

**The International Comparative Legal Guide to:
Enforcement of Competition Law 2009**

A practical insight to cross-border enforcement regulation



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Netherlands

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1 National Competition Bodies

- 1.1 Which authorities are charged with enforcing competition laws in the Netherlands? If more than one, please describe the division of responsibilities between the different authorities.

The Dutch competition authority (NMa) is entrusted with the enforcement of competition law in the Netherlands. The NMa investigates suspected violations of the rules and imposes sanctions. National courts also apply competition law in cases brought before them. They can declare the invalidity of agreements which are incompatible with the rules and order the cessation of incompatible unilateral behaviour. In addition the courts can award damage claims resulting from infringements.

- 1.2 Provide details about any bodies having responsibility for enforcing competition laws in relation to specific sectors.

The NMa has an Energy Division to enforce the Electricity Act and the Gas Act, as well as a Transport Division to enforce (among others) the Railway Act and the Act for the Transport of Passengers. There are separate authorities responsible for market regulation in the post- and telecommunication sector (OPTA), the media sector (Dutch Media Authority) and the health sector (NZa). The OPTA supervises the application of the Post Act, the Telecommunication Act and the Permission Act on cable-connected telecommunication-infrastructure by market players. The Dutch Media Authority supervises the application of the Media Act. The NZa supervises the health markets in the Netherlands on the basis of the Act for the Regulation of the Health Sector. Each of these authorities has the power to take measures in their respective sectors where normal market forces are insufficient to ensure a healthy market. The enforcement of the Competition Act in these sectors is still the responsibility of the NMa, in consultation with each of these authorities.

- 1.3 How does/do the competition authority/authorities determine which cases to investigate, and which of those to prioritise in the Netherlands?

The NMa can start an investigation of its own initiative or following a complaint. The NMa is not obliged to investigate every suspected infringement and complaint. It sets its priorities on the basis of: economic significance, consumer interest, severity of the infringement and likely efficiency of the NMa action. The NMa also establishes specific priorities each year. In its annual

“Agenda” the NMa identifies the sectors and themes to which it will give special attention in the coming year. As a result of the closer cooperation between the NMa and the European Commission since the modernisation of European competition policy, such policy plays a significant role in establishing these priorities.

2 Substantive Competition Law Provisions

- 2.1 Please set out the substantive competition law provisions which the competition authorities enforce, including any relevant criminal provisions.

The NMa enforces articles 6 and 24 of the Dutch Competition Act (*Mededingingswet*, Mw), and articles 81 and 82 EC Treaty. The Dutch articles closely mirror the European articles subject to the requirement of an effect on competition in the Netherlands instead of an effect on trade between Member States. The NMa is also responsible for concentration control.

- 2.2 Are there any provisions which apply to specific sectors only? If so, please provide details.

The Dutch Competition Act does not contain sector-specific provisions. However as a result of secondary legislation the thresholds for notification of a concentration in the health sector have, as of 1 January 2008, been lowered (Implementing regulation of 6 December 2007, 2007/518). In addition there are temporary rules for the assessment of media mergers (Act relating to Media Mergers). These rules prohibit media mergers which establish a player with 35% or more of the market for newspapers or shares on the markets for newspapers, television and radio programmes which together add up to 90% or more. The other most relevant additional legislation effecting regulation and the role of market forces in specific sectors is mentioned under question 1.2.

3 Initiation of Investigations

- 3.1 Is it possible for parties to approach the competition authorities to obtain prior approval of a proposed agreement/course of action?

Prior approval of concentrations is a precondition for implementation. It is by contrast not possible to obtain prior approval for a proposed cooperation agreement or (unilateral) course of action. In certain circumstances the NMa is however prepared to give an informal view as to the compatibility with the

competition law of a proposed agreement. The NMa only provides an informal view if (i) the case raises a new question of law, (ii) it has a social or economic significance and (iii) the applicant has provided sufficient information for the NMa to draw up an advisory letter.

3.2 Is there a formal procedure for complaints to be made to the competition authorities? If so, please provide details.

Any party, consumers and businesses, can file a complaint to the NMa. There are no special requirements for the form such complaint should take. It can be written or verbal. However the more detail it contains of the parties and behaviour concerned, the more likely the NMa will be able to take action.

3.3 What proportion of investigations occurs as a result of a third party complaint and what proportion occurs as a result of the competition authority's own investigations?

According to its Annual Report 2008, the NMa investigated 22 potential competition law breaches in that year. The Report does not specify how many of these were triggered by one of the 29 complaints submitted.

4 Procedures Including Powers of Investigation

4.1 Please summarise the key stages in the investigation process that is, from its commencement to a decision being reached, providing an indicative time line, if possible.

During the first phase of its investigation into a suspected infringement, the NMa gathers information by sending question lists to the parties concerned and other market players. The NMa can also visit companies and question employees. If the NMa has a reasonable suspicion of an infringement, it sets out its findings in a report, which it sends to the parties concerned. The report and all other documents regarding the case are then made available for inspection by interested parties. These parties can then express their views, in writing or during a hearing. The NMa comes to a final decision on the basis of the report and the hearing. This decision can impose sanctions. There are no legislative deadlines within which the NMa needs to complete its investigation. The NMa has set itself the goal of finishing an average of 90% of its cartel and abuse of dominance cases within 20 months of starting the investigation.

4.2 Can the competition authority require parties which have information relevant to its investigation to produce information and/or documents?

The NMa can ask anyone (the complainant, the suspected perpetrator and third parties) for written or oral information. The party questioned is obligated to answer truthfully. However, representatives or employees of a company which the NMa suspects of an infringement of the competition rules, are not obligated to answer questions that could lead to "self-incrimination" (confirmation by a party representing the company of a breach by the company). The NMa informs the persons concerned of this right. This right does not include the right to refuse to provide documents or answer factual questions.

4.3 Does the competition authority have power to enter the premises (both business and otherwise) of parties implicated in an investigation? If so, please describe those powers and the extent, if any, of the involvement of national courts in the exercise of those powers?

The NMa is entitled to enter and search all premises (offices, shops, cars). The NMa can, however, only enter and search private houses without the consent of the inhabitant if this is necessary to gather information. The NMa requires in such circumstances prior authorisation of the examining judge of the court of Rotterdam. The entrance and search take place under supervision of the examining judge. A public servant of the NMa makes a written report of the search, of which the inhabitant receives a copy.

4.4 Does the competition authority have the power to undertake interviews with the parties in the course of searches being undertaken or otherwise?

The NMa has the right to interview the parties in the course of searches or subsequently.

4.5 Can the competition authorities remove original/copy documents as the result of a search being undertaken?

In principle the NMa does not remove original documents. It takes copies of documents that are relevant for the investigation. Although 'relevant' should be interpreted broadly, so called 'fishing expeditions' are not allowed. Only if the documents cannot be copied on the spot, can the NMa remove originals.

4.6 Can the competition authorities take electronic copies of data held on the computer systems at the inspected premises/off-site?

During the inspection the NMa can take digital copies. If the copied data contains privileged or private documents and the undertaking can identify such documents directly, the NMa deletes them from the digital copy on the spot. After the investigation, the undertaking receives an outline of all the data of which digital copies are made. It then has a second opportunity to request the deletion of privileged or private data. The data which is claimed to be privileged or private is then placed outside the investigation. An official not involved in the investigation will assess whether privileged claims are justified; another official will assess whether data is private.

4.7 Does the competition authority have any other investigative powers, including surveillance powers?

The NMa can request the assistance of the police to obtain access to premises. It also has the right to seal business premises, to ensure that evidence will not be removed or tampered with.

4.8 What opportunity does the party accused of anti-competitive conduct have to hear the case against it and to submit its response?

The undertaking under investigation has the right to receive a copy of the NMa's report, to submit (in writing or orally) its views on the findings, to view all documents regarding the case and to react to the submissions of interested parties.

4.9 How are the rights of the defence respected throughout the investigation?

An undertaking under investigation has a right to remain silent, as described under question 4.2. It has access to the file. It has the right to be heard. A finding of a breach cannot be based on facts, information or accusations to which the undertaking has not been given the opportunity to react.

4.10 What rights do complainants have during an investigation?

If (i) the complainant is an interested party (a party who has a direct interest in the outcome of the investigation), (ii) the complaint concerns the Dutch Competition Act and (iii) the complainant provides sufficient information with the complaint, the complaint can be regarded as a 'formal complaint'. The NMa is obliged to take a decision in respect of the investigation of formal complaints. If it decides not to initiate an investigation or to terminate an investigation, for example because of lack of proof, the complainant will be informed of this. If the NMa gets to the stage of drawing up a report in which it expresses a reasonable suspicion that the competition laws have been violated, the complainant has the right of access to the NMa's file. The complainant has the right to submit his views and to react to the views of others. He also receives a copy of the final decision.

4.11 What rights, if any, do third parties (other than the complainant and alleged infringers) have in relation to an investigation?

Other interested parties also have the right of access to the file, the right to express their views about the report the views submitted by other interested parties.

5 Interim Measures

5.1 In the case of a suspected competition infringement, does the competition authority have powers in relation to interim measures? If so, please describe.

The NMa does not have the power to take interim measures.

6 Time Limits

6.1 Are there any time limits which restrict the competition authority's ability to bring enforcement proceedings and/or impose sanctions?

The NMa may impose a fine for breach of article 6 or 24 of the Dutch Competition Act up to five years after the violation has taken place. This term is extended by periods in which the NMa is carrying out an investigation or in which objection or appeal is lodged against a decision to impose a fine, subject to an absolute deadline of ten years after the infringement has taken place.

7 Co-operation

7.1 Does the competition authority in The Netherlands belong to a supra-national competition network? If so, please provide details

The NMa participates in the European Competition Network (ECN),

which consists of the European Commission and the national competition authorities of the Member States of the European Union. The Members inform each other of new cases of suspected cross border anticompetitive behaviour. They coordinate investigations and inform each other of envisaged enforcement decisions. The NMa is also actively engaged in other international organisations such as the Organisation for Economic Co-operation and Development (OECD), the European Competition Authorities (ECA, an informal forum for competition authorities in the European Economic Area), and the International Competition Network (ICN).

7.2 For what purposes, if any, can any information received by the competition authority from such networks be used in national competition law enforcement?

The ECN members may for the purpose of applying articles 81 and 82 EC, provide one another with and use in evidence any matter of fact or law, including confidential information. Where national competition law is applied in the same case and in parallel to Community competition law and does not lead to a different outcome, information exchanged may also be used for the application of national competition law. It can only be used as evidence leading to the imposition of sanctions on natural persons where the law of the transmitting authority provides for sanctions of a similar kind in relation to an infringement of article 81 or 82 EC or, in the absence thereof, the information has been collected in a way which provides the same level of protection of the rights of defence of natural persons as provided for under the national rules of the receiving authority. However, in the last case, the information exchanged cannot be used by the receiving authority to impose custodial sanctions.

8 Leniency

8.1 Does the competition authority in The Netherlands operate a leniency programme? If so, please provide details.

Natural persons or undertakings that are or have been involved in a cartel, can apply for leniency. The NMa has published leniency guidelines. To apply for leniency, the applicant has to submit a timely leniency request and cooperate fully with the NMa during its investigation. The NMa distinguishes three categories of leniency. The first applicant can apply for 100% leniency in case the NMa has not yet started investigations into the matter, the applicant has not forced others to take part in the cartel and he supplies the NMa with sufficient information to start an investigation (category A). The first applicant can get 60-100% leniency in case the NMa has started investigations but has not yet send a report to the interested parties, the applicant has not forced others to take part in the cartel and he supplies considerable additional information (category B). The applicant can get 10-40% leniency in case he is not the first applicant and no report is yet send to the interested parties or in case he is the first applicant but has forced others into participating in the cartel and (in both cases) he supplies considerable additional information (category C). The NMa adopted and applied more generous leniency guidelines in relation to the construction cases.

9 Decisions and Penalties

9.1 What final decisions are available to the competition authority in relation to the alleged anti-competitive conduct?

The NMa can decide to terminate its investigation for example if

there is insufficient evidence of the suspected infringement. If there is sufficient evidence of an infringement it can adopt a decision to that effect, with or without imposing a fine.

9.2 What sanctions for competition law breaches on companies and/or individuals are available in your jurisdiction?

Both undertakings and individuals can be fined for competition law infringements. Individuals may be liable if they gave the instruction to commit the infringement or had the managerial responsibility for the prohibited actions. The sanction of individual fines only exists since October 2007 and has, at the time of writing, not yet been imposed. Individuals are however currently the subject of ongoing investigations.

The NMa can fine undertakings up to 10% of the turnover of the undertaking in the financial year preceding the decision and individuals up to €450,000. The NMa can also impose periodic penalty payments for non compliance.

9.3 What sanctions, if any, can be imposed by the competition authority on companies and/or individuals for non-cooperation/interference with the investigation?

The NMa can impose a fine for non-cooperation or for breaking a seal. The maximum fine for individuals is €450,000 and for an undertaking, 1% of its turnover in the financial year preceding the decision. In case of a breach of commitments (see section 10) the NMa can impose a fine of up to €450,000 on individuals and on undertakings 10% of its turnover in the financial year preceding the decision.

10 Commitments

10.1 Is the competition authority in the Netherlands empowered to accept commitments from the parties in the event of a suspected competition law infringement?

The NMa may accept commitments from parties suspected of an infringement.

10.2 In what circumstances can such commitments be accepted by the competition authority?

An undertaking can offer commitments to the NMa and request the NMa to adopt a commitments decision as an alternative to a decision establishing an infringement and imposing sanctions. In a commitments decision the NMa declares binding commitments which prevent violations of articles 6 or 24 MW or that put an end to a suspected infringement of these articles. A decision by which the NMa accepts commitments is not the equivalent of a finding of an infringement. The NMa can adopt a commitment decision where in its opinion (i) it is ensured, as a consequence of the decision, that the undertaking will act in accordance with article 6 and 24 Mw, (ii) it can verify compliance with the commitments and (iii) taking such a decision is more efficient than imposing a fine.

10.3 What impact do such commitments have on the investigation?

When the NMa decides to declare the commitments binding, it terminates its investigation.

11 Appeals

11.1 During an investigation, can a party which is concerned by a decision, act or omission of the competition authority appeal to another body? If so, please provide details of the relevant appeal body and the appeal process, including the rules on standing, possible grounds for appeal and any time limits.

Appeal is only possible against final decisions. However complaints can be made to the complaints officer of the NMa or the national Ombudsman. When the complaints officer receives a complaint, he will first try to come to a solution by contacting the complainant. In case this is not successful, the NMa will eventually decide, on advice of the complaints officer, which consequences it attaches to the complaint. In case the complainant is not satisfied with the settlement of the complaint, he can make a complaint to the national Ombudsman. Depending on the matter, the national Ombudsman will make a quick intervention or start an investigation. After an investigation the national Ombudsman will draw up a report in which it decides whether the complaint is justified. This report can contain recommendations to the NMa.

11.2 Once a final infringement decision and/or a remedies decision, has been made by the competition authority, can a party which is concerned by the decision appeal to another body? If so, please provide details of the relevant appeal body and the appeal process, including the rules on standing, possible grounds for appeal and any time limits.

Parties can appeal an infringement decision. The possible grounds for appeal are breach of law or of the general principles of good administration. Appeals can be made to the NMa itself and subsequently to the Court of Rotterdam or, if the NMa and all parties agree, directly to the Court of Rotterdam. Appeals need to be lodged within six weeks of the relevant decision.

12 Wider Judicial Scrutiny

12.1 What wider involvement, if any, do national judicial bodies have in the competition enforcement procedure (for example, do they have a review role or is their agreement needed to implement the competition/anti-trust sanctions)?

National courts have a review role, as described under question 11.2. Their agreement is, however, not needed to implement a fining decision.

12.2 What input, if any, can the national and/or international competition/anti-trust enforcement bodies have in competition actions before the national courts?

The NMa does not play a role in actions before the national court. Pending the case, national courts can ask questions of the European Commission about the application of EC competition law. This possibility is not frequently used.

13 Private Enforcement

13.1 Can third parties bring private claims to enforce competition law in the national courts? If so, please provide details.

The Netherlands does not have a specific legislative framework for private enforcement of antitrust rules. Private claims are based on general civil law actions in conjunction with European and Dutch antitrust law. Third parties can bring before the national civil courts nullity actions based on articles 81 and 82 EC and/or articles 6 and 24 Mw. These actions can be based on article 3:40 of the Dutch Civil Code (DCC), which declares void legal acts contrary to mandatory rules. Acts or omissions in violation of European or Dutch competition law also constitute a tort. On this basis third parties can bring an action for damages or an action for an injunction or restraining order, possibly in conjunction with a periodic penalty payment. Another possibility is an action for undue payment or unjust enrichment.

13.2 Have there been any successful claims for damages or other remedies arising out of competition law infringements?

There have been successful claims for damages arising out of competition law infringements. The success took the form of a settlement rather than a court decision. The most well known example concerned more than a thousand claims in relation to a nationwide construction cartel. Most of these claims were settled. The NMa granted a discount on the fine imposed when the undertaking agreed to settle. Another example is the Interpay case, in which 1,200 claims were brought against Interpay, a Dutch banking institution involved in the processing of electronic funds transfer. Interpay was fined by the NMa for abusing its dominant position by charging excessive prices for PIN transactions. Various employers' organisations filed damages claims. These cases were settled.

14 Miscellaneous

14.1 Is anti-competitive conduct outside the Netherlands covered by the national competition rules?

Anti competitive conduct outside the Netherlands will only fall within the scope of the Dutch competition rules to the extent they have the aim or effect of restricting competition on the Dutch Market.

14.2 Please set out the approach adopted by the national competition authority and national courts in the Netherlands in relation to legal professional privilege.

The NMa may not review privileged documents. The NMa is obligated to respect the confidentiality of correspondence between clients and attorneys admitted to the bar. Also internal documents in which this correspondence is reflected or summarised are privileged. The procedure during the inspection relating to privileged documents is mentioned under question 4.6.

14.3 Please provide, in no more than 300 words, any other information of interest in relation to the Netherlands in relation to matters not covered by the above questions.

Not applicable.



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Sarah Beeston leads the competition law practice of Van Doorne. After qualifying in the UK, Sarah worked for the European Commission. She entered private practice in 1991 and has since specialised in EU law and competition law. Sarah has practised in Brussels, Paris, London and, since 1998, Amsterdam. She has insight into how the EU and national regimes work in practice. In addition to her solid advisory practice, Sarah represents clients in proceedings before national and international courts and in investigations by competition authorities. She has guided numerous clients through national, EU and multi-jurisdictional concentration filings. She takes a practical approach to drafting and implementing tailor-made compliance programmes. Sarah represents clients from all industries including entertainment, financial services, agriculture and energy and has a special focus on the health-care sector. Sarah lectures as part of a Master class on competition Law at the University of Utrecht and gives workshops on competition compliance.



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After completing his studies in civil law, company law and European Private law, Steven Sterk entered private practice in 2007. Steven works in the competition law practise group of Van Doorne. He advises a broad range of clients with respect to antitrust proceedings and merger filings. Steven also specialises in state aid and public procurement law. Steven publishes regularly on competition law developments and has for example written articles on the burden of proof in antitrust proceedings.

VanDoorne



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The Competition Law Group of Van Doorne is comprised of 2 partners and 8 associates. We have a wide practice extending to all areas of competition law. The defence of (suspected) cartels takes centre stage. We have achieved high levels of leniency and substantial reductions in fines in a significant number of high profile cases. We obtained for one of our clients the first and to date only commitments decision under the Dutch competition law. As a result of the excellent reputation of Van Doorne in the health sector we represent several clients in the ongoing NMa sector wide investigations into suspected cartels and have been involved in 40% of the transactions involving hospitals and nursing homes in the last year. We have also successfully defended abuse of dominance claims for several market leaders in the Netherlands. We work with and have regular referrals from our extensive international network of lawyers and advisers.