broad-based competition policy will be whether this broad exemption does in fact come to an end in five years as planned, and that arrangements reached in the meantime to balance competition policy and other regulatory policies do so in a way that limits regulation to situations of clear market failure, and clearly authorises competition policy to handle other issues for which it is competent.

6.3. *Potential benefits and costs of further regulatory reform*

Some of the tangible benefits of greater competition have begun to appear. Liberalisation of shop hours has improved several measures of competitive performance. Further improvements can be expected, as the new competition law is increasingly applied, particularly to the formerly sheltered sectors. Prices may be expected to decline in markets such as construction, health care and medical supplies, professional and other services, and local transportation. As Chapter 1 explains, prices in the Netherlands have historically been unusually rigid, so that the markets' responses must be in terms of quantity, not price. Broader application of a competition law prohibition of agreements about price may make prices more flexible, and reduce the need to make adjustments by increasing or reducing supply, or employment.

Those who have benefited from the lack of competition will likely experience at least short-term costs, though. Where benefits have already appeared, such as in retail trade, so have these costs, in the form of greater impact on smaller retailers. Providers of professional and other services are likely to feel similar effects, challenging them to devise new, more efficient methods. Experience elsewhere suggests that the long-run employment effects of more vigorous competition policy are likely to be mixed. Employment is likely to increase, perhaps substantially, where increased competition expands the market. This has often happened in telecommunications and transport, for example. And it will decline where competition leads firms to find more efficient, less labour-intensive ways to produce the demanded output. This may be a consequence in the retail sector. The benefit of greater price flexibility may also entail a cost, as the economy may seem less resistant to inflation or deflation.

6.4. *Policy options for consideration*

The following policy options are based on the "Policy Recommendations for Regulatory Reform" set out in the 1997 *OECD Report on Regulatory Reform*.

- *Apply the new law vigorously*

A sound strategy of enforcement has been in place since the new agency began operation. The NMa's Director General intends to bring significant cases to demonstrate the law's potential and importance, including cases targeting anti-competitive codes of "unfair competition," while avoiding wasteful controversies about jurisdiction and difficult, complex, novel legal theories, and establishing a reputation for real and perceived independence and professional competence. Successful application will both yield visible benefits and build support.

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

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—will measure the seriousness of the Netherlands' commitment. When the transition periods end, so should they.

- *Authorise NMa to engage in independent advocacy*

Advocacy complements enforcement. It can promote desirable outcomes that cannot be achieved by enforcement. It is an opportunity for both building and applying sectoral expertise. Here, as for enforcement, the new agency will be careful to choose initiatives that demonstrate benefits and build support, and will avoid controversialism that could weaken its enforcement position.

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

The 1998 Cabinet recommendations about the relative competencies of NMa and sectoral regulators are well-conceived. So far, they have been implemented imperfectly, in arrangements that do not give the competition authority clear powers concerning particular decisions that are likely to have substantial competitive effects. The recommendations call for general, not sector-specific, competition rules, and for avoiding disagreement about competition policy by giving NMa decisive authority in particular applications.

Similarly, the Cohen report provides thorough and sound analysis and recommendations about how the participation of government-related entities may distort normal market competition. What is now needed are specific plans and follow-through to implement those recommendations.

- *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 has been the underlying task of the MDW project. Now that the experience is familiar, the review should be expanded and made more systematic, consistent with the recommendation in the *OECD Report on Regulatory Reform*. The competition review currently being carried out in Australia offers one model for such an exercise.

6.5. *Managing regulatory reform*

Despite the many signs of movement toward greater reliance on competitive institutions, economic performance still lags in the non-traded and service sectors, where application of competition policy will be least welcome but is most needed. Liberalisation of shop hours has improved several measures of competitive performance in that sector already. Sustaining and extending those benefits will depend on using the competition law to prevent backsliding, as well as on further reform of zoning and other regulations that increase costs and discourage entry. High and inflexible retail prices probably result from long-standing protection against entry, leading to comfortable tacit understandings, and sometimes overt agreements, not to compete on price. Targeting enforcement and reform on these issues must be a high priority.

The competition law's exemption for some kinds of price agreements among retailers must be applied with great care against this history, for the agreements permitted about maximum price can quickly become *de facto* agreements about minimum prices. Similarly, the law's temporary exemption for structural combinations in the financial sector is a concern, in view of the history lack of innovation in financial services in this already concentrated industry. Applying competition policy there will require some co-ordination and sensitivity to other policy interests.

Although the pace has been deliberate, the overall strategy for strengthening competition policy in the regulatory process appears sound and likely to be effective. Thorough debate has produced a modern substantive law that is tuned to Dutch concerns and political forces and an enforcement agency to match. In the near term, the challenge is to achieve concrete, successful results with these new tools and thus help consolidate the principle of reform based on competition policy.

NOTES

1. H.W. de Jong (1992), “Het kartelparadijs: de punten van bezwaar” [“The cartel paradise: the statement of objections”], ESB, Vol. 77, n. 3878, pp. 921-927.
2. OECD (1993), *Economic Review of the Netherlands*, p. 60.
3. See, e.g., Vereniging Cement Handel (OJ EC No. L 303, 31.12.1972, p. 7); Haarden- en Kachelhandel (OJ No L 159, 21.6.1975, p. 22); Centraal Bureau voor de Rijwielhandel (OJ No L 20 of 25.1.1978, p. 18), Vimpoltu-landbouwmachines (OJ No. L 200 23.7.1983, p. 44); Samenwerkende Prijsregulerende Organisaties in de Bouwnijverheid (OJ No L 92 of 07.4.1992, p. 1); FENEX (OJ No . L 181 20.07.1996, p. 28).
4. OECD (1997), *Competition Policy in OECD Countries 1994-1995*, p. 259.
5. See W. Sauter (1997), *Competition Law and Industrial Policy in the EU*, p. 117.
6. Note accompanying Bill for the Competition Act, 18 July 1995.
7. See OECD (1997), *The OECD Report on Regulatory Reform*, Paris.
8. *Annual Report on Competition Law and Policy in the Netherlands (July 1996-June 1997)* (1997).
9. Here “dispensation” translates “ontheffing,” which conveys the sense of case-by-case decision. In EU competition law, the same term, “exemption,” is used both for general, “block” exemptions and for exemptions granted in case-by-case decisions.
10. Competition Act, Articles 12-14.
11. Competition Act, Article 12.
12. Competition Act, Articles 15, 17.
13. See *Financial Times*, 2 April 1998.
14. Competition Act, Article 100(1).
15. Royal Decree, 4 Feb 1993; effective date, 1 July 1993.
16. OECD (1997), *Competition Policy in OECD Countries 1993-1994*, Paris.
17. These decisions are described in the government’s *Annual Report on Competition Law and Policy in the Netherlands (July 1996-June 1997)* (1997) and in the annual reports to the OECD, *Competition Policy in OECD Countries 1993-1994* (1997).
18. These decisions are described in the government’s *Annual Report on Competition Law and Policy in the Netherlands (July 1996-June 1997)* (1997) and in the annual reports to the OECD, *Competition Policy in OECD Countries 1993-1994* (1997).
19. See OECD (1994), *Competition Policy and Vertical Franchising Agreements*.
20. See European Commission, Green Paper on Vertical Restraints (31 January 1997).

21. Competition Act, Article 24.
22. *Annual Report on Competition Law and Policy in the Netherlands (July 1996-June 1997)* (1997).
23. *Id.*
24. OECD (1997), *Competition Policy in OECD Countries 1993-1994*.
25. Article 22, Clause 3 of Council Regulation No. 4064/89.
26. Article 9, Clause 1, of Council Regulation No. 4064/89.
27. Competition Act, Article 91.
28. Competition Act, Article 78(3).
29. Competition Act, Article 16.
30. Competition Act, Articles 11, 25.
31. *Annual Report on Competition Law and Policy in the Netherlands (July 1996-June 1997)* (1997).
32. Competition Act, Article 7.
33. The trade's price agreements also extended to imported (foreign) books, through fixing exchange rates; this form of price fixing was ended under pressure from the European Commission.
34. OECD (1997), Competition Law & Policy Committee, Roundtable on Resale Price Maintenance.
35. See R. C. G. Haffner and P. A. G. van Bergeijk, eds. (1997), *Regulatory reform in the Netherlands -- Macroeconomic Consequences and Industry Effects*, directie Marktwerking, Ministerie van Economische Zaken (Ministry of Economic Affairs), October.
36. See generally OECD (1997), *The OECD Report on Regulatory Reform*, Vol. 2, *Thematic Studies*, Paris, pp. 251-73.