Regulatory Reform in the Netherlands

Enhancing Market Openness through Regulatory Reform

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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 *Enhancing Market Openness through 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 Evdokia Moïsé, of the Trade Directorate in 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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Does the national regulatory system allow enterprises to take full advantage of competitive global markets? Reducing regulatory barriers to trade and investment enables countries in an expanding global economy to benefit more fully from comparative advantage and innovation. This means that more market openness increases the benefits which consumers can draw from regulatory reform. Maintaining an open world trading system requires regulatory styles and content that promote global competition and economic integration, avoid trade disputes and improve trust and mutual confidence across borders. This chapter will assess regulations and the regulatory process in the Netherlands in terms of their effect on international competition through trade and investment, as well as the extent to which trade perspectives are incorporated into the general policy framework for regulations. This report shows that there is broad consistency in the principles of good regulation from both domestic and international perspectives. The analysis is built on six "efficient regulation" principles that elaborate the core principles of good regulation set out in Chapters 2 and 3 with respect to their impact on foreign parties.

The prosperity of the Netherlands has historically been largely dependent on foreign trade and investment, resting on a long tradition of market openness. Dutch domestic and international policies have been geared to enhancing both the attractiveness of the domestic market for foreign businesses and the international competitiveness of Dutch firms. In this context, the Netherlands has largely subscribed to the "efficient regulation" principles in establishing rules and procedures, even if in many cases the principles have not been translated into formal requirements in developing domestic regulation. Transparency and openness of decision making with respect to foreign parties, as well as a general tendency to espouse non-discriminatory practices, seem well anchored in the consensus tradition of the Dutch society. Furthermore, the regulatory process in the Netherlands appears to have generally operated in a manner which seeks to fulfil legitimate policy objectives while ensuring international market openness as far as possible, by avoiding unnecessary trade restrictiveness and encouraging the reduction of technical barriers to trade. For example, the Netherlands has a strong record of use of internationally harmonised measures and of the recognition of equivalence of conformity assessment performed abroad.

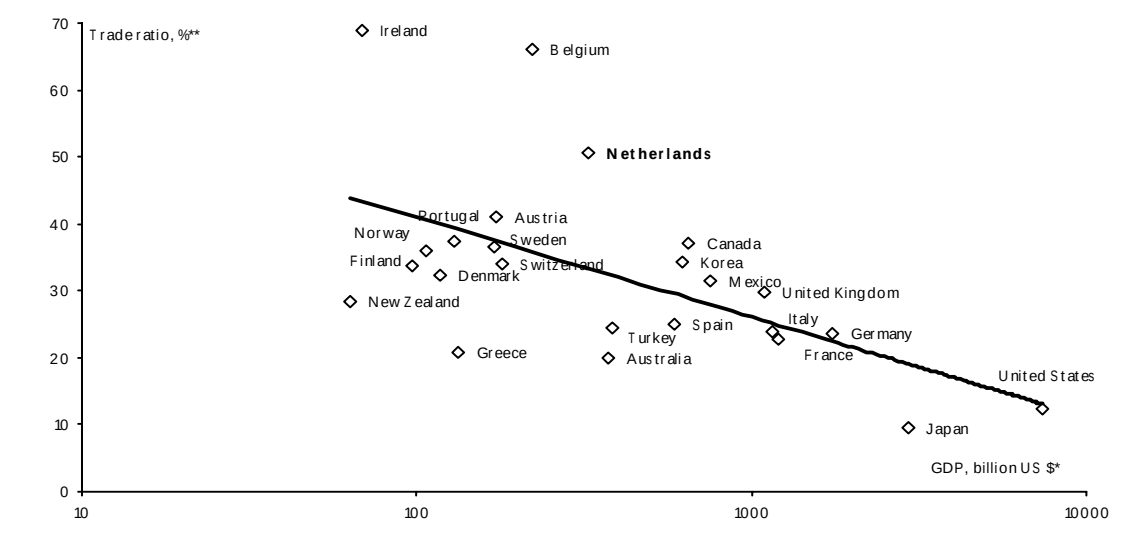
However, the benefits of policies geared towards market openness may have been mitigated in the past by the strong corporatist tradition which may disadvantage new entrants, especially SMEs. In the absence of formalised rules and procedures, the self-regulatory approach commonly used may comprise a risk of exclusion of non-represented interests. In this light, even if market openness has not been a key issue in the reform efforts undertaken in the recent years in the Netherlands, reforms undertaken in other areas, and in particular with respect to competition policy, with a view to suppressing private anti-competitive behaviour have indirectly had a positive effect on market openness. It is probably in ensuring the application of competition principles that there may remain the largest potential for further future improvement in market openness.

1. MARKET OPENNESS AND REGULATION: THE POLICY ENVIRONMENT IN THE NETHERLANDS

The Netherlands has long enjoyed a reputation as a trading nation with one of the most open economies in the world. Given the relatively small size of the country, the prosperity of the Netherlands has largely been dependent on foreign trade and investment. The exceptional international orientation of the Dutch is demonstrated by a combination of high ratios of imports, exports and foreign investment (see Figures 1 and 2). The share of exports and imports of goods in terms of GDP is close to 50 per cent, well above those of other OECD countries and matched or exceeded only by Belgium and Ireland. Foreign investment also plays a key role in the Dutch economy. The Netherlands is the OECD country which, in relation to its GDP, invests the most abroad and is among the largest recipients of foreign investment.

Outward orientation of the Dutch economy

Figure 1. **Share of trade in selected OECD member countries' economies, 1996**



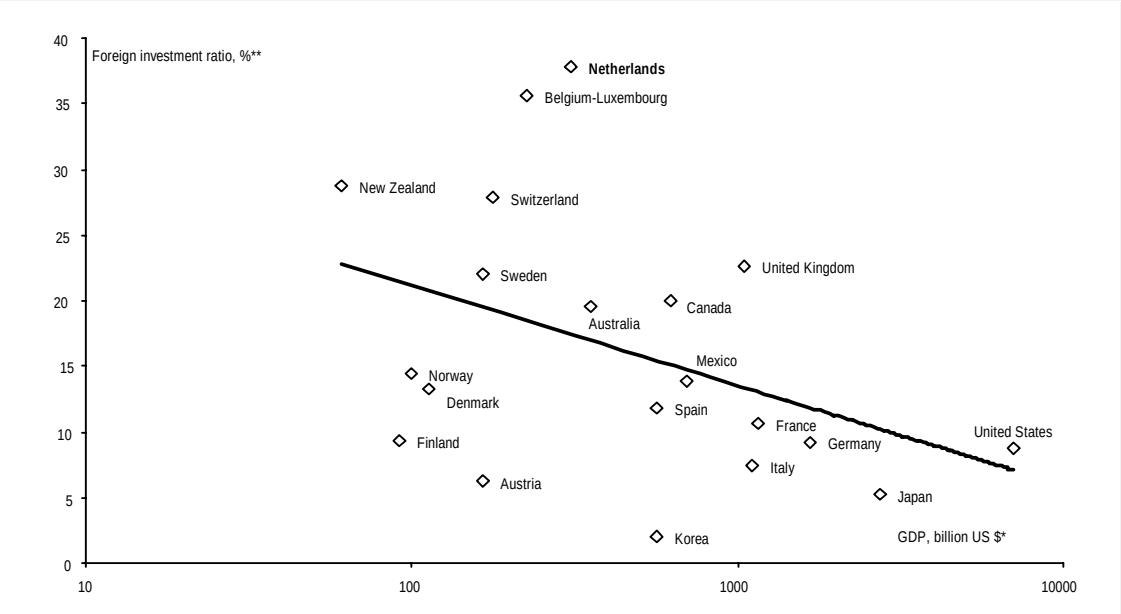
* GDP measured at current prices and current PPPs in billion US dollars.

** Average of exports and imports of goods and services relative to GDP.

This ratio includes trade simply transiting through the Netherlands; however, this probably does not significantly distort the picture of market openness, since much of "transit" trade reflects the attractiveness of the Netherlands as a "gateway" to Europe.

Source: OECD

Figure 2. **Share of stocks of inward and outward direct investment in GDP in 1995**



* GDP measured at current prices and current PPPs in billion US dollars

** Average of inward investment and outward investment relative to GDP (except for Mexico, inward only).

Source: OECD, AFA databases (DSTI, EAS Division) and DAFFE's Foreign Investment Database.

The Netherlands' strategic location, with a 160-million consumer pool within a 300-mile radius from Amsterdam, its strong sea and air transport infrastructure as well as stable and business-friendly environment have not only made it an attractive platform from which to serve the European market, but also positioned it as an important transit country for European and especially German goods shipped outside Europe. More than 6 700 foreign companies employing over 380 000 people have established operations in the Netherlands and many have set up their European headquarters there. The Netherlands is one of the most important destinations of US direct investment in Europe, with over 1 300 US companies established, totalling 170 000 people employed. Nearly half of all US companies and around 40 per cent of Japanese companies that established a European distribution centre have chosen the Netherlands.

Awareness of the importance of foreign trade and investment for the prosperity of the country has induced a spirit of market openness at many levels of society and government, including among regulators and in the administration. This market openness orientation has been asserted through the participation of the Netherlands as a founding member of the GATT and ensuing commitment to WTO obligations, but also through its membership in the European Union. As the Netherlands has geared its domestic and international policies to enhancing both the attractiveness of the domestic market for foreign businesses and the international competitiveness of Dutch firms, it has been very active in trade liberalisation both in the European and international context. It has long maintained liberal policies towards foreign direct investment. As a matter of fact, it appears on certain occasions to have chosen to initiate domestically liberalisation in given sectors (*e.g.*, the steps taken to further liberalise the electricity sector ahead of the EU schedule, see background report on Regulatory Reform in the Electricity Industry), *inter alia* so as to encourage trading partners to reciprocate with respect to Dutch products, services and capital. The Netherlands has rarely been at the centre of trade or investment disputes.[1] It has sought to provide a trade-friendly business environment and foreign trading partners surveys consistently express a high degree of satisfaction with the Dutch regulatory environment.[2]

Regulations and the regulatory process in the Netherlands of course have to be viewed also in the light of the Dutch membership in the European Union. In the Netherlands, as in all other European Union Members, a considerable amount of domestic regulation is shaped by the regulatory process at the European level and thus indirectly influenced also by the policies and regulatory culture of the other Members. The liberalisation of the Dutch market has certainly been enhanced by the ongoing process of European integration and the Single Market undertaking. It is considered that on balance the implementation of the internal market programme has improved the conditions under which third countries can access EU Member markets.[3] At the same time, the momentum of the European integration owes much to the Dutch tradition of market openness, which has consistently been one of the driving forces behind the liberalisation of European markets.

With a firmly entrenched trade- and investment-friendly regulatory environment, market openness for foreign suppliers has not been a key issue in the reform efforts undertaken in recent years in the Netherlands (see Chapter 1). However regulatory reform has indirectly affected market openness. This is particularly the case with respect to reforms in the field of competition policy (see Chapter 3). In fields such as harmonisation of technical standards, European integration and in particular the completion of the Single Market has also given a welcome impetus to regulatory reform in the Netherlands. Other efforts, such as the deregulation of retail opening hours, the accrued flexibility of fixed term contracts (legislation pending) and the creation of a central desk in the tax service for foreign investors and expatriates have reinforced the ability of foreign suppliers to compete in the Dutch market. However, it would be fair to say that there may be areas of the Dutch economy that have so far been untested in international competition. These are in particular service sectors concerned mainly or exclusively with domestic consumption, such as construction, utilities, certain financial transactions, or consumer services. In an increasingly globalised economic environment, these sectors will have to face international competition in the future and will have, as a consequence, to demonstrate that they live up to the market openness tradition characterising more generally the Dutch economy.

2. THE POLICY FRAMEWORK FOR MARKET OPENNESS: SIX "EFFICIENT REGULATION" PRINCIPLES

An important step in ensuring that regulations do not unnecessarily reduce market openness is to build the "efficient regulation" principles into the domestic regulatory process for social and economic regulations, as well as for administrative practices. "Market openness" here refers to the ability of foreign suppliers to compete in a national market without encountering discriminatory or excessively burdensome or restrictive conditions. These principles, which have been described in the 1997 *OECD Report on Regulatory Reform* and developed further in the Trade Committee,[4] are :

– *Transparency and openness of decision making.*

– *Non-discrimination.*

– *Avoidance of unnecessary trade restrictiveness.*

– *Use of internationally harmonised measures.*

– *Recognition of equivalence of other countries' regulatory measures.*

– *Application of competition principles.*

They have been identified by trade policy makers as key to market-oriented, trade-and-investment-friendly regulation. They reflect the basic principles underpinning the multilateral trading system, concerning which many countries have undertaken certain obligations in the WTO and other contexts. The intention in the OECD country reviews of regulatory reform is not to judge the extent to which any country may have undertaken and lived up to international commitments relating directly or indirectly to these principles; but rather to assess whether instruments, procedures and practices at the national level give effect to the principles and successfully contribute to market openness.

To a large extent the Netherlands has subscribed to the "efficient regulation" principles in designing domestic policies and establishing rules and procedures. Nevertheless in many cases the principles have not been translated into formal requirements in developing domestic regulation. In certain circumstances, described in the following sections, it thus appears that the regulatory processes in place may have the potential of allowing barriers to trade or investment to arise; however, the Secretariat is not aware of any actual problems or complaints to date.

2.1. Transparency and openness of decision making

In order to ensure international market openness, the process of creating, enforcing, reviewing or reforming regulations needs to be transparent and open to affected and interested parties, including foreign parties, both traders and investors. From an economic point of view, transparency is essential for market participants in several respects. Transparency in the sense of information availability offers market participants a clear picture of the rules on the basis of which the market operates, and enables them to accurately assess potential costs and market opportunities and to make informed production and investment choices. Such transparency is also a safeguard in favour of equality of competitive opportunities for market participants and thus enhances the security and predictability of the market. Transparency of decision making also refers to a dialogue with affected parties, which opens the regulatory decision-making process to public comment, including at international levels, and gives consideration to such comments prior to the adoption and implementation of decisions. Such dialogue allows to build market forces into the process and to avoid trade frictions.

As explained above, in Chapters 2 and 3, the Netherlands is a consensus society, where socio-economic policy decision-making does not belong exclusively to the government, but where both co-operation between the government and social partners and self-regulation play a major role. Taking into account affected interests and seeking a smooth implementation of policies through acceptance can be considered a typical feature of the Dutch socio-economic culture. Consultation with organised market interests, in particular capital and labour, has been long institutionalised, while the recent questioning of the representativeness of tripartite consultative structures has led, *inter alia*, to an increasing use of informal consultations. These consultations, which are conducted at the discretion of policy makers, have allowed a very flexible management of information seeking and consensus building, incorporating into the regulatory process all kinds of input deemed relevant within a given context. This consensus model has largely shaped the mechanisms for consultation and for ensuring transparency of the regulatory process, as described in detail in Chapter 2.

Information with respect to prospective and effective regulation is primarily provided by means of its publication in the *Staatsblad* (Official Gazette) prior to entry into force, as required by the Constitution. However, apart from this formal requirement, there is a limited, albeit increasing use of informal paths, including pre-publication "notice and comment" procedures and display of information on the Internet. Access of foreign parties to the information may be hindered in the Netherlands by the linguistic barrier. However, there is a constant effort to display abstracts of information of international interest in English, either through special publications, or on the Internet sites of administrations concerned. On the other hand, the access of third parties to regulation harmonised at the European level is facilitated by the availability of the information in all eleven official languages of the European Union.

In the particular field of technical standards and regulations, the Netherlands also provides information to its trading partners in the context of carrying out its notification obligations to the European Union and, through it, the WTO. Draft product regulations, elaborated by the central government or industry boards, are notified to the European Commission by virtue of Directive 83/189 when they are not pure transpositions of EU harmonising directives. Responsibility for prompt notification of draft regulations lies with the ministry concerned and is secured through the supervision of a notification co-ordinator appointed in every ministry. National standardisation organisations are required to notify new draft standards which are distinct from international or European standards.

Box 1. **Provision of information in the field of technical regulations: Notification obligations under Directive 83/189/EEC**[5]

In order to avoid erecting new barriers to the free movement of goods which could arise from the adoption of technical regulations at the national level, European Union Member States are required by Directive 83/189 to notify all draft technical regulations on products, to the extent that these are not a transposition of European harmonised directives. This notification obligation covers all regulations at the national or regional level, which introduce technical specifications, the observance of which is compulsory in the case of marketing or use; but also fiscal and financial measures to encourage compliance with such specifications, and voluntary agreements to which a public authority is a party. Notified texts are further communicated by the Commission to the other Member States and are in principle not regarded as confidential, unless explicitly designated as such.

Following the notification, the concerned Member State must refrain from adopting the draft regulations for a period of three months during which the effects of these regulations on the Single Market are vetted by the Commission and the other Member States. If the Commission or a Member State emit a detailed opinion arguing that the proposed regulation constitutes a barrier to trade, the standstill period can be extended for another three months. Furthermore, if the preparation of new legislation in the same area is undertaken at the European Union level, the Commission can extend the standstill for another twelve months. An infringement procedure may be engaged in case of failure to notify or if the Member State concerned ignores a detailed opinion.

Although private parties are not the direct recipients of the notified draft regulations, they are the main beneficiaries. In order to bring draft national technical regulations to the notice of the European industry the Commission publishes regularly a list of notifications received in the Official Journal of the European Communities. Any firm interested in a notified draft and wishing to obtain further information may contact the relevant contact point in any Member state. In this way, a firm can obtain early information to enable it to adapt its production to future regulation in its export markets; it can also identify protectionist elements in the proposed regulation and take action through its government or the Commission to have such elements removed.

The position of private parties with respect to the Directive has been further enhanced by the recent *Securitel* decision of the European Court of Justice (Decision of 30 April 1996, CIA Security International SA versus Signalson SA and Securitel SPRL). The Court recognised a direct effect to the provisions of Directive 83/189 and confirmed that individuals may rely on them before the national courts which must decline to apply a national technical regulation which has not been notified in accordance with the Directive.

Similarly, as far as standards are concerned, Directive 83/189 provides for an exchange of information concerning the initiatives of the national standardisation organisations (NSOs) and, upon request, the working programmes, thus enhancing transparency and promoting co-operation among NSOs. The direct beneficiaries of the notification obligation of draft standards are the European Union Member States, their NSOs and the European Standardisation Bodies (CEN, CENELEC and ETSI). Private parties can indirectly become part of the standardisation procedures in countries other than their own, through their country's NSOs, which are ensured the possibility of taking an active or passive role in the standardisation work of other NSOs.

In 1997 the Netherlands was the European Union Member which notified by far the largest number of prospective technical regulations (341 out of a total of 900 for all European Union Members).[6] However, this sizeable notification activity does not necessarily reflect a Dutch propensity to adopt national technical regulations. The number is inflated by the one-off notification of 230 regulations by the Dutch administration in the wake of the *1996 Securitel* ECJ ruling mentioned in Box 1. That case

underlined the risk that unnotified domestic technical regulations might be declared subsequently unenforceable by the courts; in this light, the Dutch administration decided to notify all technical regulations adopted since 1984. The question arose of the necessity to further clarify the scope of notification obligations in Directive 83/189, which the Commission is pursuing, notably by codifying the directive and by the publication of an explanatory manual.

The 230 technical regulations which passed an intensive pre-notification scrutiny in co-operation with the Commission and were eventually notified by the Netherlands, were adapted where necessary to conform with Community law and so raised relatively few concerns with respect to their trade restrictiveness. Member States issued detailed opinions (arguing that the proposed regulation constitutes a barrier to trade) on only 10 notifications. On the remaining "regular" 111 notifications by the Netherlands in 1997, Member States issued 27 detailed opinions (24% of the 111 notifications) and the Commission on 12 (11%). During the same period Member States issued detailed opinions on 116 of the total 670 notifications for the European Union (17%) and the Commission on 115 (17%). Due to the post-Securitel operation all outstanding 8 infringement procedures initiated by the Commission[7] against technical regulations adopted by the Netherlands in violation of Directive 83/189 provisions, are in the process of being resolved.

To the extent that notified prospective regulations are not based on relevant international standards, the European Commission transmits[8] the information to the WTO Secretariat and other WTO Members in accordance with the obligation laid down by Article 2.9 of the WTO Agreement on Technical Barriers to Trade. Similarly, notification required under other WTO provisions (such as Article 7 of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures, or regular notifications in the framework of WTO Agreements on agriculture, rules of origin, import licensing, etc.) is made to the WTO by the European Commission on behalf of Member States.

Foreign investors who seek access to the Dutch market can obtain information on business possibilities and regulatory conditions from the Netherlands Foreign Investment Agency (NFIA), which is part of the Ministry of Economic Affairs. The task of the NFIA is to facilitate direct investment of foreign companies in the Netherlands by providing information, strategic perspectives and practical assistance, including advice on available incentives, permit procedures or tax structures. Moreover, the NFIA presents itself as a gateway to the business network in the Netherlands, by organising contacts with government authorities or other organisations that may assist foreign parties in accessing the Dutch market. Furthermore, traders from developing countries can address the Centre for the Promotion of Imports from developing countries (CBI), operating within the policy framework set up by the Ministry of Foreign Affairs and the Minister for Development Co-operation. CBI supports SMEs and trade promotion organisations in developing countries in their promotion of exports to the Dutch and other European Union markets. For this reason it offers information and advice on how to meet regulatory requirements for products not only in the Netherlands, but also in the other EU countries. On the other hand, the Central Service for Import and Export (CDIU), which is part of the Ministry of Finance, has been designated in the framework of Directive 83/189 procedures to provide additional information on technical regulations notified by virtue of the Directive. Apart from the NFIA, the CBI and the CDIU in their respective fields of competence, there are no other centralised inquiry points where foreign parties can get information on the operation and enforcement of regulations. However, information about applicable legislation and regulations in the Netherlands can be obtained from Dutch embassies or directly from the respective Departments.

Foreign parties will in principle have the same opportunities for comments and consultation before the adoption of a new or modified regulation as domestic interest groups. However, when it comes to official consultation procedures arranged through semi-public bodies such as the Social Economic Council, access is not possible for parties that do not belong formally to those bodies, which can result in a *de facto* exclusion of foreign interests. As for other types of interests that lie outside the traditional

social partners organisations, this exclusion is in practice counterbalanced by the use of informal consultations, which are open to affected and interested parties, be they domestic or foreign. This informal path is further used to lodge non-judicial complaints directly with the concerned administrations. So, the opportunities for foreign parties to bring comments and eventual grievances finally lie with the discretion of concerned authorities. Although such informal procedures have in general the drawback of lacking institutional safeguards, they appear in practice to be administered quite satisfactorily in the Netherlands thanks to the Dutch consensus tradition, the prevailing market openness orientation and the awareness of the increasing competition between EU Member states to attract investment.

The same problem of a *de facto* exclusion of foreign interests can be raised in the context of self-regulatory activities undertaken by the "statutory industrial organisation bodies" (PBOs)[9] and organisations such as the *Consumentenbond* (the Netherlands consumers association). Self-regulatory activities naturally give expression to the interests of the industries represented in the PBOs. For a long time this was not really an issue in the Netherlands as the PBOs were supposed to adequately express also the wider interests of the Dutch society. However, as increasingly diversified social concerns have emerged and as economies have globalised, the structure of these bodies may no longer provide sufficient room for taking into account third party concerns and this may in some cases undermine the general market openness orientation of the regulatory environment in the Netherlands. PBOs are not allowed to impede fair competition, but this provision goes only so far as to deter anti-competitive behaviour. It does not necessarily prevent PBOs from producing regulations which do not take adequate account of foreign parties concerns or which unnecessarily restrict trade. Current government controls over self-regulatory activities do not seem sufficient to ensure that PBOs subscribe to market openness principles the way the Dutch administration does. In this respect it would be useful for the government regularly to perform an assessment of the effects of self-regulatory activities on competitiveness and market openness.

However satisfactory transparency provisions may be in the Netherlands, they are not aimed at covering policies and regulations elaborated at the European level, even if there is a growing effort by the Dutch administration to expand transparency and consultation procedures, especially informal ones, to cover European regulation. In this respect a number of instruments are available at the European level in order to allow the views of non-European foreign partners to be taken into account, including the organisation of hearings and informal seminars and the use of informal consultations with foreign interests associations established in Brussels specifically for lobbying purposes. Foreign firms can and do make active use of these procedures. The effectiveness of information provision and the openness of decision making procedures in the European Union have been prominent subjects in the European political agenda since the ratification of the Maastricht Treaty in 1992 and considerable efforts have been undertaken to improve what was perceived as an unsatisfactory situation.[10] Increasingly information on proposed regulation is provided at an early stage of elaboration, including in the Official Journal and on the respective Internet sites of concerned Directorate Generals. These efforts were initially undertaken for the benefit of European citizens. Nevertheless, the improvements that have been achieved in recent years, as well as the shortfalls still needing to be addressed, affect both those citizens and foreign parties.

2.2. Measures to ensure non-discrimination

Application of non-discrimination aims at providing effective equality of competitive opportunities between like goods and services irrespective of origin. It calls for avoidance of making distinctions on the one hand between foreign partners from different countries, and on the other hand between domestic versus foreign products. Most-favoured nation (MFN) and national treatment principles are among the central principles and objectives of the multilateral trading system, even if their application in particular circumstances may be open to interpretation.

The Netherlands has subscribed to the MFN and national treatment principles *inter alia* in the context of its membership to the WTO. There is no overarching requirement in the Dutch law to incorporate non-discrimination principles into the regulatory decision-making process, other than the general prohibition of discrimination contained in the first article of the Dutch Constitution. Nevertheless, the Netherlands seems in general highly committed to these principles in the overall operation of its national administration and specific legal provisions ensuring the incorporation of non-discrimination principles into the national legal order have not been considered necessary. However, when explicit non-discrimination provisions are contained in a European directive, they have to be transposed in the national legal order through specific non-discrimination provisions. This for instance has been the case for articles 7 and 11 of Directive 96/92/EC on the internal market in electricity, which have been transposed in Articles 23 and 24 of the 1998 Dutch Electricity Act.

Exceptions to non-discrimination principles arise of course in relation to preferential agreements that apply to the Netherlands, or in the context of certain EU commitments undertaken in the framework of the GATS Agreement. The most important preferential agreement in which the Netherlands participates is the European Communities, while all other preferential agreements form an integral part of the common European Union trade policy (namely the agreements with EFTA countries, the association agreements with Central and Eastern European countries and Mediterranean countries, the Lomé Agreement with ACP countries and the General System of Preferences for developing countries). The implications of these agreements reach into many areas of the economy. For example, the preferential treatment in favour of EU Members and their nationals may have induced a wider tendency for the Netherlands to "buy European" instead of "national" in the context of government procurement.[11]

In considering proposals for new preferential agreements, the European Council addresses a number of strategic questions, including compatibility with all relevant WTO rules, the impact on the Community's other external commitments and the likelihood that the agreement would support the development of the multilateral trading system. Information on preferential agreements is made available to third parties in particular through notifications to the WTO. The WTO Committee on Regional Trading Agreements reviews all preferential agreements, in a process which consists amongst others of written questions and answers. Within this context recourse is available for third countries which consider they are prejudiced by these agreements.

In the context of the GATS Agreement, the list of exemptions to MFN treatment as well as the schedule of commitments to national treatment have been decided at an EU-wide level and have been submitted to the WTO by the European Commission. These are composed of EU-wide exemptions and commitments as qualified by the additional restrictions attached by individual Member States (often replacing full commitments by partial commitments or unbound limitations). EU-wide commitments are generally considered to be among the least restrictive of any WTO member.[12] In addition, the Netherlands stands among the European Union Members which have introduced the least amount of additional restrictions to non-discrimination principles (mainly a limitation to cross-border supply of the services of office support personnel and limitations to the presence of natural persons in certain services sectors).

There is not a government body responsible for controlling the implementation of non-discrimination principles in the Netherlands. However, to the extent that those principles represent an international commitment of the country under the WTO, any violations will in principle be identified by the Legislative Department of the Ministry of Justice, which checks the quality of legislation, including the compliance with European Union and WTO rules. With respect to draft legislation proposed by regional or local authorities, concerned central authorities will try to avoid potential infringements by means of informal consultations, or by means of judicial action in case of failure. However, there is no record of problems of this type to date.

2.3. Measures to avoid unnecessary trade restrictiveness

When regulations have trade-restrictive effects, it is desirable for these not to go beyond what is needed to ensure achievement of the desired regulatory objective, taking into account technical and economic feasibility. The need to fulfil legitimate policy objectives while avoiding unnecessary trade restrictiveness both in the regulatory decision making process and in administrative procedures is acknowledged in the Netherlands as essential for achieving a cost-effective regulatory environment. In the past, although there was no formal requirement for assessing trade restrictiveness of proposed regulations, they were often tested against considerations of market openness and compatibility with international trade commitments of the Netherlands, for instance in the case of legislation on mandatory labelling of tropical timber, proposed in 1994 but withdrawn on these grounds.

In 1994-95 a new formal system of regulatory impact assessment (RIA) was adopted (see Chapter 2). The *Aanwijzingen voor de regelgeving* (Directives for Legislation) specified in this system specifically encourage regulatory and administrative procedures to avoid unnecessary trade restrictiveness. Among the fifteen questions which can be used for assessing the quality of draft regulations, seven deal with consequences of draft regulations for trade and industry, the functioning of the market and socio-economic developments. In September 1997, instructions for using these questions in an efficient way were published in the form of a "Business Effects Test (BET) checklist" and widely distributed in the Dutch administration.[13]

The BET checklist suggests assessing *inter alia*:

- The costs and benefits of draft regulations for the companies affected, including the assessment of financial and compliance costs and how these are spread among different business categories concerned.

- The relative effect of draft regulations with respect to the capacity of concerned companies and whether these regulations will restrict the companies' possibilities to develop new products and services, taking into account the intensity of competition in the affected market segment.

- The relative burden imposed on trade and industry by the draft regulation as compared to the burden of comparable regulations among the Netherlands' main competitors.

- The consequences of draft regulations for the operation of the market and in particular the conditions that such regulations may impose with respect to market entry or market behaviour and the effects that they may have on market structure.

This Business Effects Test is performed by the regulating ministry in co-operation with the Ministries of Economic Affairs and Justice. As a first step, the Interdepartmental Proposed Legislation Working Group (IPLWG) determines in consultation with the concerned department whether the type of the proposed regulation warrants the performance of a business effect test, and, in that case, which of the questions included in the checklist should be answered. Subsequently the assessment of the effects on trade and investment is based *inter alia* on trade policy expertise provided by the Helpdesk operated by the Ministry of Economic Affairs. Trade policy makers may suggest, but do not have the prerogative to request, the modification or withdrawal of domestic regulations of other departments on the grounds of unnecessary trade restrictiveness. However, co-ordination among the various departments appears satisfactory on this account, so that the institution of such a formal prerogative does not seem necessary.

This system does not include any complaint procedures for market participants. Any grievances can only be taken into account in the context of informal consultation procedures, as described in Section 2.1. Furthermore, the scope of the business effects test is limited to legislation and regulation produced under ministerial responsibility and does not cover parliamentary initiatives. In the latter case, such as the new proposal for mandatory labelling of timber and timber products which has been introduced in February 1998 on parliamentary initiative, the only path for assessing effects on trade and investment will be to test against considerations of compatibility with international trade commitments, as in 1994 (see first paragraph in Section 2.3). Experience with the operation of the business effect test is still fairly limited and has not to date led to the modification or withdrawal of proposed regulation on the grounds of unnecessary trade restrictiveness. There are no provisions requiring assessment of the effects on trade and investment of self-regulatory activities (see Section 2.1 above).

The effects of proposed regulation on trade and investment are also assessed from a more procedural point of view by the Legislative Department of the Ministry of Justice, which checks the quality of legislation, including the compliance with WTO and EU rules. As a matter of fact, the participation of the Netherlands in the Single Market entails a clear commitment *vis-à-vis* other EU Member States towards avoiding unnecessary trade restrictiveness of domestic regulations with respect to the areas covered by the Single Market. A typical example is offered by Directive 83/189/EEC (see Section 2.1), where technical regulations drafted at the domestic level are subject to the scrutiny of the Commission and other Member States with a view to preventing the creation of new technical barriers to intra-Community trade. The directive provides that the notifying Member State can proceed with the enactment of the regulation without waiting for the expiration of the standstill for urgent reasons relating to the protection of public health and safety; however, it cannot use this provision as an excuse for introducing a disguised restriction on trade between Member States.

As far as the effects of European regulations are concerned, while there are no specific provisions requiring an assessment of the impact of new regulations on international trade and investment, the general framework in which Community regulations are developed (through inter-Service co-ordination) and enacted (involving discussions with Member States and decisions, where appropriate, by other European institutions such as the Council of Ministers and the Parliament) is aimed at ensuring that draft regulations are also considered in this light. However, tangible policy results relating to trade restrictiveness will inevitably be affected by the highly complex institutional structure of the European Union. EU policies are shaped to a considerable extent by the need to make room for diverging political considerations among Member countries or among policy communities. This process potentially allows the expression of third party concerns; but it may also sometimes lead to side-stepping those concerns when consensus among intra-EU concerns seems too difficult to reach.

2.4. Measures to encourage use of internationally harmonised measures

Disparities of technical standards and regulations between countries, often explained by natural and historical reasons, relating to climate, geography, natural resources or production traditions, can frequently create trade distortions by introducing non-tariff barriers for products and services. The reduction of such barriers through the international harmonisation of standards and regulations is one of the main objectives of the WTO Agreement on Technical Barriers to Trade (TBT) and can be considered as the essential pillar of the construction of the European Single Market. The achievement of the Single Market has further reinforced the Netherlands' avowed policy of encouraging the adoption of regulations based on internationally harmonised measures.

Box 2. **Harmonisation in the European Union:[14] The New Approach and the Global Approach**

The need to harmonise technical regulations when diverging rules from Member States impair the operation of the common market was recognised by the Treaty of Rome in Articles 100 to 102 on the approximation of laws. By 1985 it had become clear that relying only on the traditional harmonisation approach would not allow the achievement of the Single Market. As a matter of fact, this approach was encumbered by very detailed specifications which were difficult and time consuming to adopt at the political level, burdensome to control at the implementation level and requiring frequent updates to adapt to technical progress. The adoption of a new policy towards technical harmonisation and standardisation was thus necessary to actually ensure the free movement of goods instituted by the Single Market. The way to achieve this was opened by the European Court of Justice, which in its celebrated ruling on *Cassis de Dijon*[15] interpreted Article 30 of the EC Treaty as requiring that goods lawfully marketed in one Member State be accepted in other Member States, unless their national rules required a higher level of protection on one or more of a short list of overriding objectives. This opened the door to a policy based on mutual recognition of required levels of protection and to harmonisation focusing only on those levels, not the technical solution for meeting the level of protection.

In 1985 the Council adopted the "**New Approach**", according to which harmonisation would no longer result in detailed technical rules, but would be limited to defining the essential health, safety and other[16] requirements which industrial products must meet before they can be marketed. This "New Approach" to harmonisation was supplemented in 1989 by the "**Global Approach**" which established conformity assessment procedures, criteria relating to the independence and quality of certification bodies, mutual recognition and accreditation. Since the New Approach calls for essential requirements to be harmonised and made mandatory by directives, this approach is appropriate only where it is genuinely possible to distinguish between essential requirements and technical specifications; where a wide range of products is sufficiently homogenous or a horizontal risk identifiable to allow common essential requirements; and where the product area or risk concerned is suitable for standardisation. Furthermore, the New Approach has not been applied to sectors where Community legislation was well advanced prior to 1985.

On the basis of the New Approach manufacturers are only bound by essential requirements, which are written with a view to being generic, not requiring updating and not implying a unique technical solution. They are free to use any technical specification they deem appropriate to meet these requirements. Products which conform are allowed free circulation in the European market.

For the New Approach, detailed harmonised standards are not indispensable. However, they do offer a privileged route for demonstrating compliance with the essential requirements. The elaboration at European level of technical specifications which meet those requirements is no longer the responsibility of the EU government bodies but has been entrusted to three European standardisation bodies mandated by the Commission on the basis of General Orientations agreed between them and the Commission. The CEN (European Committee for Standardisation), CENELEC (European Committee for Electrotechnical Standards) and ETSI (European Telecommunications Standards Institute) are all signatories to the WTO TBT Code of Good Practice. When harmonised standards produced by the CEN, CENELEC or ETSI are identified by the Commission as corresponding to a specific set of essential requirements, the references are published in the Official Journal and they become effective as soon as one Member State has transposed them at the national level and retracted any conflicting national standards. These standards are not mandatory. However conformity with them confers a presumption of conformity with the essential requirements set by the New Approach Directives in all Member States.

The manufacturer can always choose to demonstrate conformity with the essential requirements by other means. This is clearly necessary where harmonised European standards are not (or not yet) available. Each New Approach directive specifies the conformity assessment procedures to be used. These are chosen among the list of equivalent procedures established by the Global Approach (the so-called "modules"), and respond to different needs in specific situations. They range from the supplier's declaration of conformity, through third party type examination, to full product quality assurance. National public authorities are responsible for identifying and notifying competent bodies, entitled to perform the conformity assessment, but do not themselves intervene in the conformity assessment. When third party intervention is required, suppliers may address any of the notified bodies within the European Union. Products which have successfully undergone the appropriate assessment procedures are then affixed the CE marking, which grants free circulation in all Member States, but also implies that the producer accepts full liability for the product.[17]

The strength of the New Approach and the Global Approach lies in limiting legal requirements to what is essential and leaving to the producer the choice of the technical solution to meet this requirement. At the same time, by introduction EU-wide competition between notified bodies and by building confidence in their competence through accreditation, conformity assessment is distanced from national control. The standards system, rather than being a means of imposing government-decided requirements, is put at the service of industry to offer viable solutions to the need to meet essential requirements, which however are not in principle binding. The success of the New and Global Approaches in creating a more flexible and efficient harmonised standardisation process in the European Union heavily depends on the reliability of the European standardisation and certification bodies and on the actual efficiency of control by Member States. First European standardisation and certification bodies need to have a high degree of technical competence, impartiality and independence from vested interests, as well as to be able to elaborate the standards necessary for giving concrete expression to the essential requirements in an expeditious manner. Second each Member State has the responsibility to ensure that the CE marking is respected and that only products conforming with the essential requirements are sold on its market. If tests carried out by a notified body are cast in doubt, this should be followed up by the supervisory authorities of the Member State concerned.

The Dutch policy with respect to technical regulations aims at limiting, wherever possible, government intervention to the setting of essential requirements and leaving technical details to be worked out by means of standardisation, testing and certification by and for industry. In the context of the MDW project, the Dutch government actively seeks to promote standardisation, testing and certification by market players as an alternative to government regulation.[18] As noted by the Ministry of Economic Affairs,[19] "*effective interaction between the government, industry and institutes in the field of standardisation, testing and certification will help the Netherlands to achieve a decisive economic position, thereby boosting the competitiveness of companies which must be afforded maximum scope to sell their goods and services on the international market*".

The prerogatives of the Netherlands administration with respect to standardisation have thus been transferred to the Netherlands Standardisation Institute (NNI), which is the national central standardisation body. The NNI is a private institution with multiple standardisation activities, whose relationship with the Netherlands government is ruled by an agreement under Dutch civil law. This agreement provides that the Netherlands' international obligations under Directive 83/189/EEC (see above, Section 2.1) and under the WTO TBT Agreement will be fulfilled by the NNI on behalf of the Netherlands government. The NNI thus assumes the public function of implementing European and international standards and withdrawing any national standards which are not a simple transposition of existing European and international standards applicable for the same subject. However, the activities of the NNI, including those with a public relevance, are not considered administrative acts and cannot be contested before administrative tribunals. The regulatory activities of the NNI are financed by the Dutch government, which preserves ultimate control and responsibility over them.

NNI's standardisation activities are clearly geared towards the adoption of international standards, resulting in an easier access of foreign products to the domestic market as well as an additional competitive edge in the global market for Dutch producers. The NNI has accepted the WTO TBT Code of Good Practice for the preparation, adoption and application of standards and is thus committed to operate according to the principles set therein. The breakdown of NNI standardisation activities demonstrates its international orientation. By July 1996 the NNI had published over 9 000 finalised technical standards, only a fifth of which were purely national standards. The rest of them had been transpositions either from European standards (CEN, CENELEC and ETSI) or international standards (IEC and ISO) not yet adopted at the European level. Furthermore, the NNI shows considerable transparency with respect to its standardisation activities and in making relevant information publicly available, including on the Internet. It thus appears that the Netherlands is not only mindful of existing international standards, but goes beyond the level of harmonisation required by its European obligations.

NNI standardisation activities

Standards published by the NNI by 1 July 1996

Figure 3.

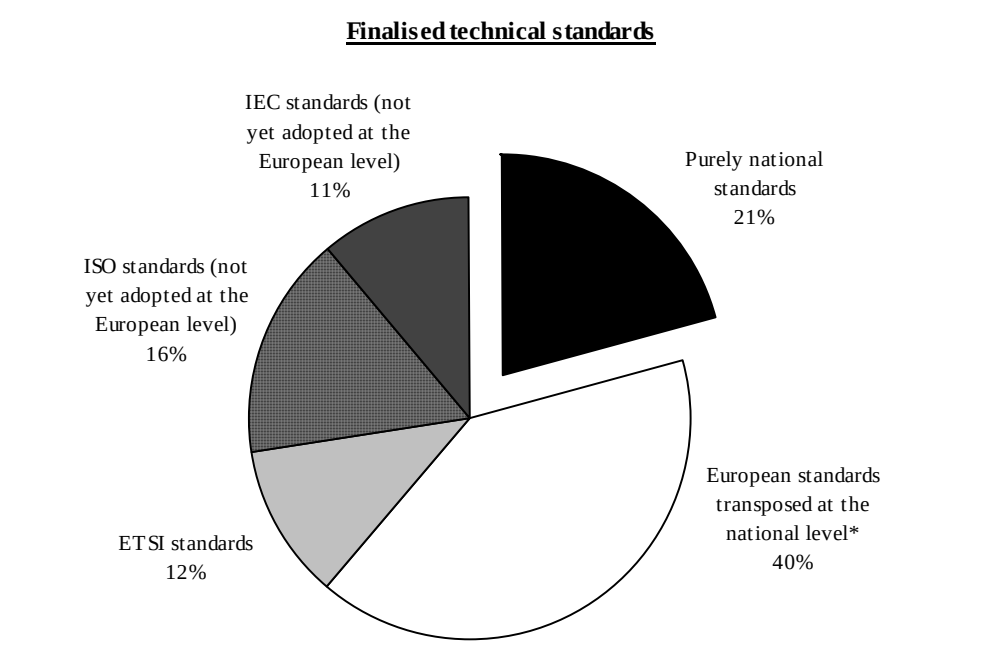
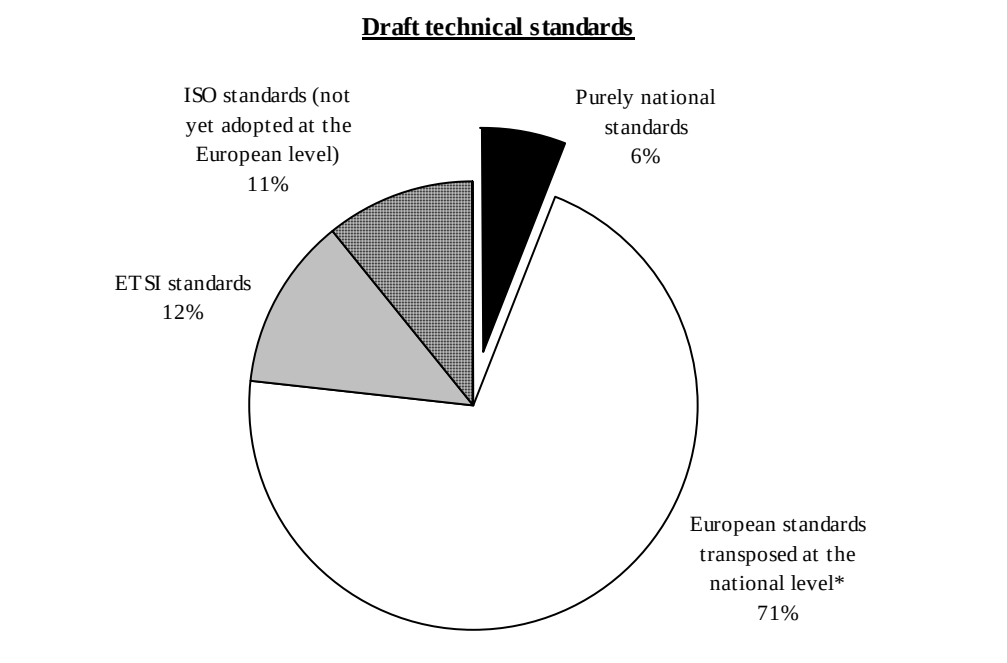


Figure 4.



* CEN-CENELEC, including standards originally produced by ISO and IEC.

Source: OECD on the basis of figures published by the NNI on http://www.nni.nl.

In July 1996 over 3 500 draft standards were under preparation. A large majority of them were transpositions of European standards (over 80%) and ISO standards. Only 6% of these draft standards were purely national. This evolution translates mainly the increasing effort of harmonisation within the European Union. The number of purely Dutch draft standards is on the wane as the scope for European harmonisation has increased and limited the need for national standards. Similarly the NNI is less busy with harmonising against existing international standards as this work is increasingly done by European standardisation bodies. The adoption of harmonised standards is thus increasingly related to the European Single Market.

The Netherlands, as dictated by New Approach directives, has enacted legislation on the operation of certification procedures under the responsibility of the concerned ministries, implementing the "modules" laid down by the Global Approach with respect to the affixing of CE-marking. In that manner, the administration can evaluate more easily whether the applicable product requirements are met, while at the same time it avoids unnecessary burden on economic operators by allowing them to choose the modules that seem most appropriate for a particular sector or product.

The basic principle which underlies European standardisation is subsidiarity with respect to global standards, based on the assumption that conformity of European standards to global standards is likely to facilitate access of European products to world markets. Apart from the standardisation work mandated by the Commission (see the Box 2), most standards are prepared at the request of industry. Since a growing number of European and national standards are in fact transpositions of international standards produced by ISO, IEC and ITU, various initiatives have been developed at the European level to promote transparency and co-operation at the international level:

- The standardisation process is undertaken in close co-operation with all parties involved, such as the Member States (through the membership of all European Union national standardisation bodies), industry and consumers (through the representation of industry, consumers, and trade unions associations on the technical committees and working parties responsible for the preparation of the standards) and trading partners (through the association with EFTA and other countries and the co-operation agreements described below); the standards produced are publicly available by means of paper and electronic publications of the standardisation bodies, as well as of official publications of the European Commission.

- The numbering of European standards clearly indicates the relationship with international standards, for instance, whenever a CEN standard is a transposition of an ISO standard it will be referenced by the same number by simply adding the EN prefix in front of the ISO prefix (f.i. EN-ISO 5079 on textile fibres); the same applies for national references (f.i. NEN-EN-ISO 5079).

- Co-operation agreements have been signed between ISO and CEN (Vienna Agreement) and between IEC and CENELEC (Dresden Agreement) to secure the highest possible degree of approximation between European and international standards and avoid duplication of work. A similar agreement is being prepared by ETSI and ITU to take into account the specificities of telecommunications.

– Furthermore, the European Union is a party to the UN-ECE 1958 Agreement on Automotive Standards. This agreement provides a basis for the technical approval of motor vehicle equipment and parts. It has been supplemented by additional regulations developed by the UN-ECE Working Party on the Construction of Vehicles. UN-ECE regulations have played a major role in the harmonization process of regulations within the European Union. Thirty-five of them have been recognized equivalent to EU directives which specify technical requirements for the type approval of motor vehicles.

2.5. Recognition of equivalence of other countries' regulatory measures

In cases where the harmonisation of regulatory measures is not considered feasible or necessary, the recognition of equivalence of other countries' regulatory measures in attaining the same regulatory objective may be the most appropriate avenue for reducing technical barriers related to regulatory divergence. Within the European Union the principle of mutual recognition applies among Member States, in the sense that all products lawfully manufactured in one Member State must be accepted by the others even when they have been manufactured in accordance with technical regulations which differ from those laid down by existing national legislation, provided they meet the marketing conditions in the originating Member State.[20] Thus, for the Netherlands, as for all other European Union Members, the extent to which the equivalence of other countries' regulatory measures is recognised has to be assessed with respect to regulatory measures introduced by third (non-EU Member) countries.

In the Netherlands, such recognition of equivalence is largely based on testing and certification conducted by private bodies. Indeed, as explained above in Section 2.4, in the framework of the MDW project the Dutch government actively seeks to promote private testing and certification instead of government involvement. Further considering that the position of the Netherlands as an important import and transit point for the European market makes it an attractive location for testing and certification bodies and laboratories, it has been promoting the creation of an open market for certification and testing at the European and international level. Dutch, as well as foreign certification bodies can be accredited by the Netherlands Council for Accreditation (RvA), although such accreditation is not mandatory. The RvA is a private institution under Netherlands civil law, but, similarly to the NNI, it carries out a number of public functions with respect to conformity assessment on behalf of the Dutch government. In this context it assumes *inter alia* the international obligations of the Netherlands under the WTO Agreement on Technical Barriers to Trade, namely with respect to non-discrimination and avoidance of unnecessary trade restrictiveness (TBT Article 5 and seq. on *Conformity with Technical Regulations and Standards*). The RvA can also provide information and advice to foreign parties as far as conformity assessment in the Netherlands is concerned.

Foreign certification bodies also have the possibility, instead of being accredited by the RvA, to be recognised on the basis of their accreditation by a foreign accreditation body with which the RvA has a mutual recognition agreement. These agreements, which are of a private nature, can be either bilateral or concluded in the framework of international fora such as the European Co-operation for Accreditation (EA),[21] the International Accreditation Forum (IAF),[22] or the International Laboratory Accreditation Co-operation (ILAC).[23] They have to be approved by the Dutch government, which preserves ultimate control and responsibility over them. In the framework of the public functions assumed by the RvA, the accreditation of the results of certification and testing performed abroad, as well as the recognition of equivalence of foreign accreditation, is subsequently accepted by the Dutch authorities as concerns the marketing of certified products in the Dutch market. In other words, a foreign manufacturer can enter the Dutch market on the basis of a certificate or test report issued by a foreign certification body accredited by a foreign accreditation body if the latter is recognised as equivalent by the RvA.

Policies aimed at recognising the equivalence of regulatory measures and results of conformity assessment performed in third countries are also elaborated at the European Union level, although their implementation is partly incumbent on national authorities or institutions. Recognition by the European Union of the equivalence of third countries' regulatory measures, including the results of conformity assessment performed in those countries, is based on the negotiation and adoption of Mutual Recognition Agreements (MRAs). On the basis of negotiating directives issued by the Council in 1992 the European Commission has negotiated agreements on the mutual recognition of conformity assessment with the United States, Canada, New Zealand and Australia. The signature of the MRAs between the European Union and the above mentioned countries is expected to take place during the months of May and June 1998, and the agreements will be effective from early autumn 1998. The European Commission has completed negotiations with Switzerland and is currently also negotiating a similar agreement with Japan.

Table 1. **Mutual Recognition Agreements concluded or under negotiation by the European Union**

	Australia	Canada	Japan	New Zealand	Switzerland	United States	Czech Rep.
Agrofood biotechnology						N	
Construction equipment					N		
Electrical safety	N	N	N	N	N	N	
Electromagnetic compatibility	✓	✓	N	✓	N	✓	
Fasteners						N	
Gas appliances					N		
Lawn movers					N		
Machinery	✓		N	✓	N		
Measuring instruments					N		
Medical devices	✓	✓	N	✓	N	✓ N *	
Motor vehicles	✓				N		
Pharmaceutical GMP	✓	✓	N	✓	N	✓	
Phytopharmaceuticals					N		
Pressure equipment	✓		N	✓	N		
Recreational craft		✓			N	✓	
Telecommunications equipment	✓	✓	N	✓	N	✓	
Toys					N		
Tractors					N		
Veterinary equivalence		N		✓	N	✓	✓

✓: Sectors for which agreement has been reached.
N: Sectors under negotiation.
*: Agreement has been reached only for part of medical devices.

Each MRA consists of a framework agreement and a series of sectoral annexes. The coverage of sectoral annexes concluded or under negotiation is presented in table 1. The framework agreements specify the conditions by which each party will accept or recognise the results of conformity assessment procedures produced by the other party's conformity assessment bodies or authorities, on the basis of the requirements set by the importing party. These requirements are specified on a sector-specific basis in the sectoral annexes. In other words, there is no recognition between the parties of the equivalence of their

respective regulatory requirements; however, if a conformity assessment body in the exporting party certifies that a product covered by the MRA is in conformity to the requirements set by the importing party, this certification will have to be accepted as equivalent by the importing party. The negotiation and conclusion by the European Commission of MRAs on conformity assessment is subject to certain conditions, the most important of which is the assurance that the competence of conformity assessment bodies in the third country is and remains on a par with that required of their European Union counterparts. It will be interesting to see how successful these agreements will be in reducing technical barriers related to regulatory divergence between their participants and whether their benefits will be sufficient to justify the difficulty of their negotiation, taking into account that additional sectors might be negotiated at a later date.

2.6. Application of competition principles

The application of competition principles in the context of regulatory reform is addressed in detail in Section 3.3 of Chapter 3 from the perspective of competition policy. The focus in the current chapter is the extent to which reform policies have been able to deal effectively with private anti-competitive behaviour affecting foreign entry to the Dutch market. As a matter of fact, the strong corporatist tradition and the lack of enforcement of competition principles which earned the Netherlands its "cartel paradise" reputation, appear to have complicated access to the Dutch market for foreign new entrants, especially SMEs.[24] The introduction of a new competition law on 1st January 1998 has the potential of remedying this situation in the future (for a detailed analysis, see background report on The Role of Competition Policy in Regulatory Reform). Ensuring that the new law and supporting policies are effective in suppressing private anti-competitive behaviour affecting foreign entry to markets will probably be the main challenge with respect to market openness in the Netherlands in the near future.

Under the Dutch competition law, foreign firms receive national treatment. Therefore, foreign firms 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. Accordingly, to the extent that market access problems can be remedied by recourse to the competition law, foreign firms may have an effective means of seeking relief.

With respect to regulatory action taken by agencies other than the NMa, no explicit procedures are available by which foreign firms can influence the regulatory process. It is not clear to what extent Dutch law permits foreign or domestic firms to intervene as a matter of right in regulatory proceedings if they believe that regulatory action or private conduct is impairing their access to the Dutch market. However, foreign firms can present their views during the legislative process in parliament in various ways, such as sending in their written comments, lobbying and meeting with members of parliament.

With respect to regulatory action, no explicit procedures are available for foreign or domestic firms to seek relief when firms subject to regulation which creates or strengthens their market power in one market exert or extend that power in another market. However, to the extent that an incumbent firm engages in a practice prohibited by the competition legislation, there may be some scope for a foreign firm to use the private right of action to have the practice prohibited or declared "null".

3. ASSESSING RESULTS IN SELECTED SECTORS

Electricity: There is a significant reliance on imported electricity (about 13%) in the Netherlands and several long-term contracts between the generators co-operative and utilities in neighbouring countries will ensure continued imports over the next decade. Consistent with the EC electricity directive, the new Dutch electricity law permits customers with the ability to choose suppliers (and by 2007, all customers) to import electricity from other countries. However, in accordance with reciprocity provisions in this directive, imports are not permitted without Ministerial dispensation from countries where customers of same type are not permitted to choose suppliers. Chapter 5 discusses further the likely effectiveness and implications of these provisions on competition in the Dutch electricity market and, in particular, their potential to reduce the openness which currently characterises this market.

Telecommunications services: The Netherlands committed to open its domestic telecommunications market in the context of the WTO Agreement on basic telecommunications services. It has introduced no exceptions or conditions to the EU-wide commitment offering complete liberalisation of basic telecommunications services (facilities-based and resale) across the EU for all market segments (local, long distance and international), including satellite networks and services and all mobile and personal communications services and systems. As a result, access to the Dutch market is totally open to foreign service providers, including call-back service providers. Service providers do not need to have a legally registered representative in the Netherlands to provide a service in the country. There are no restrictions regarding to foreign ownership size of share holding or other ownership restrictions on individuals and corporations investing in telecommunications services. The only issue of discriminatory treatment may possibly be raised with respect to an exemption from special access obligations that can be granted to companies by the Minister of Transport and Public Works when the special access concerns the provision of public telecommunications services to and from another country.[25] Chapter 6 discusses further market openness and application of competition principles in the sector of telecommunications services in the Netherlands.

Automobiles and components: The Netherlands' automotive parts and components sector is dominated by imports, accounting for 70% of the total market. Technical requirements for motor vehicles are applicable throughout the European Union, including the Netherlands. They are elaborated by the European Commission in consultation with Member States and promulgated by the EU Council as EU Directives. There are in total 54 "Old Approach" directives dealing with active and passive safety measures, lighting measures and environmental protection, focusing mainly on vehicle emissions. The European Union operates a regime of "type approval" for vehicles which meet the technical requirements of applicable directives. The certification of type approval for specific components or whole vehicles may be granted in any EU Member State and recognised as valid in all Members.

Figure 5. **Draft regulations notified by the Netherlands to the European Commission**
Draft regulations notified by sector, 1997*

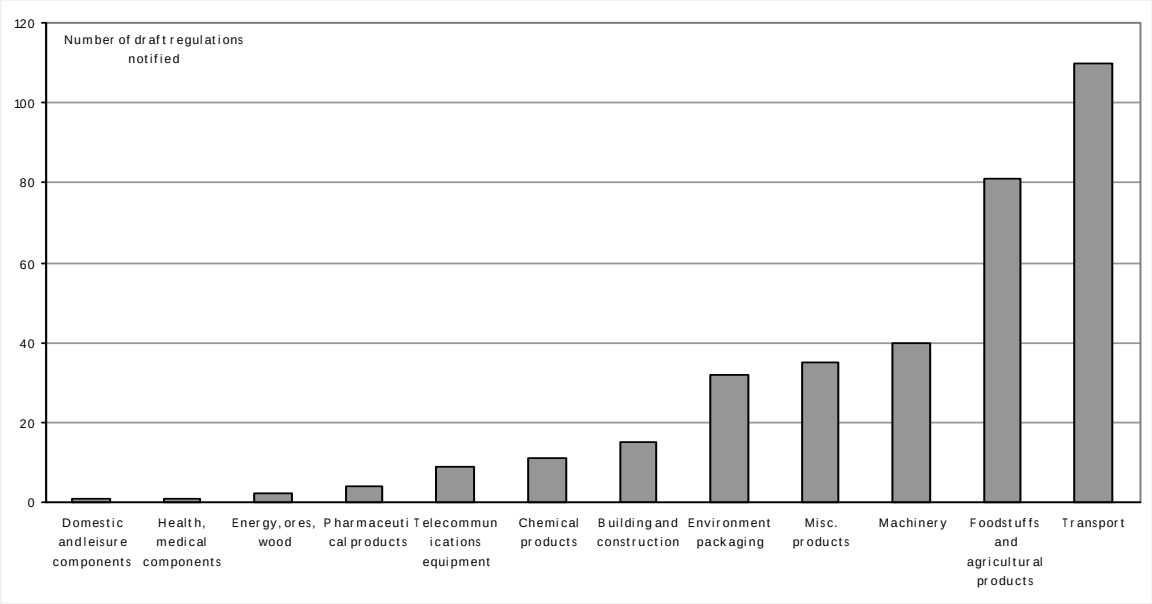
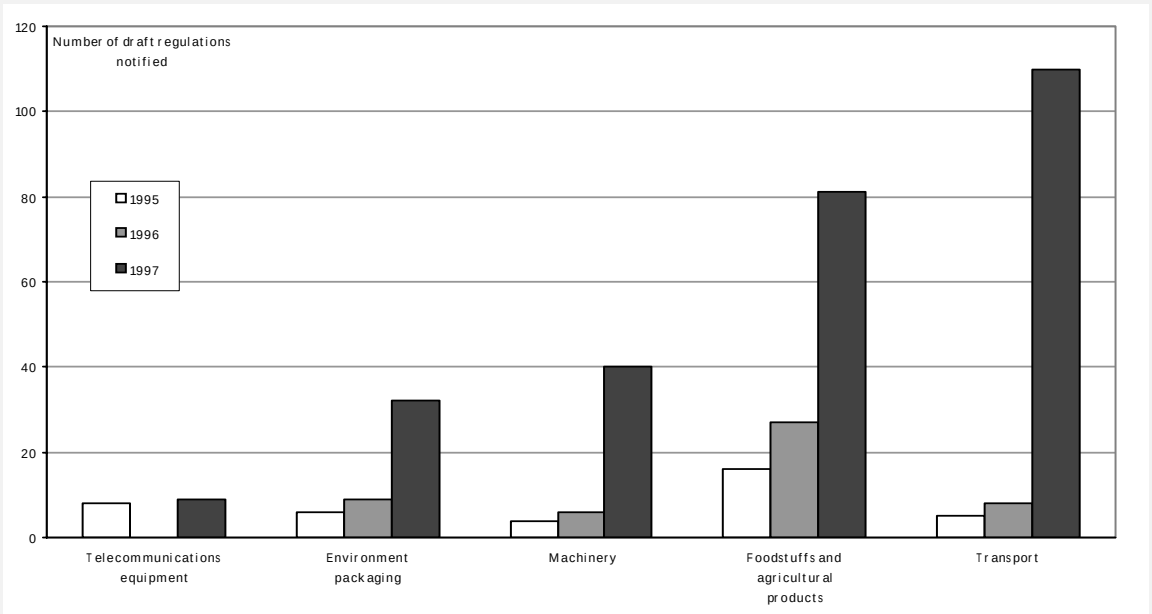


Figure 6. **Draft regulations notified between 1995 and 1997* in selected sectors**



* 1997 figures are provisional
Source: Official Journal of the European Communities, Statistics relating to technical regulations notified within the framework of Directive 83/189/EEC

Transport: With respect to foreign investment some limitations to the application of non-discrimination principles based on nationality or residence can be found in the transport sector. The Dutch Aviation Law along with EC Regulation and Bilateral Aviation Treaties limit licenses to operate an airline on the basis of nationality and ownership requirements, and reserve cabotage to national airlines unless the provisions of international agreements to which the Netherlands is a partly imply otherwise. Given the size of the country, the limitation on cabotage does not actually imply major restrictions in market access for

foreign airlines companies. In the case of rail transport, access of foreign railways to the Dutch network is granted on a reciprocal basis. Some nationality requirements can also be found in the maritime transport sector. The right to fly the Netherlands flag is reserved for ships on the basis of their owners' EU or EEA (European Economic Area) nationality. As signatory of the Revised Convention for Navigation on the Rhine, the Netherlands restricts the right to carry out transport of goods and persons on the Rhine in order to preserve the use of the inland waterways to Parties to the Convention.

Audio-visual: In the broadcasting field Dutch legislation provides for some restrictions to foreign investment based on cultural reasons. Participation in the public broadcasting service is limited to associations or groups which are socially or culturally embedded in the Netherlands society. Commercial broadcasters have a limited access to frequencies, some of which can be reserved to broadcasting in Dutch language or to other specific categories. This limitation restricts the participation of foreign broadcasting organisations, as well as the access of non-Dutch broadcasters to radio frequencies.

Agriculture and food products: Technical regulations with respect to agriculture and food products year after year account for the largest share of Directive 83/189/EEC notifications provided by the Dutch administration. A sizeable part of the Dutch notifications in these sectors is linked to the modification of the national framework law on the control of the quality of products, an area which is not covered by European Union regulation. The elaboration of a series of quality specifications for agriculture and food products produced in the Netherlands is aimed at ensuring a high quality competitive edge for products exported to demanding foreign markets, such as Japan. As a matter of fact, the Netherlands is the third largest exporter of agricultural products in the world. The proliferation of country specific technical regulations in these sectors also reflect the importance of health and safety concerns for the Dutch society.

4. CONCLUSIONS AND POLICY OPTIONS FOR REFORM

4.1. General assessment of current strengths and weaknesses

A review of the national regulatory system in the Netherlands shows that domestic policies, just like trade policies, have been effectively geared to enabling international competition in the Dutch market while enhancing the international competitiveness of Dutch firms. Although in many cases the "efficient regulation" principles have not been translated into formal requirements when developing domestic regulations, the principles seem to be well observed in practice within the domestic regulatory process. It can be convincingly argued that the trading tradition and the awareness of the importance of foreign trade and investment for the prosperity of the country are so well anchored in the mentalities of public and private sector alike that institutional safeguards may be superfluous.

However, the issue can be raised whether, in the absence of a more global view of potentially affected interests, including foreign ones, self-regulatory activities undertaken by private bodies can adequately observe principles like transparency, non-discrimination or least trade restrictiveness. Given the importance of self-regulatory activities in the Netherlands, if delegated regulation did not respect the "efficient regulation" principles, this would undermine the objective of the open market sought by government regulation. The potential threat that may represent the strong corporatist tradition of the Netherlands may be counterbalanced by the newly introduced reforms in the field of competition policy. How these reforms will perform in further enhancing market openness in the Netherlands still remains to be seen, although the significant movement away from the corporatist tradition that takes shape in the Dutch society (see Chapter 2) seems promising in this respect.

4.2. The dynamic view: the pace and direction of change

In the context of an economy that performs already well with respect to market openness the country's traditions should provide a strong orientation. The contribution of a trade- and investment-friendly regulatory environment to the attractiveness of the Dutch market can only be an asset in increasingly globalised European and world economies. As border barriers lose their relative significance, the observance of the "efficient regulation" principles will become even more prominent in ensuring the competitiveness of the national economy in global markets. The development of a consistent practice for the assessment of trade and investment effects of proposed regulations will further enhance the role of these principles in providing additional impetus to market opening policies in the Netherlands.

Furthermore, in the Netherlands as in other countries, sectors that were hardly exposed to international competition up to now will have to undergo the test of efficient operation too. It is hard to say for the Netherlands whether sectors such as construction, utilities or consumer services, are potentially as open as sectors which have long been exposed to international competition, because the domestic consumer market has been relatively small compared to market segments exposed to international competition to really matter for international economic operators. In the future, demonstrating that these sectors can live up to the national traditions of market openness, so as to be able to reap the benefits of reform, will be a major challenge for the Netherlands.

4.3. Potential benefits and costs of further regulatory reform

The Netherlands has steadfastly reaped the benefits of its market openness tradition and reputation by attracting investment and trade flows that boost the Dutch economy, as well as by conferring to the national industry an appreciable advance experience of operation in global markets. Reforms aimed at further enhancing the market orientation of the national regulatory system will allow it to maintain its head start in the framework of the progressing liberalisation of global markets. The fine-tuning of market opening policies will thus need to pay credit, preserve and build upon past and current accomplishments. For instance, the increased reliance on market initiatives with respect to standardisation, testing and certification, as recommended in the 1997 OECD report on Regulatory Reform, has helped minimise any negative economic effects from the use of technical requirements for regulatory purposes and stimulated technological development. Thus, any wider action to improve the accountability of self-regulated private bodies and to ensure the regular assessment of trade and investment effects of their activities, should not overburden these activities in a way that would run counter to the objective of promoting market forces as an alternative to government intervention.

4.4. Policy options for consideration

Policy options for reform with respect to market openness in the Netherlands are mainly a question of further strengthening the market orientation of the national regulatory system. This would in essence include:

- Strengthen competition policy to effectively deal with private anti-competitive behaviour affecting foreign entry to the Dutch market. The vigorous application of the new Competition Law, as recommended in the background report on The role of competition policy in regulatory reform, would considerably reduce the potential for private behaviour to mitigate the benefits of market opening public policies.

- Improve the transparency of regulatory activities by private bodies, in particular as concerns the possibility of taking account of foreign interests. A more explicit definition

of the regulatory responsibilities, as well as an increased accountability of these bodies, as recommended in Chapter 2, could enhance the overall transparency of the Dutch regulatory process and facilitate the expression of foreign interests.

- Develop a consistent practice for the assessment of trade and investment effects of proposed regulations on the basis of the BET procedures. The BET checklist seems to offer a good basis for carrying out such assessment, although implementation of the improvements to RIA processes recommended in Chapter 2 is needed to ensure that it is able to fulfil this function effectively in practice. The efficiency of BET procedures could also be enhanced by further promoting the incorporation of foreign concerns in the regulatory process, namely by means of informal consultations.

- Regularly assess the effects of self-regulatory activities on competitiveness and market openness. Given the importance of self-regulatory activities in the Netherlands the assessment of trade and investment effects of proposed regulations is equally, if not more, justified at the self-regulatory level than at the governmental level. The development of government surveillance over PBO regulation with respect to trade and investment effects will have to achieve the delicate balance of enhancing market openness while preserving the legitimate goal of promoting market forces as an alternative to government intervention.

- Continue to encourage the use of international standards as a basis for national standardisation activities and to promote international harmonisation in the European and international fora. A strong commitment to an efficient and reliable standardisation system not only enhances market opportunities for Dutch firms but also greatly contributes to the consolidation worldwide of efficient and transparent markets for industry and consumers alike.

- Further promote private standardisation, testing and certification as an alternative to government intervention. Taking into account the complexity of intergovernmental MRA negotiations, an increased reliance on market initiatives towards recognition of equivalence may often be a response better adapted to the increasing speed of technological development.

NOTES

1. A recent exception being the complaint by the United States to the WTO on "Certain Income Tax Measures Constituting Subsidies", dated 5 May 1998 (WT/DS128/1). Similar complaints were also formulated against France, Ireland, Greece and Belgium.

2. See, for example, the US Department of State, 1997 Country Reports on Economic Policy and Trade Practices at *http://www.state.gov*, the US Department of Commerce, "Netherlands Trade Regulations and Standards" and "Netherlands Investment Climate", 21.08.1996, STAT-USA on the Internet (202) 482-1986, the Canadian Ministry of Industry site at *http://strategis.ic.gc.ca*, the New Zealand Trade Country Profiles at *http://www.tradenz.govt.nz*, or the American Chamber of Commerce in the Netherlands "*Investors' Agenda of Priority Points*", The Hague, 1998.

3. OECD (1997), "The European Union's Trade Policies and their Economic Effects", Paris.

4. OECD (1997), "Assessing the effectiveness of the efficient regulation principles", Paris.

5. See European Commission (1998), Directorate General for Industry, "Directive 83/189/EEC - A commentary. Maintaining the single market. A guide to the procedure for the provision of information in the field of technical standards and regulations", Luxembourg.

6. These are provisional figures.

7. This figure does not relate to national technical regulations adopted in 1997, but to procedures undertaken that year by the Commission on the basis of Article 169 of the EC Treaty, as well as procedures undertaken in previous years and still outstanding. The total EC figure for that year is 94 (21 initiated that year, plus 73 outstanding).

8. This notification procedure is separate from that of Directive 83/189/EEC.

9. The PBOs are industry and trade organisations with substantial powers of self-regulation. They are composed of representatives of business organisations and unions and are most significant in sectors dominated by small businesses. For a more detailed description of the self-regulatory activities of the PBOs, see the background report on The Role of Competition Policy in Regulatory Reform.

10. See European Institute of Public Administration (1998), "Openness and Transparency in the European Union", edited by Veerle Deckmyn and Ian Thomson, Maastricht.

11. See, for instance, US Department of Commerce (1996), "Netherlands Trade Regulations and Standards", 21 August, STAT-USA on the Internet (202) 482-1986.

12. See, for instance, USITC (1995), "General Agreement on Trade in Services: Examination of Major Trading Partners' Schedules of Commitments", Publication 2940, December, which notes that the additional restrictions attached by EU Member States increase significantly the restrictiveness of the European Union market for services.

13. Ministry for Economic Affairs (1997), "BET-Checklist. Questions for the Testing of Draft Regulations on Business Effects", September.

14. See Dennis Swann (1995), *The Economics of the Common Market*, Penguin Books; European Commission (1996), "Documents on the New Approach and the Global Approach", III/2113/96 - EN; European

Commission, DGIII Industry, "Regulating Products. Practical Experience with Measures to Eliminate Barriers in the Single Market"; ETSI "European Standards, a Win-win Situation"; European Commission (1994), "Guide to the Implementation of Community Harmonisation Directives Based on the New Approach and the Global Approach (first version)", Luxembourg.

15. Decision of 20 February 1979, Cassis de Dijon, Case 120/78, ECR p.649.

16. Energy-efficiency, labelling, environment, noise.

17. Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the liability for defective products.

18. A.B. Ringeling *et al.* (1996), "Normalisatie en certificatie, Achtergrondstudies Algemeen Wetgevingsbeleid", Ministry of Economic Affairs and Ministry of Justice, February and Ministry of Economic Affairs (1997), "Follow up van het MDW-rapport Normalisatie en Certificatie", 30 May. See also Ministry of Economic Affairs (1995), Directorate General for Industry, "Standards, Certificates and Open Frontiers", May.

19. Ministry of Economic Affairs (1995), Directorate General for Industry, "Standards, Certificates and Open Frontiers", May.

20. The limits of this principle, such as the exception in Article 36 of the EEC Treaty, led to the efforts for harmonisation of technical specifications for products and subsequently to the adoption of the "New Approach".

21. The European Co-operation for Accreditation regroups the nationally recognised accreditation bodies of the Member countries of the EU and EFTA. It aims at promoting the conclusion of mutual recognition agreements among its members, so as to maintain the equivalence of competence of such bodies and ensure that products "*tested or certified once are accepted everywhere*".

22. The International Accreditation Forum is a group of accreditation bodies from various countries, including Australia, Canada, Japan, Mexico, the Netherlands, New Zealand and the United States.

23. The International Laboratory Accreditation Co-operation is an international co-operation between the various laboratory accreditation schemes operated throughout the world and aims, *inter alia*, at the conclusion of mutual recognition agreements between members on the basis of the ISO/IEC Guide 25 on laboratory accreditation.

24. See, for instance, US Department of Commerce (1996), "Netherlands Trade Regulations and Standards", 21 August, STAT-USA on the Internet, (202) 482-1986.

25. Based on the original draft of the new Telecommunications Act.