

# NATIONAL REPORT FOR THE NETHERLANDS

## FIDE XXIV Congress, Madrid 2010

*Topic 3: “Public Capital and Private Capital in the internal market.  
Securing a level playing field for public and private enterprises”*

National Rapporteur: Jenny Davidson<sup>1</sup>

### **A. Constitutional law or other fundamental/framework laws**

*At Member State level, it is, first of all, interesting to ask the question whether there are rules that require that certain activities to be performed by the State and/or to remain in the public sector. The Constitutions of some Member States contain such rules.*

#### **Provision of goods or services by the government**

**Q.13 Please state whether the Constitution of your Member State contains rules that require certain goods or services to be provided by the government.**

The Dutch Constitution identifies certain policy areas as ‘objects of concern’ of the government. These areas are employment (Article 19(1)), social security and the spreading of welfare (Article 20(1)), the environment and the habitableness of the country (Article 21), public health (Article 22(1)), promotion of sufficient housing (Article 22(2)) and education (Article 23(1)). The classification as ‘objects of concern’ does not entail an obligation for the government to provide certain goods or services. These provisions do, however, require the government to take measures, or create legislation ensuring the protection of certain interests related to these topics. Similar conditions can be found in Article 133, which provides for the creation of district water boards (*Waterschappen*) and regulation of their competencies, and Article 134, which provides for the creation of new public bodies, inter alia for professions and business.

The only field in which the Dutch Constitution directly requires the government to provide certain services is education. Article 23(4) of the Dutch Constitution stipulates that public authorities are to provide adequate primary education in a sufficient number of schools in every municipality. In practice, municipalities usually maintain one or more public schools which fall under the direct supervision of the municipality, leaving other schools to be privately organised.

**Q.14 Are there special laws that lay down similar requirements? The term special laws refers to laws that have a special hierarchical nature in the sense that they have priority over ordinary laws.**

It is important to note that the Dutch constitutional system does not acknowledge the existence of ‘special laws’ that have a higher hierarchical standing compared to ordinary laws. Even so called “organic laws” (laws whose existence is mandatory due to a constitutional obligation) do not have a special status. All Acts of Parliament are equal in nature and legal effect. The compatibility of Acts of Parliament with the Dutch Constitution and the fundamental freedoms and rights contained therein is decided upon by Parliament (as the legislature) alone and not by the judiciary.<sup>2</sup> The Acts

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<sup>1</sup> This report is the result of a true group effort, written by Jenny Davidson (rapporteur and editor for the Netherlands), Patrick van den Berghe, Nienke Saanen, Herman Voogsgaard and Willem Vriesendorp.

<sup>2</sup> Article 120 of the Dutch Constitution. It should be noted that a proposal to modify the Dutch Constitution has been tabled by some parliamentarians. This proposal would allow the judiciary to monitor the compatibility of Acts of Parliament with the fundamental freedoms laid

of Parliament that contain obligations for public authorities to provide certain goods or services are discussed below.

The Water Grid Act of 1957 (*Waterschapswet*), as modified by the Modification Act regarding the public ownership of drinking water companies, states in Article 1a that a public authority will provide drinking water. Companies are prohibited to provide drinking water unless that company is directly or indirectly (fully) controlled by public authorities.<sup>3</sup> The new Drinking Water Act (*Drinkwaterwet*) which is currently being debated in the Dutch Senate, and which will come to replace the Water Grid Act of 1957, will retain these requirements.<sup>4</sup>

The Aviation Act of 15 January 1958 (*Luchtvaartwet*), as lastly modified by the Reparation Act of 13 March 2008, (Article 37ab) designates the Minister of Justice as the public authority responsible for security in civil aviation. The Minister is therefore obliged to provide security at civil airports and airport facilities with the assistance of the Commander of the Dutch Gendarmerie (*Marechaussee*). Article 8.2a of the Act on Aviation of 18 June 1992 (*Wet op de Luchtvaart*) explicitly states that the legal and economic<sup>5</sup> majority of the shares in the operator managing the national airport Schiphol (also known as Amsterdam Airport), should be held by public authorities. Private security operators may operate at airports, but will act under supervision and authority of the Minister of Justice. Article 5.13 of the Act on Aviation attributes the provision of air traffic control services in the Amsterdam Flight Information Area to Air Traffic Control The Netherlands (*Luchtverkeersleiding Nederland, LVNL*) and the Minister of Defence. LVNL is an independent public authority (*zelfstandig bestuursorgaan*) that falls under the supervision of the Minister of Transport. The rules governing this organisation are laid down in Articles 5.22 to 5.46 of the Act on Aviation. In addition, Article 5.14 of the Act on Aviation Tasks provides that the LVNL may (partially) transfer certain tasks to the international organisation of Eurocontrol.

The Environmental Management Act (*Wet Milieubeheer*, Article 10.21) instructs municipalities to collect household waste. Article 10.24 specifies that municipalities may exercise this responsibility jointly with other municipalities and can choose to either execute this public task themselves or by hiring a private contractor to do the collecting. However, in all cases the legal responsibility rests with the municipalities. Article 10.22 of the Environmental Management Act increases the responsibility of municipalities by also obliging them to collect rough household waste such as old furniture. In addition, certain provincial ordinances may require municipalities to arrange for the collection of paper and card board, textiles, glass and small scale chemical waste.

The Electricity Act 1998 (*Elektriciteitswet*) and the Gas Act (*Gaswet*), as lastly modified by the Independent Grid Administration Act (*Wet onafhankelijk netbeheer*), require the transmission grid and the distribution grids to be publicly owned and stipulate the direct or indirect public ownership of the transmission system or distribution system operators (Article 93 Electricity Act 1998 and Article 85 Gas Act). This requirement of public ownership will be discussed in more detail in our answer to question 34.

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down in the Dutch Constitution, which is currently prohibited by the Dutch Constitution (Article 120). This proposal will not affect the above mentioned specific Articles which indicate a specific interest by government in education, social housing etc. See: *Voorstel van wet van het lid Halsema houdende verklaring dat er grond bestaat een voorstel in overweging te nemen tot verandering in de Grondwet, strekkende tot invoering van de bevoegdheid tot toetsing van wetten aan een aantal bepalingen van de Grondwet door de rechter, Kamerstukken I 2004/05, 28 331, nr. A*

<sup>3</sup> Article 1, paragraph e and f, in combination with Chapter IA of the Water Grid Act.

<sup>4</sup> The obligation for public authorities to provide drinking water will be laid down in Article 2 of the proposed Drinking Water Act and the requirement for drinking water companies to be directly or indirectly controlled by public authorities (the so called qualifying legal persons), will be found somewhere in chapters I and II.

<sup>5</sup> Dutch law makes a distinction between legal and economic ownership (of shares). Legal ownership of shares implies ownership from a civil law perspective, meaning the ability to exercise the voting rights associated with the shares. Economic ownership of shares implies that the owner may also reap the economic benefits of the shares, for example in the form of dividend.

Finally, the Mining Act (*Mijnbouwwet*) contains provisions on public participation in mining activities. The exploration and exploitation of mineral resources in the Netherlands is always performed jointly by a private company and the public (limited) company designated by the Minister of Economic Affairs. Articles 81 and 82 of the Mining Act stipulate that all shares in this designated company must be directly or indirectly held by the Dutch State.

**Q.15 Does the Constitution of your Member State contain guarantees that certain activities are reserved for the private sector?**

No. There is no fundamental prohibition in the Dutch constitution for public authorities to undertake commercial activities nor is there a reserved domain for the private sector. With respect to certain activities, the Dutch Constitution mentions that they are "free". This means that the private sector and non-profit organisations may fulfil these activities. These provisions therefore do not have the effect of reserving certain activities for the private sector, but are rather aimed at guaranteeing equal treatment between the private and public sector. A good example is Article 23 of the Dutch Constitution mentioned under question 13, which states that the provision of education is free, but that municipalities have to guarantee a minimum level of public education.

Between 1997 and 2004, there was much political debate on how to prevent undue distortions of competition caused by governmental bodies engaging in commercial activities. The existing legal framework proved insufficient to create a level playing field for public and private companies. The Government set up a working group 'Market and Government' (*Markt en Overheid*), which published a report in February 1997 and ultimately lead to the adoption of an official governmental position on Market and Government on 8 April 1997. In the course of the implementation of this position,<sup>6</sup> the Cabinet published a decree regarding commercial activities by the government and governmental bodies (*Aanwijzingen inzake het verrichten van marktactiviteiten door organisaties binnen de Rijksdienst*), on 8 May 1998.

The decree instructs the governmental organisations not to engage in commercial activities unless the exercise of these activities has been mandated by law or international obligations. In some cases the exercise of commercial activities is allowed if the public interest requires this exercise. This is often the case when the commercial activity is intertwined with the exercise of public authority or closely linked to tasks and obligations of the government. If after a careful consideration the exercise of commercial activities is deemed necessary, the governmental organisations are then obliged under the decree to engage in these commercial activities under conditions comparable with those of the private sector. This diminishes the risks of state aid and unfair competition between the private and public sector.

Some of the principles laid down in the Decree have now been incorporated into Acts of Parliament in various fields, such as the Act on the Chambers of Commerce of 1997 (*Wet op de Kamers van Koophandel*)<sup>7</sup> and The Act on the National Bureau of Statistics (*Wet op het Centraal Bureau voor*

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<sup>6</sup> See for the implementation plan: Kamerstukken II 1996/97, 24036, nr. 45.

<sup>7</sup> Article 30 regulates the exercise of the powers and activities of the Chambers of Commerce in relation to other entities such as private competitors. Based on this Article, the activities of the Chambers such as legalisation of documents, the promotion of trade and industry and the provision of services to entrepreneurs may only be exercised in so far as these activities are not sufficiently provided for by other (commercial) organisations. Activities which lead to unwarranted competition with commercial service providers are prohibited. The Article provides for the possibility to prohibit, or subject to specific regulation, the exercise of certain activities by the Chambers of Commerce by Order in Council. Until now such an order has not been adopted. It is relevant to note that the rules laid down in Article 30 are also applicable to legal persons whose majority of shares or voting rights are in the hands of one or more Chambers of Commerce or whereby the Chambers control the board of the legal person concerned. Finally, Article 35a states that when a Chamber exercises its aforementioned activities, it is under the obligation to require compensation of its costs from parties using its services.

*de Statistiek*)<sup>8</sup>. A proposal to codify the principles contained in the decree in an Act of Parliament (*wetsvoorstel Markt en Overheid*) has been on and off the table for several years now. The original proposal from 2001<sup>9</sup> was later shelved in 2004, as it was considered to impose 'unacceptable' administrative and managerial costs and would lead to an undesirable limitation of governmental autonomy. Currently, a revised (somewhat slimmed-down) proposal for an Act of Parliament<sup>10</sup> is however being discussed in the Dutch Senate.

### **Nationalisation of undertakings/government participation**

#### **Q.16 Are there any rules that prohibit nationalising undertakings or certain sectors of the economy?**

There are no specific rules in national legislation prohibiting the nationalisation of undertakings or certain sectors of the economy. However, the more general rules governing the expropriation and regulation of property do apply.

Article 14(1) of the Dutch Constitution stipulates that expropriation is only allowed if the public interest so requires and if the compensation to the expropriated is secured before the act of expropriation. The requirement of security of compensation prior to expropriation can, however, be waived in case of an emergency (Article 14(2)). When property is destroyed or made useless in the public interest, or when the exercise of the right of ownership is limited, the right to compensation may also exist (Article(3)).

The Expropriation Act of August 1851 (*Ontheigeningswet*)<sup>11</sup> contains additional rules and procedures regarding expropriation both in normal situations and in specific cases, such as expropriation for the benefit of fortification, nature development, drinking water, town and country planning and emergency situations, et cetera. A fundamental underlying principle of the Expropriation Act is the principle that expropriation by negotiation is preferable to expropriation by force: the Act instructs public authorities to acquire the relevant assets in agreement with the owner. If such an agreement cannot be achieved, the Act provides for a procedure of forced transfer of ownership. The public interest necessitating an act of expropriation should always be defined and made public. Normally, this involves the adoption of an Act of Parliament, although in certain cases, a Crown Decision (*Koninklijk besluit*) may also be sufficient. In most cases the level and amount of compensation is decided upon by a judge. The Expropriation Act contains various rules on the method and amount of compensation and regarding court proceedings.

As stated above under question 14, Article 120 of the Dutch Constitution prohibits Dutch courts from assessing the compatibility of Acts of Parliament with the Dutch Constitution and the fundamental rights contained therein. As a consequence, the fundamental rights protection under the Dutch Constitution is limited when expropriation takes place by means of an Act of Parliament. The expropriated owners can, however, invoke before a judge the principles laid down in Article 1 of the First Protocol annexed to the European Convention on Human Rights (ECHR). These principles are directly applicable in the Dutch legal order through Articles 93 and 94 Dutch Constitution, and are not subject to the same restrictions of assessment as the Dutch Constitution itself is.

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<sup>8</sup> Article 5 states that the National Bureau of Statistics can provide services to third parties in certain situations. This provision of services may however not lead to unwarranted competition with commercial service providers which provide similar services. The Minister of Economic Affairs may adopt rules regarding the provision of services to third parties.

<sup>9</sup> Dated 13 October 2001 (Kamerstuk 2001-2002, 28050, nr. 1-2, Tweede Kamer).

<sup>10</sup> Wetsvoorstel Markt en Overheid (Kamerstukken I, 2008/09, 31 354, nr. A).

<sup>11</sup> It should be noted that an overall modernisation of this Act is in preparation by the Minister of Justice.

There are also a number of bilateral treaties, which contain specific clauses regarding nationalisation and expropriation of assets belonging to the nationals of the countries that are party to the bilateral agreement. A good example of such an agreement is the bilateral investment treaty between The Kingdom of the Netherlands and the Republic of Burundi (*Verdrag inzake de bevordering en bescherming van investeringen tussen het Koninkrijk der Nederlanden en de Republiek Burundi of 24 May 2007*)<sup>12</sup>. Article 6 of this Treaty prohibits both The Netherlands and Burundi from adopting any measure that may directly or indirectly cause the other state's investors to lose their investment, unless (i) the measures are taken in the public interest and with due process, (ii) the measures are non-discriminatory and are not in conflict with any of the undertakings that the state adopting the measures has committed to in the treaty and (iii) the measures are accompanied by a fair compensation.

Article 6 of the Treaty also stipulates that compensation shall be (i) equivalent to the true value of the investments concerned, (ii) shall include interest based on the usual commercial interest rate until the date of payment, (iii) shall be paid without delay and (iv) should be transferable to an investor's country of choice, in a currency which is acceptable to the investors concerned.

It should be noted that these kinds of bilateral investment treaties also exist between Member States of the European Union and are subject to various legal proceedings (see for example Case C-205/06 *Commission/Austria* and Case C-249/06 *Commission/Sweden*). If the Treaty of Lisbon comes into effect, these treaties will have to be altered, specifically in light of the modified powers of the European Union regarding trade and commerce.

#### **Q.17 Are there rules that subject nationalising to procedures or specific rules?**

The Financial Management Act of 13 July 2002 (*Comptabiliteitswet*) contains general rules regarding the financial operations and budget of the national government. It also includes specific rules governing the government's direct or indirect establishment of legal entities under civil law as well as the government's participation in, or taking control of public or private limited companies.

Article 34(1) of the Act prohibits the establishment of (private law) entities without the consent of the Council of Ministers and prior notification (30 days) of the Parliament. Article 34(2) obliges the Minister involved to discuss the establishment with the National Court of Auditors before submitting the proposal to the Council of Ministers for approval. During the afore-mentioned period of 30 days the Parliament has the possibility to request further information or even to require the government to halt the establishment of the entity and request an Act of Parliament which will give the government a mandate to establish said entity.

The government is free to participate in public or private limited companies, as long as the sum involved does not exceed the maximum amount set by the Minister of Finance. If this maximum is exceeded, a participation of 5% or more can only take place after informing Parliament and waiting for a period of 30 days. The same powers of Parliament are applicable as with the establishment of private entities (Article 34(4)). The above-mentioned rules regarding participation are also applicable to the purchasing of bonds by the government or the provision of loans that are convertible into shares. If these bonds or loans amount to the equivalent of at least 5% of the shares, the obligation to inform Parliament applies (Article 34(5)). Please note that these obligations do not apply if the participation or provision of loans is not aimed at increasing the government's relative share/participation in the capital of the company (for example, when the company issues new shares

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<sup>12</sup> Tractatenblad 2007, nr. 187 en Tractatenblad 2008, nr. 15.

to increase its capital base and the government purchases additional shares solely in order to prevent a diminishing influence and participation).

Regarding all other kinds of participation, the government is required to inform Parliament once the transaction has taken place. This is also the case when the shareholding is partially or fully ceded in a public limited company or (private) limited company: Parliament must always be informed afterwards (Article 34(8)).

**Q.18 Are there, in the absence of such rules, other procedures or mechanisms that have to be followed for the nationalisation of undertakings?**

There are no other rules, procedures or mechanisms to be followed for the nationalisation of undertakings than those described under question 16 and 17.

**Q.19 Are there rules for the acquisition or sale of shares of enterprises by the government?**

**Q.20 Are these rules different depending on whether the acquisition leads to control or not? And do different rules apply to a sale leading to a loss of control?**

There are no specific rules regarding the acquisition or sale of shares of companies by the government, with the exception of the rules laid down in the Financial Management Act, as described under question 17.)<sup>13</sup> These rules do not differ depending on whether the acquisition leads to control or not.

**Q.21 Are contracts concluded by state-owned enterprises subject to normal civil law? Please specify.**

Contracts concluded between state-owned companies and third parties, such as consumers or other companies, are subject to normal civil law in the Netherlands. In some cases there are specific rules governing the relationship between the government and the state-owned company. These rules are usually laid down in public law and not in contracts or other civil law instruments or procedures.

**Q.22 Is there a rule or practice that one ministry is responsible for enterprises that are controlled by the government or are there different ministries responsible according to their sectoral responsibilities?**

The governmental policy regarding the management of state shareholdings (*Nota Deelnemingenbeleid*) states that the Minister of Finance is responsible for the management of the shareholdings. However, the same policy indicates that the Minister has to co-ordinate his policy with other Ministers, when relevant public interests are involved that are the responsibility of other Ministers. The policy on state shareholdings will be discussed in more detail under question 34.

**Q.23 Are there rules that restrict the possibilities for other governmental bodies, states, provinces, municipalities etc. to participate in the capital of private enterprises?**

From a constitutional perspective, governmental bodies fall under the direct responsibility of the relevant Ministers and the Minister of Finance and can not autonomously decide to participate in

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<sup>13</sup> There is one very specific exception to this statement which concerns the Treaty of Almelo of the 4<sup>th</sup> of March 1970, the Treaty of Washington of and the Treaty of Cardiff: these treaties deal with the uranium enrichment facility and technology of Urenco Ltd. Changes in the ownership of shares in Urenco Ltd. or subsidiaries need unanimous approval by the three governments which are represented in the Mixed Committee. The government of the Netherlands participates through the holding UCN for 33,1/3% of the shares in Urenco Ltd. There is furthermore also a shareholder agreement between the existing shareholders (among those also the government of the Netherlands) which makes any sale a shares by an existing shareholder dependent on the cooperation of the other existing shareholders.

the capital of private companies unless directed by a Minister to do so or with their agreement (Article 42(2) Dutch Constitution).

With respect to independent public authorities (*Zelfstandige Bestuursorganen*) a specific Framework Law is in place (*Kaderwet zelfstandige bestuursorganen*).<sup>14</sup> Article 32 of this Framework Law is of particular interest, as it provides for the competent Minister to make certain actions subject to prior approval, including the establishment or participation in a legal person or entity, the acquisition of land or ships, the provision (or taking on) of credit or loans, or the provision of financial guarantees to third parties. Such an obligation for example rests upon the National Bureau of Statistics.<sup>15</sup>

A separate regime also applies to provinces and municipalities. First of all, article 124(1) Dutch Constitution determines that they have autonomous (territorial) responsibilities. The Municipality Act (*Gemeentewet*) lays down other aspects concerning their powers, and contains rules and procedures. Article 160(2) and (3) Municipality Act deserves particular attention, as it determines that the college of mayor and aldermen (*College van B&W*) may only establish, or participate in foundations, associations, public limited and private limited companies, et cetera if such establishment or participation is particularly necessary to accomplish goals in the public interest. Before such a decision can be taken, the municipal council (*Gemeenteraad*) must be heard and it must be approved by the Executive Council of the Province (*Gedeputeerde Staten*) in which the municipality is located. Such approval can only be withheld if the decision were to harm public interest or in conflict with the law.<sup>16</sup> Furthermore, the decision requires the approval of the Minister of Home Affairs (*Binnenlandse Zaken*).

The Act on the financing of decentralized public authorities (*Wet financiering decentrale overheden*) regulates certain aspects of the financial management of assets and loans of provinces and municipalities and other decentralized public bodies. The Act specifies that the authorities concerned may only provide loans, take out loans or otherwise invest in financial products in the exercise of public authority or the fulfilment of a public task.<sup>17</sup> The Act allows however for a broad exception to this rule: decentralized public authorities may invest in financial instruments (even derivatives) as long as some rules laid down by Order in Council are respected and the risks are low.<sup>18</sup> The Act limits and regulates risk taking by decentralized public authorities.

### **Protection of national public interest within the boundaries of EU law/doctrine**

#### **Q.24 Is there any indication that the exceptions provided for under the mandatory requirements have been perceived as insufficient to protect public interests?**

The limitations of the mandatory requirements doctrine for the Dutch government to protect public interests are not that there are insufficient exceptions provided – on the contrary: the ECJ has accepted a wide variety of public interest justifications – but rather that the strict requirement of proportionality. There have been various cases in which the mandatory requirements doctrine proved insufficient to protect certain public interests. We will, however, limit ourselves to two recent examples concerning public housing and health care.

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<sup>14</sup> Staatsblad 2006, nr. 587.

<sup>15</sup> See Article 68 of the Act on the National Bureau of Statistics.

<sup>16</sup> Article 158(2) and (3), Province Act.

<sup>17</sup> Article 2(1) of the Act.

<sup>18</sup> Article 2(2) and (3) of the Act.

The first and most striking example concerns Dutch legislation on public housing. As will be discussed under question 36 of this questionnaire, the Netherlands interprets this concept in a broader manner than the Commission. The Housing Act of 29 August 1991 (*Woningwet*) provides for the approval by royal decree of institutions that operate solely in the interests of public housing and stipulates their tasks and responsibilities. The area of activity of an 'approved institution' is generally confined to certain Dutch municipalities. Amendments relating to the geographical area of activity of an institution are subject to approval by the competent Minister.<sup>19</sup> The application of these provisions has brought about much commotion in the Netherlands, eventually leading to the referral of preliminary questions to the ECJ, who issued a judgment on their compatibility with article 56 EC Treaty on 1 October 2009.<sup>20</sup>

The events leading up to the judgment were the following. A housing corporation called Sint Servatius, based in the South of the Netherlands near the Belgian border, wished to expand its activities outside its approved geographical area by financing a housing project of its Belgian subsidiary in Liège (Belgium). By decision 5 December 2002, the Minister of Housing, Spatial Planning and the Environment withheld the required consent for Sint Servatius to undertake these activities. On 19 May 2006 the court in Maastricht declared this refusal incompatible with the free movement of capital. Although public housing can constitute a legitimate interest within the sense of Article 58 EC Treaty, the Minister had provided insufficient motivation supporting that the requirements of necessity and proportionality had been met. On 19 December 2007 the Dutch Council of State (*Raad van State*) referred preliminary questions to the ECJ on the compatibility of the Housing Act with EU law.

The ECJ considered, as the Maastricht court had, that the prior authorisation scheme contained in the Housing Act can in principle be justified by requirements associated with the housing policy and the financing of that policy. The ECJ subsequently considered that such a scheme may indeed, in some cases, be necessary and proportionate to the goals pursued if the latter cannot be achieved by less restrictive measures.<sup>21</sup> These deliberations seem to indicate that there may be room under the mandatory requirements doctrine to protect the interests pursued by the Dutch public housing legislation. Naturally, it is still up to the Dutch Council of State to determine whether the Minister's decision preventing Sint Servatius from engaging in activities outside the Netherlands indeed met the requirements.

It is perhaps interesting to mention that the ECJ went on to express its doubts as to whether the prior authorisation scheme was based on objective non-discriminatory criteria known in advance.<sup>22</sup> According to settled case law, discretionary conduct on the part of national authorities cannot be justified by an overriding interest of the general interest, unless it is also based on objective non-discriminatory criteria known in advance, capable of adequately circumscribing the exercise of the national authorities' discretion.<sup>23</sup> This additional criterion makes it harder for legislation such as that in the underlying case to be protected under the mandatory requirements regime. It also raises the question of whether the Minister's decision to restrict the free movement of Sint Servatius' capital, which stemmed from the prior authorisation scheme, can still have a chance of being justified under the mandatory requirements doctrine, since its legal basis has now been declared incompatible with EU law. It will be interesting to see how the Dutch Council of State interprets this aspect of the case.

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<sup>19</sup> Article 11(1) of the Decree on the management of public rental housing of 9 October 1992 (*Besluit beheer sociale-huursector*).

<sup>20</sup> Decision of 1 October 2009 in Case C-567/07 *Minister voor Wonen, Wijken en Integratie / Woningstichting Sint Servatius*.

<sup>21</sup> See Case C-567/07, paragraphs 33 and 34, with reference to inter alia Case C-302/97 *Konle*, paragraph 44.

<sup>22</sup> See Case C-567/07, paragraphs 35-39.

<sup>23</sup> Case C-169/07 *Hartlauer*, paragraph 64, with reference to Case C-205/99 *Analir and Others*, paragraphs 37 and 38 and Case C-385/99 *Müller-Fauré and van Riet*, paragraphs 84 and 85

The second example discussed in this report concerns the preventative effects of the mandatory requirements doctrine. In the middle of 2008 the Dutch government explored the possibility to expand the existing prohibition for hospitals to distribute profits to include hospitals established in other member states. Under the existing legislation foreign hospitals could perform procedures on Dutch patients, subcontracted by hospitals established in the Netherlands ("authorised institutions"), and distribute the profits generated from these activities, if so allowed under their national laws. The Dutch government wished to broaden the legal concept of "authorised institutions" to include hospitals established in other member states, thereby expanding the prohibition to pay dividend to these organisations.

The Dutch government eventually had to abandon the above-mentioned plans, as they were likely to constitute an infringement of the free movement of capital. Although the measures were intended to protect an overriding requirement of general interest – namely public health – it was considered unlikely that they would meet the criteria of necessity and proportionality. In other words: the proposed amendment of legislation did not qualify for a mandatory requirement exception. The existing system was deemed sufficient to guarantee the quality of health care and appropriate spending of public resources. Incidentally, the political opinion on this topic has taken quite a turn since then. In a letter of 9 July 2009 the Dutch Minister of Health, Welfare and Sport in fact proposed to open up the possibility to distribute profits by hospitals – albeit under certain conditions – per 2011.

**Q.25 Has there been any discussion about the need to have recourse to Article 295 EC for the protection of national public interests?**

The clearest example of where the Dutch government has taken recourse to article 295 EC is with respect to the Act on Independent Grid Management (*Wet onafhankelijk netbeheer*).<sup>24</sup> This Act, which will be discussed in more detail under question 34, obliges vertically integrated energy companies to separate their distribution grid and grid management operations from their operations regarding trading and production of energy ("unbundling"). In the extensive parliamentary debate that preceded this Act, it was suggested that the Act would be in conflict with EU law concerning the internal market. In this discussion, the Dutch government relied (in part) on Article 295 EC to support its position that the Act was compatible with EU law.<sup>25</sup>

The Dutch government also made reference to Article 295 EC in order to justify the compatibility of the Drinking Water Act<sup>26</sup> with EU law.<sup>27</sup>

Since the outbreak of the financial crisis, the role of public ownership and its relationship with European law has attracted increased interest. New developments on the role and use of Article 295 EC are therefore expected.

**B. Company law**

*The rules of company law of a Member State can be seen as the basic charter for private business, outlining the rules of the game for the market sector. The rules may contain specific features that impact on the distinction between private and public capital. The following questions are designed to draw out such features.*

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<sup>24</sup> Please note that this law was subject to much debate and protest and is currently still being contested in the Dutch courts.

<sup>25</sup> See in particular: Nadere Memorie van Antwoord, Kamerstukken I, 2006-2007, 30 212, nr. F and Memorie van Toelichting, Kamerstukken II, 2004-2005, 30 212, nr. 3.

<sup>26</sup> The Drinking Water Act is soon to replace the earlier-mentioned Water Grid Act.

<sup>27</sup> See the Memorie van Toelichting, Kamerstukken II, 2006-2007, 30 895, nr. 3.

**Q.26 What was the reaction to the ECJ judgments in the Golden Share cases in your Member State? Have there been measures taken to amend legislation?**

The Dutch government previously had golden shares in the national telecommunications company KPN and the national mail company TPG. The legality of these golden shares was assessed in the joined cases C-282/04 and C-283/04 *Commission/The Netherlands*. By decision of 28 September 2006, the ECJ declared the existence of these golden shares incompatible with the free movement of capital and the freedom of establishment.

The government's reaction to this judgment was acquiescent. The golden shares were abolished by selling the government's shares to KPN and TPG, which then withdrew these shares.<sup>28</sup> Although the Inter-Ministerial Committee on European law (*Interdepartementale Commissie Europees Recht, ICER*) produced two (non-public) legal advices on the use of golden shares, no further action was undertaken. Since the golden shares of the Dutch government were based purely on the articles of association of the companies involved, no measures were taken to amend legislation following the golden shares judgment.

*As is well-known, the rules on the internal market also include harmonisation of legislation. In the area of company law, directives on harmonisation of national company law rules have had a major effect.*

**Q.27 Have there been any specific characteristics of the company laws of your Member State that were deemed to be imperilled by the EC company law directives? E.g. the German system of co-determination (Mitbestimmung).**

Although the EC company law directives have led to many changes in Dutch company law, they are generally not considered to have 'imperilled' any specific characteristics. The changes necessitated by the EC company law directives include an increase in the disclosure duties of corporations,<sup>29</sup> the competence of the board to represent a corporation<sup>30</sup> and the concepts of legal mergers and legal separations. To summarise, although EC harmonisation of company law has had a large impact in the Netherlands, this has not been perceived as perilous. To the contrary, the EC company law directives have led to the introduction of many new elements in Dutch company law which would not have been introduced in their absence – at least not without major political discussions.<sup>31</sup>

The main catalyst of discussions in the Netherlands has, however, been the case law of the European Court of Justice in fundamental cases such as *Centros*, *Überseering*, *Inspire Art*, *SEVIC* and *Cartesio*, where the full potential of the right of establishment has been widened<sup>32</sup>. This has not led to many critical commentaries, but rather to an awareness in legal doctrine that a change in Dutch company law is essential, in order to be able to compete with other national company law systems in the EU.<sup>33</sup>

The creation of a statute for a *Societas Europaea (SE)* and other legal company forms at EU level are also a strong incentive for an overhaul of certain rules of Dutch company law, as it has also been

<sup>28</sup> See the letter of the Minister of Finance of 17th of November 2006, and the letter of 11th of December 2006, Kamerstukken II, 2006-2007, 27 638, nrs. 6 and 7 regarding TPG and the letter of the Minister of Finance of 19th of October 2006, Kamerstukken II, 2006-2007, 28 165, nr. 54 regarding KPN and the announcement of full disengagement by the Dutch State

<sup>29</sup> Directive 68/151/EEC, OJ EC 1968, L 65/8; directive 78/660/EEC, OJ EC 1978, L 222/11; directive 83/349/EEC, OJ EC 1983, L 193/1; directive 84/253/EEC, OJ EC 1984 L 126/20 and directive 89/666/EEC, OJ EC 1989, L 395/36.

<sup>30</sup> Directive 68/151/EEC, OJ EC 1968, L 65/8.

<sup>31</sup> See already in 1997 J.N. Schutte-Veenstra, *Europese Richtlijnen Vennootschapsrecht*, Kluwer, Deventer, p. 114 and 115. See also her "EG-harmonisatie van vennootschapsrecht; een stand van zaken", in: *Sociaal Economische Wetgeving*, 2003, pp. 121-129.

<sup>32</sup> ECJ 9 March 1999, C-212/97, *Centros*; ECJ 5 November 2002, C-208/00 *Überseering*; ECJ 30 September 2003, C-167/01, *Inspire Art*; ECJ 13 December 2005, C-411/03 *SEVIC*; ECJ 16 December 2008, C-210/06 *Cartesio*.

<sup>33</sup> M.A. Verbrugh, "Concurrentie van vennootschapssystemen in Europa", in: *Sociaal Economische Wetgeving*, 2008, 122.

the case in other member states of the EU<sup>34</sup>. Winter calls the SE a ‘sluice’ for the importation and exportation of national company law to or from another member state.

Competition between national systems of company law has for example led to plans for the introduction of the so-called *flex bv*, a flexible limited corporation. Traditionally, the legal regulation in the Netherlands of the limited corporation has been modelled after the public corporation. This element of Dutch company law will also be changed because of these European wide competition. Concerning the Dutch system of participation of workers’ representatives in the nomination of the members of the supervisory board of companies, introduced in the so-called ‘*structuurregime*’, it is not feared that this element of Dutch company law for large public corporations will suffer from EU-wide developments. This Dutch element is more flexible and less absolute than the German *Mitbestimmung*<sup>35</sup>. The core of the Dutch regime is the right for work councils not to have a representative in the supervisory board, but to have a right to recommend and a right to object to candidates for this board. For international holdings Dutch law allows an exemption from the worker participation regime in case the majority of the workers of the corporation and/or the dependent companies are employed outside the Netherlands (Articles 2:153(3)(b) and 2:263(3)(b) Dutch Civil Code). The Dutch legislator did not want to give extraterritorial effect to the Dutch worker participation regime.<sup>36</sup> Moreover, groups of an international character of foreign origin and of Dutch origin may opt for a weakened ‘*structuurregime*’: the competence to nominate the board members is there not in the hands of the supervisory board, but in the hands of the general meeting of shareholders. This flexibility of the Dutch worker participation system is generally qualified as an asset among company lawyers. Some of them even advocate a national company law that is more facilitative, offering more options for corporations, and less prescriptive.<sup>37</sup> In general there are not many critical remarks, one is aware of the chances European rules offer.

### **Limitations for state-owned undertakings**

**Q.28 Do the national company rules provide guarantees that secure a level playing field when the government pursues its objectives by way of undertakings which it controls wholly or partially? Please note that such guarantees may (also) be found in specific regulation as referred to above in section III.A Q 16-20.**

Dutch company law does not provide guarantees that secure a level playing field in cases where the government chooses to pursue its objectives through undertakings which it controls wholly or partially. Such guarantees are to be found in specific regulation as has been treated questions 13 to 20 of this report. However, it should also be noted that the sole fact an undertaking is wholly or partially controlled by government does not entail an exemption from Dutch Competition law.

**Q.29 Are there rules that allow or oblige the government to make use of a special form of company if it wants to pursue public interests?**

There are no general rules obliging the Dutch government to make use of special form of company if it wants to pursue public interests. Sometimes specific rules regarding a specific activity or sector require a company to have a special form or a certain type. An example is the regulation on government participation in (and management of) the exploration and exploitation of mineral

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<sup>34</sup> J.W. Winter, “De Europese Venootschap als *sluis* voor in- en uitvoer van vennootschapsrecht”, in: *Nederlands Juristen Blad*, 2002, p. 2034-2040.

<sup>35</sup> J.W. Winter, op.cit. p. 2039.

<sup>36</sup> L.G. Verburg, *Het territoire van de (Nederlandse) ondernemingsraad in het internationale bedrijfsleven*, Deventer, 2007, at p. 300.

<sup>37</sup> J.W. Winter, op.cit. p. 2039.

resources in the Netherlands, mentioned under question 14. Articles 81 and 82 of the Mining Act stipulate that these activities must be exercised by a limited or public company, designated by the Minister of Economic Affairs, and whose shares must be directly or indirectly held by the Dutch State.

**Q.30 Are there rules blocking unfriendly take-overs? Discuss the attitude of your Member State towards the take-over directive (Directive 2004/25, the “Volkswagen directive”).**

There are no rules specifically designed to block unfriendly take-overs by means of government action. Two elements stand out in the Dutch debate on this topic. Firstly, there has been a political debate on the influence and purchasing power of sovereign wealth funds. There was quite some concern in the Dutch Parliament that strategic sectors of the Dutch economy would fall into the hands of players that were not (only) driven by commercial incentives, but might also have political goals.<sup>38</sup> Generally speaking the investment activities of intransparent actors such as sovereign wealth funds or state owned companies – which invest heavily in The Netherlands – are looked upon somewhat apprehensively. The unease brought about by the possible prospect of losing grip on certain sectors of the Dutch economy however did not lead to the creation of new powers or legal measures regarding take-overs: the public interest was already considered to be sufficiently protected.<sup>39</sup>

Secondly, there is some concern that the Dutch economy and companies might become a victim of the ongoing liberalisation and free-market process in the EU. For this reason (among others), the Dutch government was set on incorporating the level playing field clause in the directives in the third energy package.<sup>40</sup>

The Dutch position with regard to the take-over directive was more or less positive. No controversy seems to have been sparked by this proposal. The Commission's initial proposal<sup>41</sup> was greeted positively by the Dutch government. Since subsidiarity and proportionality were not considered an issue, the guiding principle for the Dutch position during the negotiations was that the competitiveness of the Netherlands and Dutch companies should not be diminished by the directive. The government made note of the various positive effects of the proposal, in particular the equal treatment of investors and increased transparency. It was also noted that some elements needed clarification, such as the effect of the directive on the Dutch practice of certifying shares and the holding these shares by administrators. Finally it also noted that the consultation of personnel of a targeted company was lacking in the proposal.<sup>42</sup> The subsequent transposition into Dutch law also did not trigger opposition based on the issue that government could not block unfriendly transactions.

**Corporate governance of state-owned enterprises**

**Q.31 To what extent are the 2005 OECD Guidelines on Corporate Governance of State-owned Enterprises taken into account?**

The Ministry of Finance and the Dutch National Bank have, on occasion, made mention of the 2005 OECD Guidelines in their yearly reports. In its yearly report for 2005/2006 the Ministry of Finance explains that Dutch government policy complies with the Guidelines,<sup>43</sup> including the provisions on

<sup>38</sup> For example, the Report on the general debate on sovereign wealth funds, Kamerstukken II, 2007-2008, 31 350, nr. 3.

<sup>39</sup> See the Analysis by the Ministers of Finance and Economic Affairs on Sovereign Wealth Funds, Kamerstukken II, 2007-2008, 31 350, nr. 1.

<sup>40</sup> See for example Article 43 of Directive 2009/72/EC.

<sup>41</sup> (COM(2002)534).

<sup>42</sup> BNC-fiche, Kamerstukken II, 2002-2003, 22 112, nr. 251.

<sup>43</sup> Ministerie van Financiën, *Jaarverslag 2005/2006. Beheer Staatsdeelnemingen*, p. 12 and 13.

the separation of public interests and shareholdership and the clear assignment of the role of shareholder within the state. The Minister also notes that the state will pursue an active shareholdership policy.

It is perhaps relevant to mention in this context that the Dutch corporate governance code (*Code Tabaksblat*) plays a far bigger role in the corporate governance of state-owned companies than the OECD Guidelines do.<sup>44</sup> In subsequent reports, the Ministry of Finance advised that it applies the Code Tabaksblat to all participations that are administered by the State. In practice this means that the code is put on the agenda of the shareholders' meetings of each state participation once every year. The Code Tabaksblat, which was quite recently revised,<sup>45</sup> is far more elaborate than the OECD Guidelines, though they partially overlap. The OECD Guidelines do, however, contain certain provisions that are not mentioned in the Code Tabaksblat. These are, among others, the specific demand for a level playing field between state-owned companies and the private sector, the prohibition of state interference in the appointment of directors and the requirement of a clear identification of the ownership function within the government. This last obligation is now concentrated within the Ministry of Finance, which also has other roles such as the political responsibility for the work of the Netherlands Authority for the Financial Markets (*Autoriteit Financiële Markten, AFM*), and for financial stability in the Netherlands. Finally, the OECD Guidelines' requirement for a clear and transparent ownership policy of the state seems to have fulfilled by the Netherlands, in its Communication of 2007.

## **Other**

**Q.32 Are there any special features in your Member State's legislation that may be relevant for our topic?**

N/a.

## **C. Competition law**

### **Articles 81, 82 and 86 EC Treaty**

*As was noted above, it is for the Member States to define which activities are in the domain of the public sector and which are not.*

**Q.33 Has there been a debate about whether the provision of certain goods or services should be undertaken by the government or by the private sector? Please specify whether and to what extent such a debate has taken place on a general level or on a specific level, i.e in the context of sector specific regulation? To the extent that there is no general legislative framework for answering such fundamental questions, there may be specific laws or policy documents.**

**Q.34 Please identify such laws and/or policy documents.**

Like in many other European countries, the eighties and nineties in the Netherlands were characterised by large-scale privatisation schemes, aimed at reducing the sizable public sector that characterised the Dutch welfare state. Privatisation of public services and the introduction of the free market system were considered the best way to improve efficiency and to reduce costs. In

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<sup>44</sup> Nota Deelnemingenbeleid Rijksoverheid 2007, Kamerstukken II 2007/08, 28 165, nr. 69.

<sup>45</sup> The renewed code became effective as of 1 January 2009.

recent years, however, this neoliberal view has come under fire. The current government has proved to be more critical towards market processes, launching a detailed investigation into the effectiveness of the Dutch free market policy and revising the policy on government participations. The effects of privatisation in various specific sectors have also been subject of public debate – health care and energy being the two most striking examples. The effects of the crisis have perhaps strengthened the change in perspective on the merits of privatisation. Besides the need for intervention aimed at restoring financial and economic stability, there is a general call for government to put an end to the 'greedy corporate culture' which is considered to be part of the problem that caused the current crisis.

In February 2008, the Dutch government published a report on how the introduction of the free market system had affected the public interests of quality, accessibility and efficiency and what lessons could be taken from this for the future.<sup>46</sup> The report, which examined the effects in eleven different sectors,<sup>47</sup> showed that introducing the free market system can be an effective instrument, as long as a certain level of quality and accessibility is guaranteed, for example through regulation. Privatisation does not relieve the government of its duty to ensure the existence of fair competitive circumstances. The report also emphasised that the introduction of the free market system is a *means* to improve efficiency, market dynamics or innovation, but should not become a cause in itself.

The Dutch central government currently holds shares in 35 companies.<sup>48</sup> The main sectors in which these companies operate are the financial sector (eight participations), energy sector (five participations), aviation (four participations), public transport (three participations) and games of chance (two participations).

Until recently, the official policy on government participations was to privatise these companies, unless there was a valid reason to retain the government share. This policy was focused on diminishing the assets held by government and maximising financial returns on the shareholdings. Under the current government, however, the policy has been completely reversed, now following a "public unless" mantra, involving an active role for the government as a shareholder.<sup>49</sup> Reason for this change in policy is that in certain cases, regulation is considered too rigid an instrument for the protection of public interests. The government has found that the protection of public interest solely by legislative measures and tools hasn't always been sufficiently effective. The new policy is therefore to protect public interests by actively managing government participations (supervising the companies' strategy, important investments, remuneration and capital structure).

An interesting example of how public interests are protected through government participation is the government's shareholdings in the games of chance sector. The Dutch government feels this is the most effective means to protect the public against the risks of gambling addiction. Not all political parties agree on this approach, for example the Dutch Liberal Party (VVD) feels that this

<sup>46</sup> Onderzoek Marktwerkingsbeleid februari 2008.

<sup>47</sup> The sectors covered by the investigation were: aviation, telecom, post, energy, transport of goods by rail, regional public transport, curative health care, re-integration services, child care, taxi services and the notary.

<sup>48</sup> N.V. Bank Nederlandse Gemeenten (50%); N.V. Brabantse Ontwikkelingsmaatschappij (67,4%); Connexion Holding N.V. (33,3%); COVRA N.V. (100%); De Nederlandsche Bank N.V. (100%); Energie Beheer Nederland B.V. (100%); Grondexploitatie maatschappij Meerstad B.V. (20%); Havenbedrijf Rotterdam (25%); N.V. Industriebank LIOF (94,4%); KG Holding N.V. (bankrupt per 14-12-2005) (100%); Koninklijke Luchtvaart Maatschappij N.V. (5,9%); Koninklijke Nederlandse Munt N.V. (100%); N.V. Luchthaven Maastricht (34,8%); N.V. Luchthaven Schiphol (69,8%); N.V. Luchtvaartterrein Texel (65,3%); MTS Amsterdam N.V. (5%); Nederlandse Financierings-Maatschappij voor Ontwikkelingslanden N.V. (51%); N.V. Nederlandse Gasunie (100%); GasTerra (voorheen Gasunie (T&S) (10%); N.V. Rechterland (100%); Nederlandse Participatie Maatschappij voor de Nederlandse Antillen N.V. (n/a); N.V. Nederlandse Spoorwegen (100%); Nederlandse Waterschapsbank N.V. (17,2%); NOB Holding N.V. (100%); N.V. Noordelijke Ontwikkelingsmaatschappij (99,9%); NOVEM B.V. (100%); Ontwikkelingsmaatschappij Oost Nederland N.V. (57,6%); Railinfratrust B.V. (100%); TenneT B.V. (100%); Thales Nederland B.V. (1%); Twinning Holding B.V. (100%); Ultra-Centrifuge Nederland N.V. (98,9%); N.V. Westerscheldetunnel (95,4%); Nationale Stichting tot Exploitatie van Casinospelen in Nederland (foundation); Stichting Exploitatie Nederlandse Staatsloterij (foundation).

<sup>49</sup> Nota Deelnemingenbeleid Rijksoverheid 2007, Kamerstukken II 2007/08, 28 165, nr. 69.

result can also be achieved by means of regulation. The European Commission has regarded this position with much scrutiny for several years. On 28 February 2008 the Commission issued a reasoned opinion as part of the infringement procedure under Article 226 EC Treaty, formally requesting the Netherlands to amend certain aspects of the Gambling Act of 10 December 1964 (*Wet op de Kansspelen*), which the Commission considered to be incompatible with article 49 EC Treaty.<sup>50</sup> The Dutch government responded by letter of 25 September 2008, claiming the obstacles to the free movement of gambling services by the Gambling act can be sufficiently justified under the overriding requirements of the general interest. It is not sure which action the Commission will take next.

There are many sectors in which a debate has taken place concerning the choice between public and private provision of services. For example, the Netherlands introduced a new health insurance system on 1 January 2006, which abolished the previous distinction between public and private insurances and replaced it with a system of private insurance, ensuring a "basic package" of health care through regulation. Conversely, the privatisation of the national airport of Schiphol was abandoned in April of 2007 after years of negotiations, when the municipality of Amsterdam (21,8% shares) made use of its veto right. Although the Minister of Finance threatened to annul Amsterdam's vote at the time, the government coalition that followed decided to discard the plans to privatise Schiphol. Other sectors that have seen such debates in the last few years are public transport, road construction, child care and naturalisation courses (to name a few).

We have chosen to elaborate in more detail on the public/private considerations in the energy sector, since the developments in this sector are partly dictated by EU law and may therefore be of interest to other Member States. There has been much debate these last few years on whether to limit private ownership of electricity and gas grids. Until recently, the Dutch Electricity and Gas Acts contained provisions that made every change in ownership of grid administrators subject to approval of the Minister of Economic Affairs (the "consent requirement").<sup>51</sup> These provisions were implemented with the aim of preventing public monopolies from turning into private monopolies during the transitional period of the market: it was considered best to first complete liberalisation, then commence privatisation.<sup>52</sup> A policy was developed based on these provisions, which authorised the Minister to approve privatisation of up to 49% of shares.<sup>53</sup> This policy was only applied once – approving the sale of 49% of the shares in Obragas Holding N.V. to RWE Gas AG in April 2002 – and soon thereafter abandoned.<sup>54</sup> The provisions in the Electricity and Gas Acts that allowed privatisation of grid administrators were subsequently frozen until July 2004.<sup>55</sup> The introduction of the Independent Grid Administration Act<sup>56</sup> has ended this discussion for the mean time. As of 1 January 2010<sup>57</sup> energy companies with a network operating subsidiary and a trading or production arm will no longer be allowed to operate as one single company. As a consequence, the Dutch energy companies are currently in the process of separating their businesses into production and supply companies (**PLBs**) and network/grid companies (**NWBs**). The provisions in the Electricity and Gas Acts limiting the privatisation of grid administrators now apply to the national grids and the transmission system or distribution system operators. It is considered that the State's 100% shareholding in these companies is necessary to protect the general interest of the supply of gas and electricity.<sup>58</sup>

<sup>50</sup> Commission document C (2008) 0638, see also the press release: IP/08/330.

<sup>51</sup> In Dutch: 'Instemmingsvereiste'. These requirements were laid down in Article 93 of the Electricity Act and Article 83 of the Gas Act.

<sup>52</sup> Tweede kamer, vergaderjaar 1997-1998, 25621, nr. 3, p.55.

<sup>53</sup> Letter from the Minister of Economic Affairs to the President of the Second Chamber on 4 April 2002 (red. ez02000235) and responses to questions on Parliament, Tweede Kamer, vergaderjaar 2001-2002, aanhangsel 2197.

<sup>54</sup> On 9 September 2002, the Minister of Economic Affairs revoked the policy on privatisation of energy distribution companies.

<sup>55</sup> Tweede Kamer, vergaderjaar 2001-2002, 28174, nr.14.

<sup>56</sup> Wet Onafhankelijk Netbeheer, Staatsblad 2006, nr. 614; in combination with the Royal Decree of August 2007.

<sup>57</sup> Kamerstukken 30 212, nr. H.

<sup>58</sup> See, for example, Kamerstukken I 2006/2007, 30 212, nr. F.

The demand for government intervention in the financial sector is large. Besides the need to rescue financial institutions for the sake of financial stability, the crisis has led to a cry for government involvement in issues that are not entirely financial, such as the bonus structure within banks. It is the general sentiment that the 'irresponsible' bonus culture in the financial sector is partly to blame for the current crisis. As a consequence, the Dutch government has adapted the remuneration regulations for (semi-) public companies and has actively influence the remuneration schemes in the financial institutions that it has granted aid to.

### **New Member States**

**Q.35 For the new member states, it would be interesting to describe how the reform process of the economy whereby large sectors of the economy were privatized has taken place.**

N/a.

### **Services of general economic interest**

*Even if it is decided that certain activities are to be carried out by undertakings, governments may still want a specific regime for them.*

**Q.36 Has there been any discussion of the question whether certain services should be guaranteed by identifying them as services of general economic interest? What are the questions that were discussed?**

A national discussion of the question whether certain services should be guaranteed by identifying them as Services of General Economic Interest (SGEI) is almost inevitable, the Green and White Paper on Services of General Interest and the (proposal on) the Services Directive in mind. In the Netherlands the discussion was, however, very limited. The Dutch government had and still has as a basic principle, in line with the case law of the ECJ, that member states (and thus regional and local authorities as well as the central authorities) should be free to determine what services are to be identified as services of general economic interest.<sup>59</sup> It would, according to the Dutch government, not do justice to the concept of SGEI to make a definitive list of services regarded as SGEI. On the one hand, it is an evolving concept: what now is a non-economic service of general interest could in a couple of years very well be regarded as a SGEI. On the other hand, also within one country, factors such as geographic characteristics, population density and traditions can differ from one region to the other, so the need for a service to be a SGEI can vary from one region to the other.<sup>60</sup> Still, to tackle some uncertainty, in October 2008 the Dutch MPs of the Christian Democrats asked for a (non-exhaustive) list of SGEI,<sup>61</sup> a request that was turned down by the Minister for the reasons stated above. Also, on 2 July 2009, MP Bochove (Christian Democrats) asked the Dutch government to designate social housing in the broad Dutch definition, and not in the narrower definition as used by the Commission, as SGEI.<sup>62</sup>

The question of whether a service should be identified as a SGEI basically comes down to the question on how public interests should be safeguarded. The Dutch approach, which is a sector specific one, is as follows.<sup>63</sup> First, the relevant public interests in a sector are defined as specifically as possible. That determines whether a service is of general interest. Then a set of minimum

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<sup>59</sup> TK 2002-2003, 22 112, no. 283, p. 3; TK 2003-2004, 22 112, no. 291, p. 2; TK 2005-2006, 21 501-30, no. 115, p. 3.

<sup>60</sup> TK 2004-2005, 22 112, no. 373, p. 4

<sup>61</sup> TK 2008-2009, 31 579, no. 5, p. 4.

<sup>62</sup> TK 2008-2009, 29 453, no. 125, p. 1.

<sup>63</sup> TK 2002-2003, 22 112, no. 283, p. 5; TK 2003-2004, 22 112, no. 291, p. 5

requirements for the provision of that service is determined. Finally, a type of market organisation is developed in which the public interests as defined are adequately safeguarded, while, in comparison with other market models, generating most welfare gains. In this last phase the level of government intervention, so also whether SGEI should be expressly identified, is determined on the basis of, amongst others, the market model, the way it operates (market failures?) and the public interests to be safeguarded.

In the Dutch discussion the government used several examples of recognized SGEI.<sup>64</sup> These were the network sectors (post, energy, telecom, transport), health care (first aid, ambulance services), basic health insurance, public tasks of notaries, waste treatment, collection of company waste, some forms of education, audiovisual services (not public broadcasting), social housing, inspection of monuments, nature conservation. These are in general laid down in acts, decrees and ministerial orders. Examples of SGEI as designated by regional and local authorities are: research into parcel structure, mediation with regard to parcel exchange and management of the process of parcel exchange (Provincial Executive of the province of North-Holland);<sup>65</sup> reintegration services for people that are long term unemployed and potentially unemployable (municipality of Den Helder);<sup>66</sup> and the subletting of particular floors and rooms for the activities of the Project High Tech Automotive Campus and Automotive House (municipality of Helmond).<sup>67</sup>

### **Q.37 Has the implementation of the Services Directive 2006/123 led to a debate about services of general economic interest?**

On 2 September 2005 the Dutch government adopted a Notice on the proposed Services Directive and services of general economic interest.<sup>68</sup> In this Notice the government stated that SGEI fall within the scope of the Services Directive (*SD*) and non-economic Service of General Interest fall outside the scope of the *SD*. The government expressed its support for the application of the *SD* on SGEI. But the government also stressed the importance of member states being able to decide on what a SGEI is. Further, the government was of the opinion that the *SD* left enough possibilities to safeguard public interests. That was also the opinion of the Social Economic Council in its advice on the proposed *SD*.

The following parliamentary debate focussed mainly on the exact scope of the *SD* with regard to SGEI.<sup>69</sup> The government reiterated that SGEI fall, as a basic rule, within the scope of the *SD*. But some sectors in which the Netherlands identified SGEI are exempted from the *SD*, e.g. social services and social housing, public transport, health care, financial services and audiovisual services. With regard to SGEI that do fall within the scope of the *SD* the Dutch government stated that the *SD* respects the freedom of member states to determine what SGEI are, how they are organized and financed and what special requirements are applicable. Furthermore, the *SD* does not lead to the elimination of national monopolies. The conclusion of the Dutch government was that with these elements it is guaranteed that the most important aspects of SGEI are not affected by the *SD*.

According to the Dutch government, the *SD* will only be relevant for SGEI when it concerns accessory requirements, like the determination of tariffs in the electricity and gas markets. In that

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<sup>64</sup> See e.g. TK 2004-2005, 22 112, no. 373, p. 4; TK 2005-2006, 21 501-30, no. 115, p. 2 and 3; TK 2008-2009, 31 579, no. 6, p. 6. See also Handreiking Diensten van Algemeen Economisch Belang en Staatssteun, available on [www.europadecentraal.nl](http://www.europadecentraal.nl), p. 20.

<sup>65</sup> Openbare besluitenlijst van de vergadering op 12 juni 2007, [http://www.noord-holland.nl/zoeken/get\\_url.asp?page=/pdfstukken/GS/GSO/2007/GSO1206.07.doc.pdf](http://www.noord-holland.nl/zoeken/get_url.asp?page=/pdfstukken/GS/GSO/2007/GSO1206.07.doc.pdf)

<sup>66</sup> Verordening vestiging alleenrecht re-integratieactiviteiten gemeente Den Helder, Article 2.

<sup>67</sup> Decision of 29 January 2009, Gemeenteblad van de gemeente Helmond, 2009, no. 11.

<sup>68</sup> TK 2005-2006, 21 501-30, no. 115.

<sup>69</sup> TK 2008-2009, 31 579, nr. 6, p. 6.

case the Dutch government will have to justify that minimum or maximum tariffs are non-discriminatory and proportional.

Several authors focussed on the concept of SGEI in the SD itself and in comparison of that in Article 86(2) EC and the provisions concerning the internal market.<sup>70</sup> They pointed out the strong points of SGEI in the SD and – mostly – the weak points and the inconsistencies. A debate on, for example, whether or not the SD would force changes in the way SGEI in the Netherlands were organized, was not conducted.

**Q.38 Has the introduction of Article 16 EC with the Treaty of Amsterdam given rise to a debate about the function of services of general economic interest and/or services of general interest?**

In the Explanatory Memorandum to the Act of Approval of the Treaty of Amsterdam, the Dutch government states that its primary aim during the negotiations about the text of the Treaty was to keep the existing balance between the Treaty provisions concerning competition and the Treaty provisions concerning the protection of public service obligations.<sup>71</sup> The scale should not tip towards competition. According to the Dutch government this balance has been kept. Article 16 does not derogate on the then existing provisions of the Treaty. It also does not provide for a legal basis for Community measures on public service obligations. This explanation obviously satisfied the parliament; there was no further discussion on this.

The discussion in the literature about the Treaty of Amsterdam was mainly focussed on topics like asylum and immigration and European private law. The introduction of Article 16 EC did not attract a lot of attention. For example, leading authors like Timmermans and De Zwaan do not even mention the new Article 16 EC in their Articles about the Treaty of Amsterdam, which indicates that Article 16 EC is not seen as an important change.<sup>72</sup> Barents does mention Article 16 EC.<sup>73</sup> But he merely states that this provision, other than at first expected, is not a derogation from the existing provisions on state aid and public undertakings. In other words, nothing really changes in this respect.

**Article 81(3) EC exceptions for public interest**

**Q.39 Has the equivalent of Article 81 (3) EC in your national competition law been interpreted so as to allow exceptions for the protection of public interest? And has this led to a situation whereby public enterprises have been favoured over private enterprises?**

The EC treaty has direct effect on Dutch national legislation so the exceptions contained in Article 81(3) EC are also directly applicable under the Dutch Competition Act (*Mededingingswet, Mw*).<sup>74</sup> The national equivalent of Article 81(3) EC is Article 6(3) Mw, which is interpreted in accordance with the European case law and legislation on Article 81(3) EC.<sup>75</sup>

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<sup>70</sup> E.g. E. Steyger, Deel II: De publieke taak: diensten van algemeen (economisch) belang en de gevolgen van de Richtlijn, *SEW* 10 (2007), p. 379-398; J.W. van de Gronden, Deel III: Bestaat er een coherente visie op de verhouding tussen diensten van algemeen economisch belang, de Dienstenrichtlijn en andere communautaire regelingen?, *SEW* 10 (2007), p.399-421; P.J. Slot c.s., Diensten van algemeen (economisch) belang nader beschouwd, *M&M* 2007, p. 101-112. See for more (Dutch) publications on the SD: <http://www.europadecentraal.nl/menu/731/Artikelen.html>.

<sup>71</sup> TK 1997-1998, 25 922

<sup>72</sup> C.W.A. Timmermans, Het Verdrag van Amsterdam, Enkele inleidende kanttekeningen, *SEW* 10 (1997), p. 344-351; J.W. de Zwaan, Het Verdrag van Amsterdam, een overzicht, *NTER* no. 1/2, p. 30-40.

<sup>73</sup> R. Barents, Het Verdrag van Amsterdam: een eerste indruk, *NJB* 1997, p. 1261-1268.

<sup>74</sup> Article 12 Mw

<sup>75</sup> Publication of the NMa d.d. 22 Februari 2005, Richtsnoeren betreffende de toepassing van Article 6, lid 3 van de Mededingingswet, *Stcrt.* 2005, nr. 47.

Like Article 81(3) EC, Article 6(3) Mw contains four (cumulative) conditions<sup>76</sup> to assess whether any anti-competitive effects of an agreement can be outweighed by its pro-competitive effect. The Dutch Competition Authority (*Nederlandse Mededingingsautoriteit, NMa*) has considered that since public interest is not one of the criteria laid down in article 6(3) Mw, it can be concluded upfront that public interest is not, in itself, sufficient to warrant an exception of Article 6(1) Mw.<sup>77</sup>

Thus, for have public interests to be taken into consideration, they should meet the objective requirements of Article 6(3) Mw. In that respect, the first of abovementioned conditions (the improvement of the production or distribution of goods or promotion of technical or economic progress) has often been very broadly interpreted, even stretching out to include public interests such as environmental benefits<sup>78</sup>, traffic safety<sup>79</sup> and recycling.<sup>80</sup>

This approach is justified by the fact that public and non-economical interests, such as the abovementioned, are considered to form a part of the notion of "consumer welfare",<sup>81</sup> will therefore ultimately be beneficial to the consumer and therefore be objectively demonstrable as an improvement as set out in the first requirement of Article 6(3) Mw.

The positive effect of an agreement on the environment can, for example, be regarded as having a positive effect on the promotion of technical or economic progress. Provided, of course, that the measure is proportional, or that an a-contrario reasoning can be made to determine the value of the aforementioned agreement by calculating the potential cost of pollution that would arise if such agreement was never entered into.

Finally, Article 5d(2) Mw authorizes the Minister of Economic Affairs to set policy on the way in which the NMa must take account of non-economical considerations in its assessment of measures under Article 6(3) Mw. Incidentally, there seem to be no indications that public companies are favoured over private companies on the basis of Article 6(3) decisions.

## **Merger control**

*Another area of competition law where member states governments may intervene in a way that may be relevant for our topic is merger control.*

### **Q.40 Do the merger control rules in your member state provide for special authorisation of mergers when public interests are deemed to be at stake?**

The Dutch merger control regime prohibits the realisation of a concentration without obtaining a licence from the NMa.<sup>82</sup> The NMa will grant such licence after having concluded that there are no anti-competitive effects of the proposed concentration.<sup>83</sup> Similar to the European Commission's approach, this competition analysis is made by objectively defining the relevant market and

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<sup>76</sup> These conditions are:

- contribution to improving the production or distribution of goods or to promoting technical or economic progress;
- allowing consumers a fair share of the resulting benefit;
- no restrictions that are not indispensable to the attainment of these objectives; and
- no possibility of eliminating competition in respect of a substantial part of the products in question.

<sup>77</sup> NMa Jaarverslag 2001, p. 31-32/Kamerstukken A, p. 9-10. It should be noted that Article 11 Mw does provide for an exemption from the prohibition contained in art 6(1) Mw in respect of companies that are charged by the government or government-related authorities with the obligation to perform duties of public economical interest. However, since Article 11 Mw is not the equivalent of Article 81 (3) EC (it is the equivalent of Article 86 (2) EC), this exception does not answer the question at hand.

<sup>78</sup> NMa 1998, case 51, Stibat.

<sup>79</sup> NMa 1999, case 38, Takel en Berging.

<sup>80</sup> NMa 1999, Zaak 12, Vereniging van Fabrikanten van Kunststofleidingssystemen.

<sup>81</sup> Syntheserapport evaluatie Mededingingswet, p. 30.

<sup>82</sup> Article 34 Mw.

<sup>83</sup> Article 41(1) Mw

assessing the market shares that the merged entity will have on such relevant market. The NMa is bound by this economic approach, meaning that it may not take public interests into account in this assessment. Nor does the Mw provide the NMa with the specific competence to authorise mergers when public interests are at stake.

On the other hand, possible efficiency gains *can* play a decisive role in the assessment of a concentration. Similar as in procedures before the European Commission, such efficiency gains are considered to outweigh the negative effects on competition if they reasonably benefit the consumer, are specific to the concentration and if they are objectively verifiable. A recent decision suggests that public interests may be taken into account in the context of an efficiency defence (to be discussed in more detail under question 43). To conclude, the NMa does not have the power to take public interests into account in the assessment of mergers, other than under an efficiency defence.

On the basis of various cooperation protocols, the NMa is obliged to engage certain sector-specific authorities in merger proceedings that involve particular sectors. For example, the NMa must invite the Dutch Health Care Authority (*Nationale Zorgautoriteit*) to submit an opinion in mergers in the health care sector. Similarly, the Broadcasting Commission (*Commissariaat voor de Media*) is requested to advise on mergers in the media sector. Other authorities that the NMa has cooperation protocols with include the Dutch National Bank (*De Nederlandsche Bank, DNB*), the Ministry of Housing Spatial Planning and Environment (*Ministerie van VROM*) and the Independent Post and Telecommunications Authority (*OPTA*). The protocols with these authorities regulate the interaction between the NMa and the competences of these institutions, which are rather more suited to protect the public interest than competition law is.

Although the NMa may be limited in taking public interests into account in the assessment of mergers, the Mw does provide for special authorisation of mergers by the Minister of Economic Affairs in cases where public interests are at stake. Article 47 Mw stipulates that where the NMa has prohibited a merger, the Minister may – upon request – approve the merger, if he considers there to be considerations of general interest at stake that outweigh the expected distortion of competition. Such a request must be submitted within four weeks of the NMa's final decision. The Minister must take such a decision with the consent of the Council of Ministers and within twelve weeks of receiving the request (Article 49 Mw).

#### **Q.41 Have such powers been used? Give a brief overview of the cases.**

In a recent case involving the merger between two hospitals, the NMa was presented with an efficiency defence that involved other than economical considerations.<sup>84</sup> The NMa considered that efficiency gains must be broadly interpreted and that certain non-economical benefits or public interests may be taken into account in a merger case. The NMa finally approved the merger between the two hospitals on the basis of the expected (non-economical) efficiency effect (that it would result in an increase in the quality of healthcare in that region), in combination with a failing firm defence (that non-authorisation of the merger would result in a decrease in the quality of healthcare in this remote area of the Netherlands, to a level well below acceptable standards). It is suspected that the strong involvement of the Dutch Health Care Authority in this case may have been of influence on this outcome. Nonetheless, this recent decision seems to suggest that the door has been opened for accepting the protection of public interests under an efficiency defence.

Besides the above-mentioned case, there are no known decisions in which the NMa has explicitly recognised that it has taken public interests into account in its assessment. This does, however, not

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<sup>84</sup> Decision of 25 March 2009, case 6424, Ziekenhuis Walcheren – Oosterscheldeziekenhuizen.

exclude the possibility that they did not – below the surface – play a role. For example, it is imaginable that the public interest of reducing the environmental burden of double catalogues may have been a factor in approving the merger between Telefoongids and Goudengids (both providers of telephone books/directories).<sup>85</sup> It also seems probable that the public interest of securing the supply of energy played a role in assessing the (anti-competitive) effects of the proposed merger between the energy companies Nuon and Essent.<sup>86</sup>

**Q.42 Have these decisions been appealed to courts? What was the outcome of these appeals?**

N/a.

**State aid**

**Q.43 Does your Member State have national rules on the granting of state aid? Are there any procedural rules on the granting of state aid?**

There is no Dutch legislation on the granting of state aid in general. However, the General Administrative Law Act (**GALA**)<sup>87</sup> does contain a number of provisions concerning the granting of state aid in the form of subsidies.<sup>88</sup> For example, Article 4:23 GALA requires a legal basis (which may be either national or EU) for the grant of subsidies. In addition, there are a number of Subsidy Framework Acts (*SFA*) that govern the grant of subsidies by various different Ministries.<sup>89</sup> These framework laws set out the purposes for which each Ministry may grant subsidies and allow for the adoption of additional (procedural) rules, concerning *inter alia* the conditions for granting subsidies, subsidy maximums and the recovery of subsidies. A department of the Ministry of Internal Affairs (*Coördinatiepunt Staatssteun*) coordinates and supervises state aid applications of municipalities and provinces to the European Commission. Following a recommendation by the National Audit Office (*Algemene Rekenkamer*) in 2001, to create an application procedure on a national scale, the Council Ministers approved a policy document containing interdepartmental arrangements on state aid cases (*Interdepartementale afspraken inzake steunzaken*)<sup>90</sup> on 13 June 2003, which lays down the procedure for state aid applications by the Netherlands. Other than that, the supply of state aid, for example in the form of private law instruments or tax facilities, is not subject to any particular national rules on state aid.

In this context it is perhaps interesting to note that there is (also) no sound legal framework in the Netherlands for the *recovery* of unlawful state aid, as required under EU law.<sup>91</sup> Whether aid can be recovered and – if so – which procedure should be followed, depends on the form in which aid has been granted. This means it is not always clear which rules apply. In addition, none of the existing

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<sup>85</sup> Case 6246/ European Directories (Telefoongids) – Truvo Nederland (Gouden Gids). This case concerned a merger between two dominant players on the market for telephone directories.

<sup>86</sup> Case 6015/ Essent N.V. – N.V. Nuon. After a first phase investigation the NMa considered that there were sufficient reasons to assume that the concentration between these two energy companies would lead to the creation or strengthening of a dominant position on (a part of) the gas- and electricity markets in the Netherlands. The request for a permit (second phase investigation) was finally withdrawn by the parties themselves.

<sup>87</sup> Algemene wet bestuursrecht.

<sup>88</sup> Section 4.2 GALA contains rules on the grant and recovery of subsidies by public authorities.

<sup>89</sup> See for example the Kaderwet EZ-subsidies (economic affairs), Kaderwet LNV-subsidies (agriculture, nature and food quality), Kaderwet SZW-subsidies (social affairs and employment), Kaderwet WVS-subsidies (health, welfare and sport), Kaderwet subsidies Ministerie van Buitenlandse Zaken (foreign affairs), Kaderwet subsidies Verkeer- en Waterstaat (transport, public works and water management).

<sup>90</sup> Staatscourant 29 September 2003, nr. 187 / p. 16 2.

<sup>91</sup> The lacunas in Dutch law on the recovery of unlawful aid have already been addressed by P.C. Adriaanse in the Dutch report on the application of EU State Aid law for the FIDE 2006 congress. The current contribution will briefly summarise the problems identified by Adriaanse and provide an update on the status of Dutch legislation. For a comprehensive overview of the possibilities to recover state aid in the Netherlands, see: T. Ottervanger, S. Evans and M. van den Oord, Report on the availability of judicial remedies before the Dutch courts in the field of State aid; in: Study on the enforcement of state aid law at national level, March 2006.

procedures are tailored to the recovery of unlawful state aid, making it questionable whether the Netherlands can meet its requirements under EC law.<sup>92</sup>

These lacunas in Dutch law are recognised both in literature and by the government.<sup>93</sup> There is, however, some hope on the horizon. The Dutch government is currently in the process of adopting a law which will amend the GALA, Dutch Civil Code and Dutch tax law,<sup>94</sup> providing a suitable set of national instruments to fulfil the EU requirements on the recovery of state aid.<sup>95</sup> Although it does not entail the establishment of a single procedure, it is a step in the right direction. When the law will come into force is unclear. It was sent to the Dutch Council of State (*Raad van State*) for a legal opinion in the summer of 2007, and is still to be approved by both the Lower and Upper Chamber of Parliament.

**Q.44 Has the application of the guidelines for state aid to the financial sector mentioned above been successful in addressing the distortions of competition resulting from the massive aid operations and the accompanying measures?**

**Q.45 Discuss the main Commission decisions concerning your member state so far. As these decisions all contain a revision clause that the effects of the aid have to be assessed after six months it is appropriate to describe/analyse the follow up measures. Such analysis should be focused on the main theme of this questionnaire, as set out above.**

Since October 2008, the Commission has published five sets of guidelines on the assessment of state aid to the financial sector in the context of the current global financial crisis.<sup>96</sup> From the start, the Commission has stressed the need for safeguards against possible abuses and undue distortions of competition resulting from such aid. According to the Commission's guidelines, these safeguards should include behavioural constraints preventing aggressive expansion (e.g. restrictions on commercial conduct, limitations to the size of the balance sheet, or prohibition of other irreconcilable conduct) and appropriate provisions that enable Member States to enforce these behavioural constraints.<sup>97</sup> A high level of remuneration is also considered to act as a safeguard, limiting the distortive effects of measures.<sup>98</sup>

Despite commencing the 6-month reviews on time, there has been some delay in the assessment of the viability/restructuring plans under the review clause.<sup>99</sup> Given the complexity of assessing the 'economic viability' of the recipients of aid – a key criterion in determining the severity of the conditions attached to aid and the extent of the restructuring plans to be submitted – in combination with the sheer volume of cases, this is not entirely surprising. Given that at the time of writing, the

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<sup>92</sup> At minimum, the 5-year time limits for recovery in both administrative and civil law are considerably less than the 10 year period in which the Commission can commence recovery based on Article 15 of EC Regulation 659/1999.

<sup>93</sup> See for example, R.J.M. van den Tweel, *Beschouwingen over effectieve terugvordering van onrechtmatige staatssteun*; in: SEW, nr. 10, oktober 2007, R.H.C. Lua, *Terugvordering van fiscale staatssteun: Navordering van Europees perspectief*, TBF 2001, nr. 9, p. 6; B. Hessel, J.R. van Angeren, W. den Ouden & G.J. van Slooten, *Staatssteun op het grensvlak van bestuursrecht, Europees recht en fiscaal recht (VAR-reeks 134)*, Den Haag: 2005; P.C. Adriaanse, *Handhaving van EG-recht in situaties van onrechtmatige staatssteun*, diss. VU Amsterdam 2006; R.J.G.M. Widdershoven, S. Prechal e.a., *De Europese agenda van de Awb, BJu 2007 & de Commissie Evaluatie Awb III, Toepassing en effecten van de Algemene wet bestuursrecht 2002-2006*, BJu 2007.

<sup>94</sup> *Algemene wet inzake rijksbelastingen*.

<sup>95</sup> TK 31 418, *Wijziging van het Burgerlijk Wetboek, de Algemene wet bestuursrecht en de Algemene wet inzake rijksbelastingen in verband met de tenuitvoerlegging van een beschikking van de Commissie van de Europese Gemeenschappen of een rechterlijke uitspraak inzake staatssteun, alsmede wijziging van het Burgerlijk Wetboek om de procedure voor het vaststellen van de wettelijke rente aan te passen (terugvordering staatssteun)*.

<sup>96</sup> In chronological order these guidelines are: the "Banking Communication" of 13 October 2008 (OJ C 270, 25.10.2008, p.8-14); the "Recapitalisation Communication" of 5 December 2008 (OJ C 10, 15.1.2009, p.2-10); the "Impaired Assets Communication" (IAC) of 25 February 2009 (OJ C 72, 26.3.2009, p.1-15); the "Temporary Framework" of 17 December 2008 (OJ C 16, 22.1.2009, p. 1) amended on 25 February 2009 and "Communication on restructuring aid to banks" (Press release of 23 July 2009, IP/09/1180 (not yet published in the OJ).

<sup>97</sup> *Banking Communication*, paragraph 27.

<sup>98</sup> *Recapitalisation Communication*, paragraph 36.

<sup>99</sup> Not only is it unclear when a financial institution qualifies as 'sound' and 'not sound', the exact difference between a restructuring plan and a viability plan also remains to be clarified.

review of none of the Dutch measures has been completed, it will not be possible to discuss their outcome in this report. We will therefore limit ourselves to a description of the aid granted by the Dutch government to its financial sector, focusing on the conditions under which the aid was granted in order to limit the distortions of competition.

The Dutch government has so far implemented one general aid scheme<sup>100</sup> and has taken 5 ad hoc aid measures<sup>101</sup> that have been reviewed by the European Commission. Two of these measures are currently subject to in-depth investigation by the Commission.<sup>102</sup>

The general aid scheme concerns a credit guarantee scheme within the meaning of the Banking Communication which was approved by the Commission on 30 October 2008.<sup>103</sup> During the course of the initial period of six months, five financial institutions made use of the Guarantee Scheme, with a total issued amount of € 44,7 billion.<sup>104</sup> On 6 March 2009, the Netherlands notified several changes to the guarantee scheme, which had already been implemented prior to that date. The main amendments were: (i) the extension of the maximum maturity of guarantees from three to five years<sup>105</sup>; (ii) the broadening of the conditions on corporate governance under the scheme; and (iii) the expansion of the scope of debt instruments eligible for a guarantee. By decision of 7 July 2009, the Commission approved the amendments and prolongation of the Guarantee Scheme until 31 December 2009.

The first two individual measures – the emergency recapitalisations of ING Group N.V. (*ING*) (worth € 10 billion) and Aegon N.V. (*Aegon*) (worth € 3 billion) – were assessed under the Banking Communication, which stipulates three conditions for compatibility under Article 87(3)(b) EC Treaty (appropriateness, necessity and proportionality) and provides for the imposition of conditions to prevent distortions of competition.

Given the position of ING and Aegon in the Netherlands and worldwide – as confirmed by the Dutch National Bank – the Commission recognised their importance for the Dutch economy and considered the recapitalisation measures appropriate means to strengthen and thus restore market confidence in the Dutch financial sector. Also based on the expert opinion of the Dutch National Bank, the Commission considered the proposed amounts as the minimum necessary to remedy the concerns at hand and expected the return on the State's investments to be in excess of 10%, which it deemed sufficient.

In addition, to ensure that the aid was limited to the minimum amount necessary so as to prevent undue distortions of competition, both beneficiary banks committed to refrain from expansion of their business activities that they would not have pursued if it had not received the capital injection. The Dutch State and the beneficiary banks also jointly committed to limit the expansion of the balance sheet growth of all their banking and insurance activities in the EU and to submit a restructuring plan within six months. ING also committed to maintain its solvency ratio of Tier 1 and to refrain from mass marketing invoking the recapitalisation measure as an advantage in competitive terms.

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<sup>100</sup> N524/2008 Dutch credit guarantee scheme, OJ C 328, 23.12.2008, p.7.

<sup>101</sup> N528/2008 ING, dated 12.11.2008 (issued under the Banking Communication); N569/2008 Aegon, dated 01.12.2008 (issued under the Banking Communication); N611/2008 SNS Reaal, dated 08.12.2008 (issued under the Recapitalisation Communication); N138/2009 ING, dated 31.03.2009 (issued under the IAC); C 11/2009 (ex NN53/B/2008) Fortis Bank, dated 08.04.2008.

<sup>102</sup> N138/2009 ING, dated 31.03.2009 and C 11/2009 (ex NN53/B/2008) Fortis Bank, dated 08.04.2008.

<sup>103</sup> OJ C 328, 23.12.2008, p.7.

<sup>104</sup> The five financial institutions that issued debt instruments using the Guarantee Scheme were: Leaseplan Corp, NIBC, ING, SNS and Fortis Bank Nederland.

<sup>105</sup> The length of time a guarantee may be available is commonly known as "maturity".

On 8 December 2008, the Commission approved an emergency recapitalisation of SNS REAAL N.V. (SNS) worth € 750 million. The measure was reviewed under the Banking Communication and the Recapitalisation Communication. The precise deliberations of the Commissions and the details of the conditions imposed upon SNS and the Dutch State are not clear, since the public version of this decision is not yet available at the time of writing this report. From the press release, however, it seems that similar conditions were imposed as in the ING and Aegon cases.

In the above-mentioned cases, the Commission referred to the distinction between fundamentally sound financial institutions and institutions that are additionally suffering from more structural solvency problems. In line with the Dutch government's plea, the Commission considered the recipient banks to be fundamentally sound.<sup>106</sup> Perhaps this is why the Commission approved the measures in these cases, considering the imposition of the 'standard' conditions laid down in the Communications sufficient. Quite different was the Commission's assessment of the second measure with respect to ING and the measures concerning FBN/ABN.

On 31 March 2009, the Commission temporarily approved the implementation of an illiquid back-up facility for a portfolio worth \$ 39 billion in favour of ING and initiated an in-depth investigation as to the compatibility of certain aspects of the measure. The measure was reviewed under the Impaired Assets Communication. The Commission found that the measure complied with the conditions on eligibility of assets, asset management arrangement, transparency and disclosure and a guarantee fee as stipulated in the IAC and in view of financial stability approved the measure for six months. However, the Commission had doubts that the measure complied with the conditions relating to valuation and burden sharing and opened a detailed investigation. The remarkable thing about this decision is that the Commission made no mention of the fundamental 'soundness' of bank. The focus was more on the necessity of a common European approach to deal with the treatment of impaired assets and the protection of the principles of adequate burden sharing and remuneration. This second measure with respect to ING led to many questions and much debate in the Dutch Parliament.<sup>107</sup> The fact that ING has received aid twice, prompted the Dutch Second Chamber to request the government not to award a bonus to ING employees over 2009<sup>108</sup> and to cease sponsoring the Renault Formula 1 team<sup>109</sup>.

On 8 April 2009, the Commission opened an in-depth investigation to establish whether State measures in favour of Fortis Bank Nederland (FBN) were in line with the EU State aid rules. After The Dutch State purchased FBN from Fortis on 3 October 2008, the Dutch State provided FBN with a credit facility worth € 45 billion and purchased € 16 billion worth of loans, in order to separate FBN effectively from Fortis (*separation measures*). In addition, on 24 December 2008 the Dutch State purchased FBN's shares in ABN for € 6,5 billion (*purchase measure*).

The separation measures were reviewed under the Banking, Recapitalisation and Impaired Assets Communications. The Commission had doubts whether the separation measures were proportionate and minimised negative spill-over effects on competitors. The purchase measure – which was considered to constitute aid since the part of the price that was in excess of the market price had the same effect as recapitalisation of the bank – was assessed under the Recapitalisation Communication. Key to this assessment was whether FBN was to be considered as a "sound" bank or not. This distinction determines which section of the Recapitalisation communication applies. Due to a significant lack of information, however, the Commission could not come to a conclusion on this aspect. The Commission nonetheless had doubts as to the fulfilments of the conditions

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<sup>106</sup> See the press releases IP/08/1699 (ING), IP08/1822 (Aegon) and IP 08/1951 (SNS).

<sup>107</sup> Kamerstukken 31371, Nr. 97.

<sup>108</sup> Kamerstukken 31371, Nr. 103.

<sup>109</sup> Kamerstukken 31371, Nr. 100.

which are common to both section 2.2 and 2.3: (i) the submission of a suitable viability/restructuring plan, (ii) the level of remuneration, and (iii) a clear exit strategy/redemption incentives. The problem with respect to the first condition was that FBN's intended viability/restructuring plan was based on the merger between FBN and ABN. The conditions to which the approval of this merger was subject had however not yet been implemented.

The fact that the review of the measures has not yet been completed also means that it is too soon to tell whether the Commission's application of the above-mentioned guidelines – and the conditions contained therein – to Dutch aid measures has sufficiently addressed possible future distortions of competition in the Netherlands. To put it simply: the Commission has not yet fully applied the conditions. However, it can be remarked that the Dutch Parliament has been very critical toward the aid to Dutch financial institutions. The bonuses and corporate culture in particular being subject to scrutiny.<sup>110</sup>

## **D. Miscellaneous**

### **Financial crisis/regulation**

**Q.46 If you are of the opinion that financial regulation and supervision has an effect on the cleavage between public and private capital in your Member State please provide your views.**

In principle, the answer to this question is no. The general opinion in the Netherlands seems to be that financial regulation and supervision (both EU and national) serve a legitimate public interest that ultimately will benefit everyone. The current financial crisis is likely to have an impact on the powers of the Dutch financial supervisory bodies, in particular the Dutch National Bank. Reason for this is that the lack of proper supervision and appropriate, timely action, is partly to blame for causing the financial crisis. The Icesave debacle is an example of where financial supervision is considered to have failed.<sup>111</sup> The increased powers and supervision of the Dutch National Bank will however most likely not affect the (market) positions of public and private companies through their participations, since that is the domain of the other financial regulator (*Autoriteit Financiële Markten*).

**Q.47 Is there a risk that the measures taken to address the financial crisis including the nationalisation of some banks, will lead to less stringent financial supervision?**

Although the recent nationalisations of financial institutions are supposed to be temporary in nature, the Ministry of Finance's dual role of supervisor versus shareholder does indeed create a risk of conflicts of interest. To prevent the Ministry from lessening its supervision while this situations lasts, there have been so called "Chinese walls" created between the department of Financial Markets (responsible for laws concerning financial supervision) and the department of Financing (involved in decisions concerning participations). In addition, the Financial Institutions Agency (*Bureau Financiële Instellingen*), which fulfils the role of shareholder and financier in participations, is emphasised to be an independent agency.

### **Other**

**Q.48 Are there any other areas of the law that are designed to secure a level playing field between public and private capital?**

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<sup>110</sup> See for example: Kamerstukken 31 371, Nr. 165, 173 and 191.

<sup>111</sup> See for example: Kamerstukken 31 371, Nr. 58.

N/a.