

**Topic 2: Competition Law and Policy of the European Union:  
The Reform of Competition Law Enforcement – Will it Work?**

**Report for the Netherlands**

Rein Wesseling<sup>1</sup>

**Introduction**

The General Rapporteur has asked the national rapporteurs first to address the basic elements of the existing competition law system – that is before measures were taken to bring the system into line with what is required under Regulation 1. The first section of this paper deals with the existing system. It should be noted at the outset that the Dutch Competition Act (*Mededingingswet*), which entered into force on 1 January 1998, closely follows the EC system.<sup>2</sup> Moreover, in as far as required for the operation of the system envisaged under Regulation 1, the Dutch Competition Act will be amended before 1 May 2004. The necessary measures for the implementation of Regulation 1 are discussed separately in the second section of this paper. The third - and final - section addresses the complications that the Dutch competition law system may cause to swift operation of the envisaged dispersed enforcement action in the network of enforcement authorities responsible for the application of Articles 81 and 82 EC.

**I. The current system**

This first section presents the main features of the existing competition law system in the Netherlands. After some general words on the background to the current system, this section is divided into three subsections dealing successively with the substance, institutions and procedures of the existing system.

*Background*

When adopting the Competition Act the Dutch legislator's objective was two-fold; introducing a fiercer competition law regime and harmonising Dutch competition law with European Community law. As mentioned, the law closely resembles EC law. This is the case in particular as regards Articles 81 and 82 EC, the Treaty articles most relevant to the modernisation program. The institutional framework, with an administrative authority – the Dutch Competition Authority (*Nederlandse mededingingsautoriteit*) as the primary enforcer of the law in the public interest – also follows the EC design. While the main procedural rules are also similar to those in force

---

<sup>1</sup> *Advocaat* at Stibbe (Amsterdam, the Netherlands). The author is indebted to Martijn Snoep for his comments on a draft version of this report and to Wouter Algera for his assistance in preparing section II of the report. Naturally, the author alone is responsible for the contents of the report itself.

<sup>2</sup> *Mededingingswet* of 22 May 1997, published in *Staatsblad* No. 242 (1997). A translation into English is available from [http://www.nmanet.nl/en/Wet\\_en\\_regelgeving/default.asp](http://www.nmanet.nl/en/Wet_en_regelgeving/default.asp).

at the Community level (in particular those enshrined in Regulation 17<sup>3</sup>), the interpretation of the procedural provisions has led to a degree of diversity between the Dutch and the Community regime.

*The substantive law: the Dutch Competition Act (Mededingingswet)*

It was noted in the introduction that the Dutch legislator adopted the Competition Act (hereinafter: the "Act" or "Mw") with the objective of harmonising national competition laws with EC competition law. In the context of the envisaged pan-European enforcement network after 1 May 2004, it is worth noting a legislative technique used by the Dutch legislator to establish consistency between the Dutch and the Community system. Several provisions of the Act directly refer to EC law provisions or notions. For example, Article 1e of the Act defines "agreement" as "an agreement in the sense of Article 85, paragraph 1, of the Treaty". This mode of harmonisation incorporates the EC rules into the Act in a flexible manner.<sup>4</sup> If the interpretation of the EC rules changes over time the Dutch rules will change automatically. In other instances the Act refers to the European counterpart by taking over the current definitions of a concept. For example, Article 1i of the Act defines "dominant position" as "a position of one or more undertakings which enables them to prevent effective competition being maintained on the Dutch market or a part thereof, by giving them power to behave to an appreciable extent independently of their competitors, their suppliers, their customers or end-users. Evidently, the legislator based its definition of "dominant position" on the case law of the EC Court of Justice ("ECJ") with respect to Article 82 EC. If the jurisprudence changes the relevant provisions of the Act have to be amended in order to maintain the parallel between the EC and the Dutch system.

The Act reflects the three main elements of EC competition law. Article 6 contains a prohibition for agreements and concerted practices restricting competition. Article 24 prohibits the abuse of a dominant position. Articles 26 onwards establish a concentration control procedure system. The merger control regime is excluded from the scope of this paper, which focuses on the "modernisation" of the implementation of Articles 81 and 82 EC.

The Act applies to all sectors of the economy. Article 16 of the Act stipulated that the Act did not apply to agreements which were subject to approval by a governmental body. The intention following the entering into force of the Act was to adjust the competencies of the various sector-specific regulators (e.g. in the health sector) during the period between 1998 to 1 January 2003. This provision has become void of purpose since 1 January 2003.

*The prohibition of restrictions to competition*

Article 6 of the Act contains the equivalent of the prohibition formulated in Article 81(1) EC. The Act provides for statutory *de minimis* rules with respect to the Article 6 prohibition (Articles 7-9). Agreements between companies below the thresholds defined in those articles are not prohibited by Article 6, although the Director-General of the

---

<sup>3</sup> Council Regulation No. 17 of 6 February 1962, First Regulation Implementing Articles 81 and 82 EC, OJ [1962] 13/204 (English special edition, series 1, chapter 1959-1962, p. 87 ff.).

<sup>4</sup> Not of course in the rare event that the numbering of the Treaty articles is changed. Article 1e of the Act should now refer to Article 81, paragraph 1, EC.

Dutch Competition Authority (hereinafter: “NMa”) may declare Article 6 applicable where, in view of the market conditions on the relevant market, agreements result in considerable restrictions of competition. Other exceptions to Article 6 of the Act are provided for restraints which are ancillary to concentration agreements (Article 10 of the Act) and agreements between companies of which at least one is entrusted with a duty in the public interest (Article 11). The Act does not contain any specific exception with respect to “vertical” agreements.

Several prohibitions further aim to ensure consistency with EC competition law. The Article 6 prohibition does not apply to agreements which benefit from an EC block-exemption Regulation (Article 12 of the Act). Moreover, Article 13 of the Act extends the benefit of EC Block Exemption Regulations (“BERs”) to those agreements which fall within the substantive scope for those BERs but which do not have an effect on trade between Member States. The Article stipulates that the NMa may withdraw the benefits of a BER for the latter agreements if a situation exists which pursuant to the relevant BER could lead to a decision withdrawing the applicability of that regulation. Agreements benefiting from individual exemption to Article 81(1) EC are also not prohibited by the Act (Article 14). The status of “comfort letters” issued by the EC Commission (now outmoded) was not explicitly addressed in the Act but the NMa has confirmed that comfort letters do not have formal legal effect under the Act.<sup>5</sup> Likewise, there is no specific provision concerning agreements which have been notified to the Commission under the appropriate opposition or objection procedure but it would seem that these agreements are considered to fall within the scope of Article 12 (or outside of the scope of Article 6 altogether). This would imply that the Article 6 prohibition does not apply to such agreements.

National block- and individual exemptions are available to agreements which fall within the Article 6 prohibition under the same substantive conditions as under EC law (Articles 15 and 17 of the Act). The unclear EC regime with respect to the role of non-competition concerns is thus copied into the Dutch Act. Indeed the NMa has issued decisions which mirror Commission-exemption decisions on non-economic grounds. The NMa exempted a “crisis”-cartel agreement with reference to the Commission’s considerations with respect to the steel and synthetic fibre industries in the early 1980s.<sup>6</sup> Likewise, the NMa judged that environmental concerns fall within the concept of economic and technical progress. An exemption was granted to an agreement between various florists which restricted competition but enabled recycling of products.<sup>7</sup>

In addition to these general exceptions to Article 6 three specific block-exemptions remain in force. These national exemptions cover agreements constituting syndicates, exclusivity clauses in tenancy agreements for shops in malls, agreements between retailers, and resale price maintenance for newspapers.

---

<sup>5</sup> Decision NMa-51/20 of 18 December 1998 (“Stibat”). All decisions of the NMa are available from its website (in Dutch): <http://www.nmanet.nl/>

<sup>6</sup> Decision NMa-374 of 23 March 1999 (“Stichting saneringsfonds varkensslachterijen”) referring to the EC Commission’s *Twelfth Annual Report on Competition Policy* (Brussels, 1982).

<sup>7</sup> Decision NMa-492 of 9 July 1999 (“Verenigingen van bloemenvelingen in Nederland”). See also the “Stibat”-decision, above, n. 5.

### *Prohibition of the abuse of a dominant position*

Article 24 of the Act prohibits abuse of an “economic” dominant position. The addition of the word “economic” to the formulation used in Article 82 EC does not entail divergence from the EC article. Yet in one way the Act does deviate from Article 82 EC. The Act formulates explicitly that the realisation of a concentration shall not be deemed to form an abuse of a dominant position – thus eliminating the effects of the ECJ decision in *Continental Can* in the Dutch national context.<sup>8</sup> Contrary to the situation under EC law, third parties cannot therefore contest a merger in court on the basis of the prohibition of abuse of a dominant position enshrined in the Act.<sup>9</sup> However, in view of the broad interpretation of the effect on trade between Member States criterion in Article 82 EC it is not excluded that such parties will find recourse to that article of the EC Treaty.

While the decisional practice of the NMa in the application of Article 24 of the Act can be considered to follow that of the EC Commission in the application of Article 82 EC, there is one area in which the NMa is considerably more active than the Commission has historically been. It is the area of excessive pricing. In various decisions addressed to companies operating in the postal, telecom and aviation sectors, the NMa based its judgement on a detailed cost price analysis of the services concerned. The NMa decisions suggest that rates of return on capital employed on a particular service or product above a normative rate are sufficient evidence for a finding of an abuse of a dominant position. Commentators argue that the NMa thus acts as price regulator and goes beyond the scope of the competition law provisions regarding abuse of a dominant position.<sup>10</sup> The lawfulness of NMa practice under this part of the Act remains uncertain. Few of these decisions have until now been reviewed on the merits by the administrative chamber of the District Court of Rotterdam, the specialised court exclusively competent to hear appeals against NMa decisions (see below).

### *The institutional framework*

Like the Community competition rules, the crucial provisions of the Dutch Competition Act can be applied both by a (specialised) administrative authority (the NMa) and by civil law courts. The double entry creates two columns of case law. The first is administrative and consists of decisions of the NMa and the judgements of the administrative law courts on appeals. The second has a civil law nature and consists of the judgements of civil law courts (including orders of judges in interlocutory procedures) in actions brought by others than the NMa, relying in full or (typically) in part on provisions of the Act.

### *The administrative "column"*

The Act is enforced by a specialised administrative agency; the NMa. Currently, it has a staff of some 300 persons, including both lawyers and economists. The NMa still formally operates under the responsibility of the Minister of Economic Affairs. The

---

<sup>8</sup> Case 6/72 *Continental Can v. Commission* [1973] ECR 223.

<sup>9</sup> M. Mok, *Kartelrecht I*, Fifth revised edition, pp. 353-354 (Deventer, W E J Tjeenk Willink, forthcoming 2004)

<sup>10</sup> See E. Pijnacker Hordijk, "Excessive Pricing under EC Competition Law; An Update in the Light of 'Dutch Developments'", in: B. Hawk (ed.), *Annual Proceedings of the Fordham Corporate Law Institute's conference on International Antitrust Law & Policy 2001*, pp. 463-495 (Juris, 2002).

Minister may issue general guidelines but he may also provide the Director-General with specific instructions with respect to the exercise of his powers in a case at hand. In practice the NMa functions as a politically independent institution and the Minister has not made use of the existing competence to exercise influence on the outcome of investigations in individual cases. A legislative proposal is pending to formalise this practice and to turn the NMa into an independent administrative authority under Dutch law (*zelfstandig bestuursorgaan*).<sup>11</sup>

The fact that the NMa is responsible for the entire enforcement procedure means that it combines all the functions the European Commission has under EC competition law. The combination of functions within the EC Commission under EC competition law (policing, investigation, hearing, decision-making) is widely considered unsatisfactory. Under the Dutch Act this situation is aggravated since the NMa is also itself responsible for an administrative review procedure and decision, prior to an appeal lodged with an independent tribunal (i.e. the administrative chamber of the District Court of Rotterdam). In order to reduce the negative consequences of the combination of functions, the NMa is structured in such a way as to separate the personnel responsible for the various functions. The separation of functions partially follows from Article 3, paragraph 2, of the Act which provides for a separation of the persons responsible for hearing the parties concerned and those responsible for establishing administrative fines from those responsible for drawing up a statement of objections. Notwithstanding these attempts to make an internal separation, the current accumulation of investigative, prosecutorial and adjudicative functions remains susceptible to criticism.<sup>12</sup>

The fact that the Act is enforced by an administrative body implies that the procedural framework is defined by the Dutch General Administrative Law Act (the “*Algemene Wet Bestuursrecht*” or “**AWB**”). This has various consequences, most importantly with respect to judicial protection. Before an appeal can be lodged with the administrative courts, a complaint must be made to the institution, in this case the NMa, which issued the decision.<sup>13</sup> It would go beyond the scope for this section of the paper to go into details of the current Dutch administrative law. Suffice it to note that there are in total three stages of appeal. As just noted, the first is the administrative complaint which is dealt with by the NMa itself. The second stage is an appeal against the decision concerning the complaint. That appeal must be lodged with the District Court of Rotterdam, which is exclusively competent to hear appeals in relation to the Act. The District Court of Rotterdam contains an administrative law chamber specialised in matters of economic law. Thirdly, judgements of the District Court are subject to appeal at the Industrial Appeals Court (“*College van beroep voor het bedrijfsleven*” or “**CBB**”). The CBB qualifies as a court against whose decisions there is no judicial remedy and which shall therefore bring the matter before the ECJ in accordance with Article 234 EC.

---

<sup>11</sup> The legislative bill with this proposal was introduced by the Dutch government (*Kamerstukken II, 2000-2001, 27639*) and adopted by the lower house (*Tweede Kamer*). Yet the senate (*Eerste Kamer*) suspended its consideration on 13 September 2002 until further notice.

<sup>12</sup> See, e.g., M.B.W. Biesheuvel and R. Wesseling, “Kroniek van het mededingingsrecht”, *Nederlands Juristenblad*, pp. 1647-1654 at p. 1654.

<sup>13</sup> A legislative bill is pending to make the first administrative phase of appeals optional. In certain circumstances addressees of decisions would be able to appeal decisions directly to the District Court, thus skipping the administrative review procedure before the NMa.

*The NMa applying Article 81 EC: the North Sea Shrimp case*

In view of the central topic of the paper the general-rapporteur will prepare, it may be beneficial to go into more detail in discussing the decentralised application of Article 81 EC by the NMa. Article 88 of the Act appoints the NMa as the Dutch administrative body authorised to apply Articles 81 and 82 EC in accordance with Articles 83-84 EC and Article 9 of Regulation 17 (cf. Article 5 of Regulation 1/2004). So far the NMa has adopted one decision on the basis of this prerogative. In the North Sea Shrimp case the NMa imposed fines of in total Euro 13.781 million on various trade associations of shrimp wholesalers and individual "producers" of shrimps (i.e. fishing companies).<sup>14</sup> Although the decision is contested in an administrative review procedure by several of the addressees, the case provides an interesting example of the application of Article 81 EC by a national competition authority in a case involving companies and trade associations established in various Member States.

For the purposes of this report the facts of the case can be summarised as various meetings between fishing groups (producer organizations) which were attended by wholesalers and during which agreements were concluded to restrict output (fishing quota) and to establish minimum prices. These facts led to a complex case with a transborder application of the competition rules in a sector which is covered by Regulation 26; the "agricultural exception" to the applicability of Articles 81 and 82 EC and is also covered by the common organisation of the markets for fishery and aquaculture products ("CMO Fish").<sup>15</sup> The NMa concluded that Article 6 of the Act and Article 81 EC applied concurrently.

It may be noted at the outset that the EC Commission holds the exclusive right to decide in a certain situation whether the exception provided for in Regulation 26 applies. However, the ECJ has ruled that a national court that is convinced that the conditions for profiting from the exception do not apply, is also competent to rule that the conditions for applying the Regulation are not fulfilled.<sup>16</sup> The District Court of Rotterdam has interpreted this judgement in such a way as to conclude that the NMa, as the Dutch national competition authority, has the same competence as national courts. The NMa could thus apply Regulation 26 in a "negative" manner, which it did in the case at issue. Leaving aside the idiosyncrasies stemming from the agricultural exception to the application of the competition rules (Regulation 26), there are three aspects of the case which merit attention in the context of this report: the limitation of the scope of the investigation, the exchange of information with a foreign national competition authority and the determination of the appropriate level of the fines.

In its decision the NMa reveals that the scope of the investigation was limited to the North Sea Shrimp sector in the Netherlands, Germany and Denmark. According to the NMa, North Sea Shrimps are also supplied by fishing companies established in Belgium, France and the United Kingdom. However, still according to the NMa, the

---

<sup>14</sup> Decision NMa-2269 of 14 January 2003 ("Garnalen").

<sup>15</sup> Council Regulation 26 of 20 April 1962, "Regulation applying certain rules of competition to production of and trade in agricultural products", OJ [1962] 30/993 (English special edition, series 1, chapter 1959-1962, p. 129 ff.) and CMO Fish, Regulation 3759/92 (applicable at the time of the alleged infringements) and Regulation 104/2000 (the current CMO regulation).

<sup>16</sup> Joined Cases C-319/93, C-40/94 and C-224/94, *Dijkstra v. Friesland (Frico Domo) Coöperatie BA*, ECR [1995] I-4497. Cf. for the application of block-exemption regulations generally; Case C-234/89, *Delimitis v. Henninger Bräu*, ECR [1991] I-935.

supply of North Sea shrimps by Dutch, German and Danish fishing companies constitutes 85 to 90% of the "European" supply of North Sea shrimps. On this basis the NMa decided to exclude the Belgian, French and UK producers and possibly other (non-"European") producers from the scope of its investigation. At first sight there were therefore undertakings from six Member States involved in the alleged infringement. Nevertheless the NMa decided to initiate proceedings and in an early phase of its investigation it decided to restrict the scope of its investigation to undertakings based in some of the Member States involved. From the NMa's decision it is not clear to what extent it had consulted representatives of the other national competition authorities in the jurisdiction involved before deciding on the scope of the investigation. This aspect of the case begs interesting questions as to the discretion available to Member State authorities in the new situation. Secondly, the NMa decided to transfer information to the German national competition authority; the *Bundeskartellamt*. Article 90 of the Act stipulates that information or data concerning an undertaking obtained in the course of any activity undertaken in connection with the implementation of the Act may be used solely for the purpose of the application of the Act itself. Derogating from this rule Article 91 provides that the NMa is authorised to provide information or data to foreign institutions which are responsible for the application of competition rules, in as far as such data or information is or could be of significance for the performance of the tasks of that institution and, in the NMa's opinion, provision of that information or data is in the interests of the Dutch economy. Use of this competence is subject to two conditions. The confidentiality of the information has to be sufficiently protected (by that foreign authority) and there has to be sufficient assurance that the information or data forwarded will not be used for any purpose other than that for which it is provided. The *Bundeskartellamt* had requested the NMa to provide documents which the NMa had obtained in the course of its investigation into the North Sea Shrimp sector. From the decision it also emerges that the NMa had notified the parties concerned before providing the documents to the *Bundeskartellamt*, thus providing the parties with the possibility to oppose the intended provision of information in court.

The NMa concluded that both Article 6 of the Act and Article 81 EC had been infringed. As to the risk of "double jeopardy" the NMa concluded that it follows from the principle of proportionality, as enshrined in the general principles of Dutch administrative law, as well as from the case law of the ECJ (in particular the *Walt Wilhelm* judgement<sup>17</sup>) that in cases in which it intends to impose fines for the infringement of Article 6 of the Act and for the infringement of Article 81 EC, that it has to mitigate the total fine. It considered that it could either impose separate fines for both infringements – in which case the level of those fines had to be mitigated – or it could impose "one fine", i.e. a fine for infringement of only one of the two norms. In the North Sea Shrimp case the NMa referred to Article 10 EC and to the fact that the Dutch legislator intended the Competition Act to be applied in the same manner as EC competition law and decided that it was pertinent to impose fines only for one of the infringements. On this basis it decided to impose fines only for the infringements of Article 81 EC. In determining the level of the fines for the infringement of Article 81 EC the NMa applied its own Guidelines for the Setting of Fines (hereinafter: "Guidelines on Fines").

---

<sup>17</sup> Case 14/68, *Walt Wilhelm v. Bundeskartellamt*, ECR [1969] 1.

### *The civil law "column"*

The Act's provisions may also be relied upon directly in civil law proceedings. Undertakings which infringe Articles 6 and 24 of the Act (the cartel prohibition and the prohibition of abuse of a dominant position) face the automatic nullity of their behaviour and may be liable for damages incurred by parties as a consequence of the infringement of these provisions of the Act.<sup>18</sup>

Damage claims on the basis of an infringement of the Act are still scarce but there are numerous judgements from civil law courts in which the Act is applied. The proceedings are mainly interlocutory procedures between contracting parties seeking the rescission or suspension of provisions in contracts. There is also a number of precedents relating to the abuse of dominant position.

The problems civil law judges may have – in particular in summary proceedings – with the application of provisions of the Competition Act emerge from a series of cease and desist orders of presidents of district courts concerning the dairy sector. The judgements all have a large competition law element. Arguably, the judgements were prompted by an NMa decision containing a badly drafted passage. In a decision condemning a collective boycott by dairy co-operatives on purchasing milk which was not produced according to criteria established by (what could be considered) a trade association, the NMa held that an infringement of Article 6 of the Act would occur where “one or more” of the participating undertakings were materially the same as that condemned in the decision.<sup>19</sup> Not only the reference to one individual undertaking infringing the cartel prohibition is confusing but also the absence of any reference to the requirement that evidence is provided for the existence of an agreement or concerted practice. As a consequence various civil law judges held that a unilateral decision by an individual dairy co-operative to stop purchasing milk which was not produced according to the production criteria (referred to above) constituted an infringement of Article 6 and was therefore not allowed.

While Dutch civil law judges are generally not reluctant to adjudicate claims on the basis of the Act there are situations in which civil law judges have dismissed claims and referred the plaintiffs to the NMa. This happens even in cases in which the civil law judge considers that there are strong indications that an undertaking with a probable dominant position has abused that position. In one particular case the hesitance of the civil law judge to decide a competition law dispute in the absence of a NMa decision turned out to be warranted. The judge had considered it likely that an undertaking had abused its dominant position but had turned down the claim of the plaintiffs because he considered that the claim could not be awarded unless there could not be any reasonable doubt that an infringement had occurred. He referred the parties to the NMa. The NMa then decided that the divergence in rebates granted by the dominant undertaking to supermarkets did not constitute abuse because the supermarkets were not similar purchasers.

---

<sup>18</sup> For a general description of the organisation of the Dutch national judiciary, see the national report for the Netherlands at the FIDE Congress in Helsinki, 1-3 June 2000, part I, pp. 227ff.

<sup>19</sup> Decision NMa-1237 of 14 March 2000 (“Stichting KKM”).

### The procedural framework

As mentioned the procedural framework within which the Act applies is also basically in line with the Community system. However, the procedural framework is largely determined by the General Administrative Law Act, which applies to measures taken by the NMa. Whilst the Minister of Economic Affairs stressed in the parliamentary debates concerning the adoption of the Act that the powers of the NMa would be exactly the same as those of the EC Commission, subsequent case law has revealed that there is some divergence in the powers of the NMa and the EC Commission.

#### *Investigative power*

The NMa has two principal powers to fulfil its statutory task to monitor compliance with the Act: the powers allowing for surveillance and for investigative measures. The substance of these powers is defined by the general provisions on surveillance and investigations in the General Administrative Law Act. The distinction between surveillance and investigation is particularly relevant in the context of the application of the Act because initiation of an investigation prompts the "right to remain silent" (the concept of Article 6 of the European Convention for Human Rights as interpreted by the European Court for Human Rights which is applicable to measures taken by the NMa). Generally speaking however, the powers of NMa-officials undertaking surveillance activities are the same as the powers of investigation. The powers allocated to the NMa and its officials may only be exercised in as far as this is reasonably required.

NMa-officials performing surveillance tasks are authorised to enter all premises, no prior judicial authorisation being required. Private homes are an exception in that the NMa-officials are not allowed to enter them without the consent of the occupant. Surveillants are also authorised to request information, to examine books and other records of businesses and to take copies of these items. In practice the NMa in its investigations tends to focus increasingly on computer records and it is standard practice for it to make "images" of the entire hard disk of a company's server.<sup>20</sup> In as far as it is ensured that companies themselves are able to obtain the same material, and thus are able to prepare their defence on the basis of the same documents the NMa has obtained at the premises of the company concerned, this practice has been provisionally endorsed by the judiciary.<sup>21</sup> Deviating from the Commission's powers under Regulation 17, the NMa is also authorised to interrogate employees of a company which is the object of an investigation. The employee acting as representative of the company concerned, enjoys a derived "right to remain silent".<sup>22</sup> The government intends to introduce to Parliament a bill which would extend the investigative powers of the NMa when pursuing activities under the Act. In particular the powers of the NMa would be aligned with those the Commission and the NMa enjoy under Regulation 1 (in particular the power to enter private homes without permission if a judicial authorisation has been provided and higher maximum fines for obstruction of procedural measures).

---

<sup>20</sup> See the codification of this practice (in Dutch) at the NMa's website:  
[http://www.nmanet.nl/nl/images/11\\_9072.pdf](http://www.nmanet.nl/nl/images/11_9072.pdf).

<sup>21</sup> Order of the President of the District Court of The Hague of 9 April 2003, *Van Hattum & Blankevoort v. NMa*.

<sup>22</sup> Decision of the District Court of Rotterdam (Administrative Chamber) of 7 August 2003, *Texaco v. NMa*.

### *Decisions and sanctions*

The NMa may take decisions establishing the existence of an infringement. It may impose fines on undertakings which can be held responsible for such infringements. In addition the NMa is authorised to order the termination of infringements and impose periodic penalty payments to ensure compliance. The order applies for a maximum period of two years. In urgent cases the NMa may give a provisional order sanctioned by periodic penalty payments in order to end the infringement. The NMa cannot rule on the private law effects of its decisions. Neither can it award damages. Under the Act no criminal law sanctions can be imposed but naturally aspects of competition law infringements may also qualify as violations of criminal law provisions.

### *Exchange of information*

As was illustrated above (in the context of the North Sea Shrimp case), the current powers of the NMa include the competence to provide confidential information to foreign institutions responsible for the application of competition rules, in as far as such data or information is or could be of significance for the performance of the tasks of that institution and, in the NMa's opinion, provision of that information or data is in the interests of the Dutch economy. The NMa has to establish in such cases that the confidentiality of the information is not at risk and that the information will only be used for the purpose for which it was provided. It seems evident that the NMa also has the power to receive (confidential) information and hence also to exchange information. In view of the direct effect of Regulation 1 and the competence for national competition authorities to exchange information both for the application of Articles 81 and 82 EC and parallel application of national competition law (Article 12 of the Regulation), the current power to provide information to foreign competition authorities is expected to remain in force only for authorities other than the competition authorities falling within the scope for Article 12 of Regulation 1.

### *Role of European Commission and NMa in civil proceedings*

Within the current system the potential for intervention by the European Commission and the NMa in civil law proceedings is unclear. By analogy to other institutions or parties submitting (expert) evidence to the national judiciary there appears to be room for the provision of information by the European Commission or the NMa in accordance with what is provided for in Article 15(1) of Regulation 1. Own initiative intervention by the administrative authorities to act as *amicus curiae* (Article 15(3) of Regulation 1) would not have fitted within Dutch procedural law. Neither would the authorities have the possibility to intervene in the proceedings as third parties since this is only possible in cases in which the intervening parties support the position and claim of one of the parties or in which the intervening parties bring their own (related) claim. However, the intention is to amend the Dutch civil procedural law before 1 May 2004 in order to enable the European Commission and the NMa to play the role(s) in civil law proceedings envisaged in Regulation 1. These amendments will be discussed in section 2 of this report.

### *Limitation periods*

Article 64 of the Act determines that the power to impose a fine for infringements of Articles 6 (cartel prohibition) or 24 (prohibition to abuse a dominant position) of the Act ends five years after the infringement is committed.

### *Conclusion: the current system, "under reconstruction"*

It has been noted in passing-by several aspects of the current system that various initiatives to reform provisions of the Act are pending or are intended to be presented shortly. First there is the "fast-track" bill for adapting the Competition Act - and some other laws, such as civil procedural law, see further below – to what is required under Regulation 1/2003. This bill is central to the second section of this paper (below). But that bill with the mandatory "implementing" provisions is not all there is. The government aims to introduce another bill in order to re-establish substantive consistency between Dutch national competition law and Community competition law. Moreover, from an overall review of the functioning of the Act (and in practice, of the NMa) the conclusion was drawn that the investigative powers of the NMa ought to be extended so as to increase the effectiveness of enforcement measures initiated by the NMa. Further, as seen, a bill is pending to fortify the NMa's political independence by altering the institution's status from that of a ministerial body to that of an independent agency. Finally, there are bills on administrative law which do not focus exclusively on the Act but which will have an effect on the application (in particular the cancellation of the existing obligatory administrative appeal phase, enabling in certain circumstances a direct appeal to the District Court). Presenting the current system, as is attempted above, thus has the character of shooting at a moving target.

## **II. The implementation of Regulation 1/2003 in the Netherlands**

This second part of the report describes the manner in which Regulation 1/2003 will be implemented and the direct consequences of the Regulation for the functioning of the Dutch competition law system. As mentioned above, a legislative proposal is pending to adopt the amendments to the Act which are considered indispensable for correct operation of Regulation 1 in the Netherlands. This "technical" set of "necessary" amendments to the Act was proposed on 29 October 2003. Because of its alleged non-controversial (and "non-political") character the government expects the bill to be adopted in time to see the amended Act operative from 1 May 2004. Regulation 1 also prompts a number of desirable, but not technically compulsory amendments to align the Act with the "modernised" Community system. In order not to put at risk the swift adoption of the essential, "technical" amendments, the set of desirable changes will be included in a separate bill. This second ("slow-track") bill should include, for example, a proposal to abolish the national notification for exemption system that the Act still contains, in order to restore the substantive equivalence of the Act and the Community competition law system.

### *Measures required to enable the practical operation of the system foreseen in Regulation 1/2003*

Measures required to give effect to the provisions of Regulation 1 comprise amendments of the Act as well as of provisions of other national laws (notably the civil procedural code). As noted a legislative proposal was presented to Parliament in order

to allow for the necessary amendments in these laws to be made (hereinafter: the “**Implementing Act**”). These amendments are discussed below.

It follows from the general outline of the Dutch system in the first section of this paper that the adaptation of the Act to what is required under Regulation 1 did not call for the establishment of a new competent authority. The NMa had already been appointed as the national authority competent to apply Articles 81 and 82 EC. The NMa will also be the Dutch institution within the network of competition authorities. The Implementing Act also explicitly appoints the NMa as the authority competent to withdraw the benefit of a Block Exemption Regulation in accordance with Article 29(2) of Regulation 1.

Formally, the NMa still acts under the responsibility of the Minister of Economic Affairs. In practice the NMa acts independently and the Minister does not intervene in individual cases. Moreover, as mentioned above, a bill is pending to change the formal status of the NMa into an independently operating administrative authority, which will thus formalise the current practice. As a specialised administrative authority, staffed predominantly with lawyers and a significant number of economists, the NMa has expertise in the application of the (European and national) competition rules. The NMa is not a judicial institution in the sense of Article 234 EC and thus cannot use the preliminary reference procedure. Should the NMa seek clarification on a point of law it can suggest, if an appropriate appeal case occurs, that the District Court of Rotterdam or the CBB use the preliminary reference procedure. Likewise the NMa can make the same suggestion in civil law proceedings in which it acts as *amicus curiae*. There is no designation of one or more civil law courts as the courts responsible for the application of Articles 81 and 82 EC. However, an “expert centre” on financial and economic law was installed at the District Court Rotterdam in March 2003. Judges of various district courts and appeal courts take part in the operation of this centre. These specialised judges can be allocated to a specific chamber of a court if a case involving complex competition law issues is lodged before that court (on the practical measures taken by the Dutch judiciary to enable this, see further below). As noted, the Administrative Law chamber of Rotterdam District Court is exclusively competent to hear appeals arising from decisions of the NMa.

The Implementing Act includes the new power foreseen in Articles 20 and 21 of Regulation 1 to inspect places other than company premises. The Implementing Act allocates the power to make such inspections to the NMa, which will have the same powers as the Commission has under Regulation 1.<sup>23</sup> An authorisation from the examining magistrate of the District Court of Rotterdam is required before such an inspection can take place.<sup>24</sup>

The sanctions provided for under the Act are generally in line with those provided for under EC law. However, the NMa and the Minister for Economic Affairs consider the current level of maximum fines for procedural infringements to be too low to have sufficient deterrent effect. Therefore the intention is to raise the maximum level of fines for such infringements, akin to what the Community legislator did in Regulation 1. The Minister also aims to introduce personal liability in the form of fines for the

---

<sup>23</sup> This follows directly from Articles 20 and 21 of the Regulation but is also included in the Implementing Act (Article 89g).

<sup>24</sup> Article 20 Reg. 1/2003, bill 29276, Article 89d.

executive staff of companies infringing competition law provisions and for the instigators of such infringements.

The use of evidence supplied by the Commission or by the NMa is governed either by the relevant provisions in the Act itself (in the case of administrative procedures) or by new provisions in the Dutch civil law procedural code. Materially the rules are the same and both sets of rules are defined in the Implementing Act. Information provided by the NMa or the European Commission will be admissible, no further procedural steps being required in either the administrative law or the civil law column. Both in civil law and administrative law procedures the judge is free in weighing the evidence submitted in the procedure by the parties, including third parties such as the NMa and the European Commission.<sup>25</sup> Even unlawfully collected proof is not barred from use in an administrative procedure. This may be different if the proof is collected in a way that cannot be expected from a decent and proper administration, a condition that is not easily fulfilled.<sup>26</sup>

The possibility for national courts to ask the Commission to transmit information in its possession or its opinion on questions concerning the application of the Community competition rules (Article 15 of Regulation 1) does not have a basis in the current administrative or civil law systems but such a basis is foreseen in the Implementing Act. Judges intending to ask for information or advice in accordance with Article 15 of Regulation 1, have to inform the parties about this intention and must submit the questions to be posed as well as indicate which documents will be sent to the authorities. The parties are allowed to comment on the questions and the documents. The registrar will provide the parties with a copy of the answers provided by the relevant authority and the parties will have the possibility to comment on the answer or the advice provided by the Commission or NMa. As a general rule of Dutch civil procedural law a judge has to allow the parties to comment on the other parties' statements. This would seem to imply that parties should be allowed to react to the comments the other parties have given in reaction to the Commission's or the NMa's submission.

The task of forwarding to the Commission of a copy of any written judgment of national courts deciding on the application of Article 81 or Article 82 of the Treaty (Article 15 (2) Reg. 1/2003) has been assigned to the Council for the Administration of Justice, which itself shall be provided with the judgments by the clerks of the courts.<sup>27</sup> Should the judge consider this pertinent, in view of the relevant interests of the parties to the procedure, a non-confidential version of the judgment can be provided.

The bill implementing Regulation 1/2003 does not contain a provision on the languages used. The NMa website however has an English version. While press releases as well as a translation of the Act and the annual reports of the NMa are generally available in English, this is not the case with decisions of the NMa (except where the addressees of a

---

<sup>25</sup> Hugenholtz Heemskerk, *Hoofdlijnen Nederlands Burgerlijk Procesrecht*, 20<sup>e</sup> druk, Elsevier, 2002, p. 81.

<sup>26</sup> Van Wijk, Konijnenbelt en Van Male, *Hoofdstukken van Bestuursrecht*, 12<sup>e</sup> druk Elsevier, 2002, p. 530.

<sup>27</sup> There is an exception for the Supreme Court and the Judicial Division of the Council of State which do not fall within the competence of the Council for the Administration of Justice. These courts will be providing copies of their judgments and decisions to the Commission themselves.

decision are foreign undertakings such as in the “North Sea Shrimps” case, referred to above). Judgements of national courts, both in administrative law and civil law proceedings, are only available in Dutch. No proposals are pending to facilitate access to decisions and judgements by providing translated versions of those decisions into any language other than Dutch.

### **III. Difficulties in the application of Articles 81 and 82 EC by national institutions**

In this section the objective is to identify issues and areas of actual or potential difficulty in the application of Articles 81 and 82 EC by national competition authorities and courts within the framework of the new system established by the Regulation. In view of the analytically dispersed nature of the potential problems foreseen by the General Rapporteur and the potentially widely divergent character of the problems that arise in the various jurisdictions of the Member States it seems useful – contrary to what was done in the first two sections of this paper – to adopt the formulation of the potential problems identified in the text of the report itself. This has been done below (in italics).

*Does the exercise by your NCA of the combined powers of investigation prosecution and adjudication of infringements of Articles 81 and 82 pose any particular problem in administrative or constitutional law and if so, how is it proposed to be overcome?*

There are no problems arising from this combination which are specific to Dutch administrative or constitutional law. The problems are the same as the problems perceived within the EC system, stemming from the fundamental principle of the "equality of arms" of parties to a procedure on the one hand and the fact that one of the parties in (administrative appeal) procedures has access to the entire file, chooses the approach in the decision and determines whether there is an infringement and whether a fine should be imposed in the first instance. The situation in the Dutch system is aggravated somewhat since there is no institutionalised Hearing Officer. Moreover, it remains to be seen whether the scrutiny of NMa decisions in the judicial review process before the Administrative Chamber of the District Court of Rotterdam will reach the intensity demonstrated in the recent approach of the EC Court of First Instance. So far, the picture is mixed.<sup>28</sup>

*How well prepared/equipped are your NCA and courts to apply Article 81(3) and particularly to carry out the analysis and evaluation of economic issues which are involved in assessing fulfilment of the conditions of the provision?*

The NMa should be well prepared and equipped to apply Article 81(3) since it has ample experience in applying the parallel provision in the Act and it is staffed with a significant number of economists.

---

<sup>28</sup> The District Court has overturned NMa decisions in a high profile merger case (“Wegener/VNU”) (only to be corrected by the Industrial Appeals Tribunal on further appeal which basically reaffirmed the thrust of the NMa decision) and in one of the few decisions imposing fines to have been dealt with on appeal (a case concerning alleged collusive behaviour by public notaries). In spite of these annulments of NMa decisions (imposing sanctions), some commentators suggest that the District Court’s scrutiny generally leaves the NMa some margin for administrative discretion. See, e.g., F. Leeftang, annotation of the decision of the District Court of Rotterdam of 16 May 2001 in *Markt & Mededinging* (2001), pp. 227-231.

Views differ as to whether national courts are likewise well prepared and equipped to apply Article 81(3). Part of the difference in views is arguably related to the question of whether the application of Article 81(3) implies a margin of administrative (or “political”) discretion, which the judiciary would not be able to employ. However, on the basis of the Draft Commission Notice on the application of Article 81(3) and the Court of First Instance’s judgement in the “Métropole” case it seems clear that the current approach denies the existence of administrative discretion. In that situation there would seem to be no reason why the judiciary is not sufficiently prepared to apply the provision on the basis of economic analysis. Parties’ representatives are responsible for informing the judge and they will therefore play a vital role.

Arguably, one of the reasons why there remains fear that civil law courts are not well equipped to apply Article 81(3) EC is the absence of specific expertise at such courts. It is indeed unlikely, at least in the Dutch context, that the quantity of cases involving complex Article 81(3) EC issues is such as to allow all (or even any) District Courts to obtain significant experience in the evaluation of the economic issues involved.

In addition to the establishment of the “expert centre” on issues of economic and financial law the Dutch judiciary has taken practical measures to aim to ensure that a limited number of judges can reach a level of specialisation. This is mainly done by identifying a group of judges that are willing to specialise in competition law and then to take measures to ensure that the members of this group will hear a sufficient number of cases. Crucially, a very large number of civil law judges of District Courts have been appointed as deputy judges in one or more of the other District Courts. It is therefore possible to select a group of specialising judges and to put together chambers in each District Court in which these specialists will sit when complicated competition law related cases are commenced before that Court. This scheme is a practical and flexible way of responding to the demand for specialisation, without having to alter the existing judicial organisation by establishing a dedicated, specialist competition law court.

*What standard of proof is required to establish the existence of an infringement of Article 81 or 82 in your national law?*

In administrative proceedings the burden of proving the existence of an infringement rests with the NMa. The NMa appears to consider that the standard of proof under the Competition Act is the same as the standard of proof for the EC Commission in the application of Articles 81 and 82 EC.<sup>29</sup> If the NMa imposes a fine, this qualifies as a (criminal) sanction in the sense of the European Convention on Human Rights (“ECHR”). Hence the standard of proof in such cases is that required under the ECHR.

Provisional orders sanctioned by periodic penalty payments are not considered to fall within the ambit of the ECHR. The standard of proof applying in such cases is that provided for in the General Administrative Law Act. On appeal the District Court will test whether the NMa has gathered sufficient evidence in order to enable it assess the facts and to weigh the interests involved in the subject matter of the decision. Furthermore, a duty rests with the NMa to provide sufficient reasons for the decision taken.

---

<sup>29</sup> See, implicitly, e.g. the decision of the NMa in the “North Sea Shrimps” case, referred to above, fn. 14.

In civil law proceedings the general rule is that the plaintiff has to state the facts which constitute the infringement which forms the basis for the claim. If these facts are disputed the plaintiff is, generally, under the duty to provide sufficient evidence to support the statement of facts. An exception to this general rule may be provided for either specifically in a statute or in circumstances in which it follows from the general principle of reasonableness and fairness that the burden of proof should not rest on the party alleging that the facts occurred, but - in stead - on another party. Generally, the civil law judge is free in the appreciation of the evidence presented in the proceedings.

*What form of appeal or judicial review will be available to undertakings concerned against negative findings/decisions of the NCA?*

The general appeal procedure in administrative law cases is described above. Currently, there is an obligatory administrative appeal phase in which the NMa can first reconsider its decision. Thereafter an appeal may be lodged with the specialised administrative law chamber of the District Court of Rotterdam. Further appeal is open to the Industrial Appeals Court.

*Where a private complainant both lodges a complaint of infringement to the NCA and brings a court proceeding for injunctive relief and/or damages, (“private enforcement”), which procedure will take precedence and by reference to what criterion or principle will priority be decided?*

There is no general or statutory rule concerning the precedence of the one or the other procedure. In cases where a complainant lodges a complaint and takes no further action court proceedings for injunctive relief (“private enforcement”) will normally take precedence in the sense that a (first) judgement is likely to be handed down before the NMa issues a decision on the merits regarding the complaint. The fact that the NMa is also competent to rule on the issue does not imply that a civil law judge is not competent to provide interim relief. In a recent case concerning alleged abuse of a dominant position a civil law judge provided interim relief even though the NMa had allegedly approved the conduct (and was further investigating it at the time of the civil law proceedings).<sup>30</sup>

The Act affords the NMa itself the competence to take interim measures in the form of a provisional order sanctioned by periodic penalty payments in order to terminate the alleged infringement. The question which proceedings take precedence has occurred in situations in which both the court and the NMa can provide interim relief. In such situations the NMa has sometimes referred parties to civil law interlocutory proceedings. Conversely, civil law judges have ruled in cases that civil law interlocutory proceedings are not an appropriate forum to decide on complicated competition law issues. In those situations civil law judges have sometimes referred the parties explicitly to the NMa.<sup>31</sup>

---

<sup>30</sup> Order of the President of the District Court of The Hague of 12 November 2003 in the case between Educatief Net (“nl.tree”) and KPN and others.

<sup>31</sup> See, e.g., the decision of the President of the District Court of Utrecht of 14 February 2002 in the injunction procedures brought by a retail chain (“Superunie”) for alleged abuse of a dominant position (by “Interpay”, a joint venture between nine major banks which organizes the operation of the central debit card system in the Netherlands). Even though the President of the Court found “strong indications” that Interpay abuse its dominant position, he concluded that further investigations “preferably to be conducted

*Do the roles of the NCA and the Commission as parties entitled to make written and/or oral submissions to a court under Article 15 (3) pose any particular procedural or other difficulty in your national legal system?*

Currently yes, but following the amendments envisaged as being implemented before 1 May 2004 these problems should be solved. A problem that remains, and which is likely to occur in other Member State jurisdictions, is that there are no provisions in the Dutch civil procedural law code concerning the problem of the possible confidential nature of elements of the written or oral submissions of the NMa or Commission (including supporting documents). Regulation 1 itself does not seem to include a prohibition on the Commission or NMa submitting in its intervention information which is confidential to one or more of the parties to the civil law procedure. It is a principle of Dutch civil procedural law that the parties to the dispute have access to the same information. Hence it is difficult to foresee how the confidentiality of information is guaranteed in situations in which this is warranted. Moreover, while the Dutch civil procedural law code stipulates (in Article 67 (2)) that the parties can give their opinion on the questions and the documents the judge is asking for pursuant to Article 15(1) of Regulation this does not provide guarantees. Furthermore, this provision will not be applicable in the case of own initiative *amicus curiae* initiatives of the NMa and Commission pursuant to Article 15(3) of the Regulation.

Moreover, there is no guarantee that the information and documents submitted by the Commission or the NMa will be used exclusively in the relevant national court proceedings in which Article 81 or 82 EC is applied. Whereas Regulation 1 does explicitly state that any information exchanged between the NCAs and the Commission in the context of the co-operation within the network can only be used for the purpose of the application of Article 81 and 82 EC and for the subject-matter for which it was collected by the transmitting authority (see Article 12(2) of Regulation 1) there is no similar provision concerning the information the Commission or NCA has collected and which is then used in its intervention in civil law proceedings.

*What standing would be accorded by your national courts to the Commission intervening as amicus curiae before them under Article 15(3)? Would it be regarded as entitled to intervene in support of a particular party or proposition and to plead for a specific result to the case?*

The standing accorded to the Commission (and NMa) in the amended civil procedural law act has a *sui generis* character. A specific provision will be adopted. The provision follows the model of the existing competence which allows the public prosecuting body, not acting as a party to the dispute, to present its opinion in a particular case. The same will apply to the Commission and the NMa; they will not act as a party. There is nothing, however, preventing these institutions from supporting (explicitly or implicitly) a particular proposition or from pleading for a specific result, even if this supports the case of one of the parties to the dispute.

---

by the NMa” were required to decide the matter. See also the decision of the President of the District Court of The Hague of 10 July 1998 (*ACSI Internationale Campinggids v. ANWB*) in which the President ruled that there is no need for civil law interim measures since the NMa has the competence to adopt interim measures. Only where a decision cannot be foreseen within a reasonable period is there room, in the President’s opinion, for a civil law injunction procedure.

*If a national court is seised of a case involving application of Article 81 or 82, can it of its own motion refuse to rule on it or suspend the proceedings if, for example, it is informed that the Commission or the NCA or court of another member State is examining the same complaint? If informed that the Commission "contemplated" for the purposes of Article 16 (1) taking a decision relevant to issues in a proceeding before the court, would that court be obliged in national law to suspend the proceeding?*

While judges can of their own motion suspend proceedings, there is no obligation arising from national law to suspend proceedings if the Commission is "contemplating" taking a decision. However, irrespective of the absence of a specific provision of national law concerning the duty for civil courts to stay proceedings in the situations referred to in the question, it would seem to follow from the principles of EC law itself that a judge may stay proceedings if he is informed that the European Commission is examining a complaint relating to the same conduct.<sup>32</sup> In the case of interlocutory proceedings the answer may be different. In particular in situations in which NCAs of another Member State are contemplating taking measures this would not necessarily imply that a civil law judge will stay proceedings. On the contrary, since civil law judges in interlocutory proceedings do not necessarily await the judgement of the national competition authority (the NMa) if that institution is contemplating action it is even less likely that courts will await the outcome of pending investigations of foreign NCAs.<sup>33</sup>

*Do the provisions for exchange of information (Article 12) and for cooperation by the NCA with the Commission and with the NCAs of other Member States (Article 11) pose any legal or constitutional problem? In particular what will be the status and evidential value of information supplied to your NCA by the Commission or the NCA of another Member State?*

No constitutional problems are foreseen in the context of the envisaged co-operation. The status and the evidential value of information supplied by the Commission or the NCA of another Member State will have to be determined by the NMa and – on appeal – the judicial review bodies.

*Does the obligation imposed on the NCA to supply information to the Commission or to the NCAs of other Member States (Articles 12 and 15) pose any difficulty? Will the undertakings concerned have any right to be informed of such information prior to its being communicated and will they have any right to access to it under any national legislation governing freedom of information or access to documents?*

The obligation imposed on the NMa to supply information to members of the network does not pose any constitutional difficulties. There is no obligation for the NMa to inform parties of the fact that the information will be communicated to members of the network. This diverges from the procedure under the civil law procedural law, regarding questions to be posed by national courts to the Commission or NMa. In those cases national courts are obligated to inform the parties of the questions that will be posed and of the documents that will be transmitted to the authorities. Parties have the right to comment on both the questions and the documents.

---

<sup>32</sup> See the *Delimitis* case (referred to above) and Case C-344/98, *Masterfoods*, ECR [2000] I-11369. See also Article 16 of Regulation 1.

<sup>33</sup> See above fn. 28.

*The Commission can impose only financial penalties but NCAs may impose “any other penalty provided for in (-) national law” (Article 5). Article 12 (3) limits the use of information supplied by the Commission or another NCA to proceedings leading to non-custodial penalties. Does this discrepancy pose any problem in your national law? Where the penalty falls to be decided by a court – either as competent authority or on appeal from the NCA – is the penalty proposed by the prosecuting/applicant party or assessed and decided exclusively at the discretion of the court?*

The noted discrepancy does not pose any problems in Dutch law. As is clear from the above, it is the NMa which decides in the first instance on the penalty for infringements of provisions of the Act. On appeal the District Court fully reviews the appropriateness of the penalty with the proviso that it cannot raise the level of fines imposed by the NMa.

*Decentralisation of enforcement will increase the importance of the application of articles 81 and 82 in private litigation. Will your courts be entitled and/or obliged to raise of their own motion questions as to the possible application of those articles in the course of litigation where they have not been raised or pleaded by the parties themselves?*

This is a complicated question under Dutch law to which there is no straightforward answer. In the first place it is relevant to recall that under Dutch private procedural law the parties determine the scope of the dispute, i.e. the issue they want to see resolved and settled by the court. In line with this general principle courts must rely on the facts raised and - where these facts are disputed by the other party - proved by the parties. Conversely, courts may amend the legal grounds underpinning claims of a party as long as the facts presented by (one of) the parties provide a basis for applying the relevant legal provisions. It follows from this rule that there is not a general duty for courts to raise of their own motion questions as to the possible application of Articles 81 and 82 EC where the parties to the dispute have not raised sufficient facts and circumstances as to turn the question of the applicability of these articles into legal grounds which, in such situations, have to be amended by the courts. The Court of Justice has confirmed that this rule of Dutch procedural law is compatible with Community law. In “*Van Schijndel*” the Court ruled there is not an obligation arising from Community law for a national judge to raise of its own motion legal grounds based on the violation of a provision of Community law, if for the adjudication of that issue the judge would have to depart from the passive role accorded to him under national law, by extending the scope for the dispute as presented by the parties and to base itself on facts and circumstances other than those raised by the party to the dispute which would profit from the application of that principle of Community law.<sup>34</sup>

There is some confusion however as to the continued validity of this approach since the Court of Justice’s judgement in the *Eco Swiss* case.<sup>35</sup> In that judgement the Court ruled, in the specific context of a claim for annulment of an arbitral ruling, on the question of what the situation is where a rule of national procedural law obliges a national court to annul an arbitral ruling if this ruling is contrary to provisions of national law with a

---

<sup>34</sup> Joined Cases C-430/93 and C-431/93, *Van Schijndel and Van Veen v. Pensioenfondsvoor Fysiotherapeuten*, ECR [1995] I-4705. See also Case C-312/93, *Peterbroeck a.o. v. Belgium*, ECR [1995] I-4599.

<sup>35</sup> Case C-126/97, *Eco Swiss China v Benetton*, ECR [1999] I-3055.

public order character. If such a rule exists, the Court ruled, then a national judge should assess whether the behaviour central to the dispute constitutes a violation of Article 81 EC, because Article 81 EC is – in view of its crucial importance for reaching the objectives of the EC Treaty – a rule which is equivalent to a national rule with a public order character. Hence the judge must apply *in such a situation* Article 81 EC of its own motion. More recently, in *Courage v. Crehan*, the Court – referring to its *Eco Swiss* judgement – ruled that Article 81 EC “constitutes a fundamental provision which is essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market”.

It would seem that the *Eco Swiss* judgement leaves unaffected the general rule, laid down by the Court in *Van Schijndel*, that a civil court does not have to raise of its own motion questions as to the possibility of the applicability of Articles 81 and 82 EC if the parties have not identified sufficient facts and circumstances for the judge to base its assessment on. However, in view of various judgements in which the Court ruled that it follows from the principle of effective protection of rights conferred on individuals by Community law that national courts have to apply of their own motion provisions with a public order character combined with the ruling that Article 81 EC has a public order character in arbitral proceedings, the correct interpretation of *Van Schijndel* (and *Peterbroeck*) and *Eco Swiss*, remains uncertain.<sup>36</sup>

*Article 6 of the Regulation empowers national courts to apply Articles 81 and 82. What forms of order or remedy will be available to be granted by your courts in giving effect to this provision? (For example, declarations as to infringement: declarations as to compliance with Article 81 (3): annulment of agreements or of particular clauses: injunctions to restrain repetition of infringements: interim measures in advance of final judgment: damages.)*

There does not exist, under Dutch law, an exhaustive catalogue of remedies available to parties in civil law proceedings. Hence all of the suggested orders / remedies are available to be granted by the courts.

As a substitute for Commission exemption decisions parties to an agreement could seek a declaratory judgement that the agreement they contemplate entering into fulfils the criteria of Article 81(3) EC. The value of such a declaration may in practice be limited. First, the judgement is only binding upon the parties to the dispute (i.e. the agreement) themselves. Secondly, the judgement will be based on the facts submitted to the judge. These facts may change over time. Nevertheless, if the parties submit facts extensively the validity of their contract may “be certified” by the declaratory judgement for as long as these facts do not alter. Such a declaratory would arguably not be very different from Commission exemptions the validity of which is also limited in time and the factual situation upon which the Commission based its judgement.

*Will such remedies be available to private parties against the State and/or State undertakings?*

---

<sup>36</sup> See, e.g., Joined Cases C-240/98 and C-244/98, *Océano Grupo Editorial v. Murciano Quintero*, ECR [2000] I-4941 and Case C-48/98, *Söhl & Söhlke*, ECR [1999] I-7877. See also for the importance (suggesting public order character) attributed to the competition law provisions of the EC Treaty by the Court of Justice; Case C-453/99, *Courage v. Crehan*, ECR [2001] I-6297, referring explicitly to the *Eco Swiss* judgement (in paragraphs 20-21) and Case C-198/01, *Consortio Industrie Fiammificieri v. Autorità garante della concorrenza e del mercato*, ECR [2003] I-0000 (*nyr*).

Yes, in as far as the State can be considered in a particular case to be acting as an undertaking in the sense of Article 81 EC of course.

*Identify any other issues or areas of potential difficulty in the operation of the new regime which you consider should be discussed under this topic at the conference.*

In order for the system envisaged by the European Commission to work within the framework of Regulation 1 there are two elements which, as minimum requirement, have to function properly: the co-operation between the European Commission and national competition authorities (and NCAs inter se) as well as the co-operation between the national courts and the European Commission and NCAs.

Because of their role, which is primarily passive and reactive, there is no “network” of national courts within which the co-operation of cases pending before the various national courts will take place. The driving force behind decentralised application of Articles 81 and 82 EC by national courts will be private parties. It remains to be seen whether the absence of a harmonised procedural framework and the absence of multiple damages (such as the “treble damages” that can be awarded in the United States) obstructs the efficacy of this aspect of the “modernisation” programme. In as far as the alleged exceptional complexity of the evaluation of the economic issues involved in the application of Article 81(3) EC is concerned, the Dutch judiciary has taken practical measures to enable individual judges to obtain specific expertise in the adjudication of competition law cases. The envisaged “pool” of specialised judges, the members of which will be “touring” through the Netherlands and sit in the respective chambers of the District Courts according to the needs (i.e. only if a – complex – competition law case is lodged with that particular Court), may be a good example of a flexible and practical response to the demand for specialisation in competition law within the judiciary.

The co-operation between the Commission and NCAs within the network of enforcement agencies is well developed in the Regulation itself and in the (draft) Notice of the European Commission on co-operation within the network of NCAs. Nevertheless there would seem to be at least three - inter-related - areas in which co-operation within the network may lead to as yet unresolved problems. These areas relate to diverging rules and competences for NCAs in investigation, examination and adjudication of cases. These three aspects are briefly touched upon below.

The national rules in such areas as investigative powers, professional secrecy and privileged documents vary between the 25 Member States. The discrepancy in rules may lead to problems in various situations in which EC competition law is applied parallel to national law. To take the rules on privileged documents as an example, the Act contains a legal privilege for correspondence between undertakings and lawyers admitted to the bar. In-house lawyers can be admitted to the bar but relatively few are. Other jurisdictions, such as the United Kingdom, may have a wider legal privilege (covering all in-house lawyers) while others may have a more limited legal privilege (excluding in-house lawyers). Article 12(1) of Regulation 1 stipulates that the Commission and the NCAs shall, for the purposes of applying Articles 81 and 82 EC, have the power to provide one another with and use in evidence any matter of fact or of law, including confidential information. Article 12(2) clarifies that information thus exchanged shall only be used in evidence for the purpose of Articles 81 and 82 EC and

in respect of the subject matter for which it was collected by the transmitting authority. However, where national competition law is applied in the same case and in parallel to Community competition law and does not lead to a different outcome, information exchanged under Article 12 may also be used for the application of national competition law. Article 12 of the Regulation takes precedence over any conflicting rule of national law.<sup>37</sup> The question rises what the status will be of documents retrieved by an NCA in a jurisdiction with a narrowly formulated legal privilege which are forwarded to an NCA, to which a case has been allocated because it is “best-placed” to deal with it, in a jurisdiction in which the legal privilege would have excluded the use of those documents as evidence. These and similar problems arising from incongruous procedural rights and duties may thwart the effective operation of the network.

Likewise, diverging rules regarding leniency applications can raise problems in practice. Leniency policies of NCAs play an increasingly important role in the (intensified *ex post*) enforcement of competition law. Both the European Commission and various NCAs have adopted formalised leniency guidelines. The contents of these guidelines vary. Numerous practical problems can be foreseen. First, the question how the application of the various leniency guidelines interacts with the operation of the network of NCAs. Article 11 of Regulation 1 holds that the NCAs, when acting under Articles 81 and 81 EC, shall inform the Commission in writing “before or without delay after commencing the first formal investigative measures”. The Commission holds that a leniency request has to be notified within the network in accordance with Article 11.<sup>38</sup> The question is what and when an NCA has to submit to the Commission in the context of leniency applications. If the handling of leniency requests is notified in a late stage (or if the information provided is too limited to inform the other NCAs sufficiently about the undertakings and infringement(s) concerned), the lack of mutual knowledge about leniency applications. In these circumstances different NCAs may grant leniency to different applicants. While this is not per se incompatible with the system foreseen,<sup>39</sup> such conflicting decisions in the application of Article 81 EC in different Member States are problematic and may lead to the result that numerous NCAs are pursuing a case relating to the same infringement against different undertakings participating in the infringement. Again, this would seem to go against the aspirations of the “modernisation” project.

Finally, similar issues arise in relation to the existence of diverging guidelines and practices on the setting of fines. Within the boundaries set by the principle of *non bis in idem* there remains ample scope for inconsistencies in the handling of similar cases by different NCAs. In the *North Sea Shrimps* case for instance the NMA decided to impose fines only for the infringement of Article 81 EC. In doing so it applied its own guidelines on the setting of fines. If NCAs were to continue applying individual policies in the decentralised application of Articles 81 and 82 EC the consistency in this element (fines) of the application of Community law may be at stake. Similar infringements of the same Community law provision may lead to dissimilar fines.

---

<sup>37</sup> Cf. Commission (draft) Notice on the co-operation between the Commission and NCAs, para. 27.

<sup>38</sup> Commission (draft) Notice on the co-operation between the Commission and NCAs, para. 39.

<sup>39</sup> The Commission explicitly acknowledges that individual applications have to be made at each relevant NCA, see Commission (draft) Notice on the co-operation between the Commission and NCAs, para. 38.