

LIMITS AND CONTROL OF COMPETITION WITH A VIEW TO INTERNATIONAL HARMONISATION

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1 General Aspects

1. The constitution of the Netherlands does not contain provisions laying general principles of the economic system, nor are there any such provisions in other legislative instruments. It is fair to say the principle of the market economy is so deeply enshrined in the Dutch Political Economy that it is thought of as totally self-evident and in no need of affirmative constitutional or legislative provisions. After all the Dutch East Indies Company, established in 1602, was the first limited liability company in modern times. However, it could be argued that the Competition Act which entered into force January 1, 1998, provides such principles. The Dutch Competition Act (hereinafter referred to as CA) is closely patterned after the EC Competition rules which implement the basic principles of the EC Treaty.¹ The latter are spelt out in Article 3 (1) (g) EC: "a system ensuring that competition in the internal market is not distorted."² Furthermore Article 4 (1) EC provides that the Community policies shall be: "conducted in accordance with the principle of an open market economy with free competition." Article 4 (2) EC enumerating the activities of the Economic and Monetary Union, stipulates that these activities shall be conducted in accordance with the principle of an open market economy with free competition.

2. The basic model underlying the Dutch Competition Act is the same as that of the EC competition law and that is workable competition as propounded by the Court of Justice of the European Communities (henceforth the ECJ) in the first *Metro* judgment.³ However, it is important to note that the assumptions underlying the EC Competition policy have shifted towards a fuller recognition of economic theory as embodied by the Chicago school. The adoption of the new block exemptions on vertical restraints and the rules on patent licensing and R&D, as well as the accompanying guidelines, are a demonstration of this trend.

3. The Netherlands is a founding member of the EC, the impact of its membership has been described above in section 1.

4. The estimated GDP for the year 2002 is 450 billion Euro. The share of the

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1. This is all spelt out clearly in the Explanatory Memorandum to the Competition Act, Tweede Kamer 24707 Nr. 3, 1995- 1996, p. 9. A comprehensive summary of the Dutch Act is provided by T.R. Ottervanger, J. Steenberg and S.J. van der Voorde, *Competition Law of the European Union, the Netherlands and Belgium*, Kluwer/Loeff Legal Series, 1998.

2. See Bastiaan van der Esch, *The System of undistorted competition of article 3(f) of the EEC Treaty and the duty of Member States to respect the central parameters thereof*, *Fordham International Law Journal* Vol 11, 1998, pp. 409-431. It should be remembered that the Treaty is called the EC treaty and that it has been renumbered thus art. 3(f) is now art. 3(1) (g).

3. Case 26/76, *Metro v. Commission*, [1977] ECR 1875.

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public sector is [] % and the share of the regulated markets is [] % Private consumption represents 59,1 % of GDP and public consumption 13,7 %. The Netherlands was 5th in the ranking of global competitiveness.⁴

2 State intervention

1. The following markets are subject to some form of government control/supervision with regard to either market access, prices, or other conditions of production: health care, agriculture, electricity, natural gas, railways, telecommunications and postal services. In several sectors, public service obligations may be imposed in case there is insufficient supply of such service in certain areas: air transport, maritime cabotage services, electricity, natural gas and telecommunications. Some sectors are subject to special regulatory regimes supervising prudential rules: banking and insurance, both life and no-life. The Competition Act applies to all these sectors unless the sectoral legislation provides for specific powers such as the power to regulate prices. This is the case in the health care sector, maritime transport, electricity, natural gas and telecommunications. It is important to note that for all these sectors, with the exception of the health care sector, the national regulatory regimes are the result of EC legislation.⁵

2. State-owned enterprises are subject to the same competition rules, the Competition Act, as private enterprises. However, like EC competition law, the CA provides for exemptions for enterprises that are entrusted with the operation of services of general economic interest or having the character of a revenue producing monopoly. Such enterprises are exempted to the extent that the application of the competition rules would obstruct the performance in law or in fact of the particular tasks entrusted to them. It is also worth noting that under EC law, the governments of the Member States are enjoined from enacted monopolies or granting exclusive or special rights that lead the enterprises involved inevitably to infringe the competition rules. This is the gist of Article 86 of the EC Treaty and the relevant case law.⁶

4. The Economist Pocket: World in figures, 2000 edition p. 70. The ranking reflects assessments for the ability of a country to achieve sustained high rates of GDP growth per head.

5. The literature on the different sectoral regimes in the EC is vast: Faull and Nickpay, *The EC Law of Competition*, Oxford university Press, 1999, provide a good overview of the following sectors: financial services, energy, communications (telecoms, media and internet) and transport. See further P.J. Slot and A. Skudder, *Common features of Community law regulation in the network-bound sectors*, 38 CMLRev. 2001, pp. 87-129.

6. See e.g. L. Ritter, W.D. Braun and F. Rawlinson, *European Competition Law: A Practitioner's Guide*, 2nd ed. Kluwer, 2000, IX. See further, Faull and Nickpay, *op. cit.* chapter 5. The Court's judgements in the electricity cases, the German Post case as well as the Copenhagen waste case, show that the ECJ leaves a considerable margin of discretion for the Member States when defining the particular tasks for undertakings operating under special or exclusive rights. In these judgements the Court held that the standard of proof is whether or not the undertaking concerned can fulfil its particular tasks under economically acceptable conditions. It is not necessary that it would be absolutely impossible for the undertaking to perform its tasks. Thus the test is relative rather than absolute. Secondly, the Court seems to have softened the burden of proof at least as far

Moreover, Member States may not impose or induce anticompetitive behaviour by enterprises, reinforce the effects of anticompetitive behaviour or delegate regulatory power to private operators.⁷

3. The legal system of the Netherlands provides for a well defined legal regime for the control of state aid because the rules of Article 87 and 88 EC as well as the relevant regulations apply directly.

3 Private restrictions of competition □ general aspects

1. Dutch private law, the law of torts, sanctions acts by which private parties exploit the breach of contract by other parties. Furthermore, it sanctions infringements of the law that cause damage to other private parties. There is no specific law on unfair competition.

2. The Dutch Competition Act, like the EC competition rules, is based on the prohibition principle. However, it should be noted that the system of block exemptions has moved the system in the direction of an abuse system. In the exercise of its function, the Dutch Competition Authority (Nederlandse Mededingingsautoriteit, NMa) enjoys a clear margin of discretion. Although it is too early to evaluate its scope of discretion, it is to be expected that the Dutch courts, when reviewing the decisions of the NMa, will grant it a similar, substantial margin of discretion as the ECJ has granted the EC Commission.⁸ The decisions of the NMa are subject to judicial review. Decisions are defined as acts that produce legal effects for the parties involved.⁹ There is some dispute as to which acts are subject to review, the question has arisen whether a preliminary view expressed by the NMa can be appealed. The Rotterdam district court, which is exclusively competent to hear such review cases, ruled that such preliminary views do constitute a decision.¹⁰

as the Member State is concerned.⁶ It held that Member States do not have to prove that no other conceivable -often hypothetical- measure could enable the tasks to be performed under the same conditions. These are important statements which are highly relevant for the subject of public service obligations. As we shall see below, the Community regimes for the network bound sectors leave a considerable discretion for the Member States to define public service obligations whilst at the same time the relevant provisions such as article 3 of the electricity and natural gas directive specifically state that the provisions of article 86 (ex 90) have to be observed.

7. Case 267/86, *van Eycke v. Aspa*, [1988] ECR 4769. See further, Ritter, Braun and Rawlinson, op. cit. p.751 et seq. and Faull and Nickpay, op. cit. p.274-276.

8. See in general P. Graig and G. de Burca, *EU Law* 2nd ed., OUP 1998, p. 506- 510, discussing the intensity of review by the ECJ. A clear example of the ECJ's tendency to leave a considerable margin of discretion to the Commission is found e.g. in case C-68/94, *France v. Commission*, [1998] ECR I-1375 and case T-102/96, *Gencor v. Commission*, [1999] ECR II-753.

9. See on this question C.S.Kerse, *E.C. Antitrust Procedure*, 4th ed. Sweet & Maxwell, 1998, □Acts which may be challenged□ p. 396-391. As the CA is designed to follow EC competition law closely it is to be expected that the Dutch courts will take their clue from this case law.

10. *Markt en Mededinging*, 2001, p. 170.

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3. Although the Act is based on the prohibition principle, which normally excludes an assessment of the anticompetitive and the procompetitive effects, there have been instances where such an assessment has in fact taken place. The NMa has in a few cases rejected complaints because the acts did not constitute an infringement after an assessment of the anti- and procompetitive effects. Courts have also engaged in such an analysis.

4. The CA provides in Article 56 for administrative sanctions including the imposition of fines as well as civil sanctions, injunctions. Like EC competition law agreements that are infringing the basic prohibition of cartels laid down in Article 6 CA, are void. Furthermore, aggrieved parties can claim damages both as a result of a prohibited cartel or the abuse of a dominant position. Private parties can also ask for an injunction.

5. As stated before, Dutch competition law follows EC competition law, and even though there has not yet been a case involving conduct abroad, it is to be expected that the ECJ's Woodpulp rule will be applied.¹¹ However, it should be noted that in case such foreign conduct involves acts originating or performed in other EC member states, EC competition law may apply and therefore there will not be a need to apply Dutch competition law. Following the EC competition law principles, this would lead to the conclusion that restrictions of competition directed at foreign markets will not normally be caught unless such restrictions have an effect on the Dutch market.¹² An exception to this has to be made in case of exports to other members of the European Economic Area and partners of Euro agreements such Poland, Hungary, Slovenia, the Czech Republic and Estonia.¹³

4 Specific Aspects

Most of the questions in this subsection can be answered by referring to EC competition law. It may therefore be useful for the reader to carefully read the EC competition law report.

1. Although horizontal agreements are, like in EC competition law, looked at more critically than vertical agreements, this does not mean that there is a general presumption that they are prohibited. Such a clear presumption only applies in case of the so called "hardcore" restrictions: the fixing of prices and production quota as well as the sharing of markets and customers. Other forms of horizontal agreements may either be allowed under the block exemptions: R&D etc. or by individual exemptions.¹⁴ EC block exemptions are, pursuant to Article 12 and 13 of the CA, automatically applicable in the Netherlands. In January 2001, the EC Commission

11. Joint cases 89, 104, 114, 116, 117, and 125-129/85, A. Alstrom c.s. v. Commission (Woodpulp I), [1988] ECR 5193. According to this judgment the EC has jurisdiction over agreements concluded outside the EC but implemented in the EC.

12. Ritter, Braun and Rawlinson, op. cit. p.57.

13. See A.M van den Bossche in: M. Maresceau, (ed.), *Enlarging the European Union. Relation between the EU and Central and Eastern Europe* (London, 1997).

14. OJ, 2001, L 304/3 and OJ, 2001, L 304/7.

has published guidelines for horizontal agreements.¹⁵ In view of the close between EC and Dutch competition law, these guidelines will also be followed by the NMa and the Dutch courts. Many joint ventures qualify for an individual exemption, especially when it is clear that the parents could not on their forces enter the market, or when important technological advantages are to be expected.¹⁶

2. The legal framework for vertical restraints is EC regulation 2790/99, which entered in to force June 1, 2000.¹⁷ As was explained above under 1, this regulation is also in force in the Netherlands. Furthermore, the EC Commission has also published extensive guidelines on vertical agreements.¹⁸ The new EC system for vertical agreements is based on the idea that under a market share of 30% all restrictions are allowed except the hard core restrictions listed in Article 4 of the regulation. Agreements by parties with combined market share over 30% are not automatically void. Such agreements with a market of up to 50% may qualify for an individual exemption according to the guidelines. The hardcore restrictions are the same as those listed above for the horizontal agreements. Restrictions on intellectual property rights are covered by the block exemption when they are ancillary to a vertical agreement. All other restrictions in licensing agreements are covered by the special block exemption regulation 240/96 on transfer of technology.¹⁹

3. Like EC competition law, Dutch competition law prohibits the abuse of a dominant position. This prohibition can be directly applied; no further action by the NMa is required.

- The relevant geographical market is the Netherlands or a part thereof depending on the nature of the product involved. In one instance concerning the sharing of the market by the local notaries public, the relevant geographical market was defined as the city of Breda.²⁰

- Even though there is no case law on this issue in the Netherlands, it is to be expected that the NMa and the Dutch courts will follow the case law of the ECJ as propounded in the judgments *Kali und Salz*²¹ and *Compagnie Maritime Belge*²², as well as the Court of First Instance (CFI) in *Gencor*.²³ Similarly, the NMa and the

15. OJ 2001, C 3/2.

16. A good summary of Commission's treatment of joint ventures is given in Ritter, Braun and Rawlinson, *op. cit.*, Ch. III.D. and Ch. VI. E.

17. OJ 1999, L 336/21.

18. OJ 2000, C 291/1. An excellent discussion of the new block exemption as well as the guidelines on vertical agreements is given by R. Wish, *Regulation 2790/99: The Commission's new style block exemption for vertical agreements*, 37 *CMLRev.* 2000, 887-924.

19. OJ 1996, L 31/2.

20. NMa 1999, nr. 952, *Notarissen Breda*. Although this decision was based on art. 6 CA (the equivalent of art. 82 EC) there is no reason to assume that markets under art. 24 (82 EC) cannot be similarly narrowly defined.

21. Case C-98/94 and 30/95, *France and others v. Commission*, [1998] ECR I-1395.

22. Case C-395 and 396/96 P, *Compagnie Maritime Belge and Others v. Commission*, [2000] ECR I-1365.

23. Case T-102/96, *Gencor Ltd. V. Commission*, [1999] ECR II-753.

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Dutch courts will follow the case law of the ECJ in the second Woodpulp judgment.²⁴

- Specific forms of abuse in Dutch competition law are those recognized in the case law of the ECJ, CFI and the EC Commission. Summaries thereof may be found in any textbook on EC competition law.

4. The Dutch Competition law provides for a system of merger control, again patterned after EC regulation 4064/89 on this topic. The threshold is, of course different, 250 million Guilders. A second point of difference is that the amendments of regulation 4064/89, introduced in regulation 1310/97, are not yet implemented in Dutch competition law. As a result, joint ventures that satisfy the definition of a concentration but are cooperative in nature, will not be assessed under the rules applying to mergers but only under Article 6 CA.

- The control is not limited to publication/notification. The NMa has the power to prohibit mergers.

- The criterion is whether the concentration creates or strengthens a dominant position as a result of which effective competition would be significantly impeded. The NMa cannot apply criteria referring to objectives of general economic policy or the promotion of certain industries. Article 47 of the CA provides that the Minister, after a negative decision of the NMa enjoining the merger, may take a contrary decision if according to her/his opinion important considerations of general interest would require so. There has been one instance where the parties requested the Minister of Economic Affairs to intervene; it was not successful.

- All mergers above the minimum threshold and below the EC thresholds of Article 1 of regulation 4064/89²⁵ have to be notified to the NMa. The NMa has 4 weeks to decide whether or not the merger may go ahead. If the NMa has doubts, it will open the second phase. It has 13 weeks to adopt a final decision.

- Article 74 of the CA gives the NMa the power to order that the merger will have to be rescinded (‘unscrambling the eggs’).

5 Future Harmonisation

1. As the experience of the recent enactment of the Dutch competition act has demonstrated,²⁶ it is possible to harmonise all major areas, both of substantive and procedural law, in a situation where interstate transactions are already subject to the same rules. Obviously, such harmonization is much more difficult in international relations where such a close form of integration is missing. Moreover,

24. Case C-89, 104, 114, 116, 117, 125-129/85, Ahlstrom and others v. Commission, [1993] ECR I-1575.

25. Mergers above the Community threshold have, of course, to be notified with the EC Commission.

26. Of course, similar harmonisation developments have taken place in other member states of the EC.

for the member states of the EC, individual efforts at harmonization with third countries are no longer an option as the EC is competent to regulate in the area of competition law. Although it may be argued that member states still have the power to regulate intrastate competition law, this does not seem to a viable option. As far as the EC is concerned, it makes sense to increase the present cooperation. This would seem to apply in particular to the rules for merger control and in certain specific industries such as air and maritime transport. The cooperation between the US authorities and the Commission has so far been quite successful, notwithstanding occasional differences of opinion such as the GE-Honeywell merger. This is the result of two agreements between the USA and the EC on the application of the competition laws. Especially the second agreement on positive comity allows a hitherto unknown degree of cooperation in enforcement. The two agreements have led to an extensive cooperation between the competition authorities on both sides of the Atlantic. Nevertheless, as the present debate on the GE-Honeywell merger demonstrates, there is still a long way to go before enforcement actions of the USA and the EC are perceived as adequately aligned. Article 24 of the merger regulation does not provide an adequate solution in case of actual conflicts. It only addresses general difficulties encountered by Member States' undertakings with mergers in third countries. A more effective mechanism is found in regulation 4056/86.²⁷ Article 9, entitled '*Conflicts of international law*', provides:

1) Where the application of this Regulation to certain restrictive practices or clauses is liable to enter into conflict with the provisions laid down in by law, regulation or administrative action of certain third countries which would compromise important Community trading and shipping interests, the Commission shall, at the earliest opportunity, undertake with the competent authorities of the

27. OJ 1986, L 378/4, competition rules for the maritime transport sector. A similar clause is laid down in the Commission's proposal to extend the scope of regulation 3975/87, competition rules for the air transport, to third countries.

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third countries concerned, consultations aimed at reconciling as far as possible the abovementioned interest with the respect of Community law. The Commission shall inform the Advisory Committee referred to in Article 15 of the outcome of these consultations.

2) Where agreements with third countries need not be negotiated, the Commission shall make recommendations to the Council, which shall authorize the Commission to open the necessary negotiations.

The Commission shall conduct these negotiations in consultation with an advisory Committee as referred to in Article 15 and within the framework of such directives as the Council may issue to it.

As can be seen this provision provides for a clear approach in case of a conflict of jurisdiction. It has been used in the relations with countries in West Africa.²⁸ The insertion of a similar provision in the merger control regulation should be considered to formalize the duty of the Commission to take steps to resolve conflicts of jurisdiction. In practice, the Commission already cooperates closely with the US authorities.²⁹ The Commission's decision in the Boeing/McDonnell Douglas decision also demonstrates a willingness to take the interests of the third countries into account.³⁰

Nevertheless, there seems to be a clear need to draft a new agreement on co-operation between the EC and the US providing for a substantial alignment of procedures. Such an agreement would lead to the introduction legislative provisions in both the EC and the USA to align their merger approval procedures and to provide for an obligation to provide a more adequate procedure for taking the views of other countries into account. Some preliminary suggestions may be made.³¹ As to the first point, it would take a lot off the pressure of merger cases like the GE-Honeywell case, if the time limits for approving the merger were harmonised. That would avoid a situation wherein the politicians of one country can, by referring to the fact that their authorities have approved the merger, put political pressure on the authorities of other countries to accept the merger.³² As to the second point, it may be suggested to subject the Commission and the US authorities to the requirement to provide reasons how they have addressed comments by other governments.³³ Further

See Commission decisions French West African Shipping, OJ 1992 L 134/1 and UKWAL OJ 1992, L 121/45.

29. This was stressed by Commissioner Monti in the Press Release on the GE-Honeywell merger, see note 2 above.

Decision 97/816 of 30 July 1997, OJ 1997, L 336/16. See in particular the rather extensive summary in paragraphs 11 and 12 about the co-operation with the US authorities.

31. Further suggestions are made in the Leader of the Economist of June 23rd, 2001 and the Editorial comment of the Financial Times of July 6, 2001. Both suggest that in case the Commission wants to prohibit a merger, it should seek a court order like the situation in the US. The Economist suggests an expedition of the appeal procedure to the CFI as a second best solution. A third suggestion is to: "take competition away from the Commission altogether and to give it to a wholly independent body, free of political influence."

32. This is, of course, precisely what happened in the GE-Honeywell merger, where both the US president and the secretary of the Treasury made statements to that effect.

33. Such requirements may take a similar form as those laid down by the ECJ in case C367/95P,

down the line, cooperation on market definitions may be very helpful to avoid unnecessary conflicts. If ultimately the effects of a proposed merger are felt more strongly in one jurisdiction than in another, a different outcome cannot be excluded. A discussion on proposed remedies is equally important. The situation should be avoided that the authorities on one side of the Atlantic require remedies that would negatively affect the other party.³⁴

Such harmonization is, of course, more difficult to achieve in case civil claims are handled by courts. Here the principles of the notice of the EC Commission on the co-operation between national courts and the Commission in the application of the EC competition rules can be taken as an example.³⁵ Under these principles, courts can stay proceedings to give the Commission the opportunity to proceed with the case. Similarly this procedure should be followed when there is a claim that the enforcement of jurisdiction would run counter the principles of public international law. Alternatively, courts could seek the Commission's opinion.

2. There seems to be no single best method to achieve harmonization. As observed before, the international agreements between the EC and the USA as well as with Canada and Japan are for the moment useful and appropriate instruments. They have also created a rather intensive dialogue between EC, the Department of Justice and FTC officials. Still, they have the potential to achieve further harmonization. It should also be observed that important factual harmonization has been achieved through informal though extensive contacts between policy makers and competition lawyers such as the annual Fordham and Florence seminars. The recent changes in the EC competition policy in the area of vertical agreements and to a somewhat lesser extent also in the area of horizontal agreements, represent an important alignment with US antitrust policy.

Harmonization in certain specific sectors may proceed through future WTO agreements. Countries with a very limited experience in the field of antitrust law may benefit from model laws.

3. A distinction has to be made between procedures and substance. Procedures may be different for international and local transactions. As the experience in the Netherlands has shown under the legal regime prior to the present CA has demonstrated, it is difficult to have two different standards apply to conduct with an international dimension and conduct with only local effects. It should never be forgotten that in competition policy such differences will automatically arise because the standards will have to be applied in a different competitive environment/market. This will normally take care of the need for differentiation. To apply different standards on top of such differentiation per market would not create a level playing

Commission v. Sytraval, [1998] ECR I-1719. In this judgment, the ECJ ruled that the Commission was obliged to address the main contents of complaints in its final decision.

34. The Commission's notice on remedies acceptable under Council Regulation 4064/89 and Commission regulation 44/98, OJ 2001, C 68/3, does not deal with this issue. Yet as again the GE-Honeywell merger has shown, there is increasingly a possibility that the requirements of the different authorities involved may lead to conflicts.

35. OJ 1993, C 39/6.

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field.

4. There seems to be an emerging consensus on what are called hardcore restrictions as well as the need to prohibit clearly anticompetitive behaviour by an enterprise with a dominant position, see e.g. the Microsoft case. A similar consensus may be emerging in the area of merger control, notwithstanding occasional spates of discord like the Boeing-McDonnell Douglas and the GE-Honeywell cases. In all these areas a substantial degree of informal harmonization has taken place.

5. There are at present in my view no alternatives for strong antitrust enforcement by well established national competition authorities. Moreover, the increasing globalisation will further enhance the effectiveness of enforcement by a combined of the antitrust authorities of the major jurisdictions, USA, EC, Canada, Brazil.

6. In the light of the experiences of the WTO Dispute Settlement Body, it will still be too early to entrust the enforcement of competition policy to an international agency. After all, the enforcement of competition requires a highly sophisticated and effective authority.