

Réponses au questionnaire sur la régulation économique  
*Responses to the questionnaire on economic regulation*

**Pays-Bas**  
**Conseil d'Etat**

***Netherlands***  
***Council of State***

## QUESTIONNAIRE ON ECONOMIC SECTORAL REGULATION IN EUROPEAN UNION COUNTRIES

### I. Scope and purpose of economic sectoral regulation

1. **Economic sectoral regulation mainly focuses on sectors submitted to European Union' secondary legislation (transport, energy, postal activities, electronic communication, audiovisual media). Are other sectors subject to such regulation in your country?**

Yes. The media sector, health care sector and gaming sector are subject to special regulation and are supervised by sectoral economic regulators (see also question 7). All economic regulators have English websites. The survey will mainly focus on regulators that have a key task in promoting and protecting competition in sectors that were previously dominated by public monopolies. The financial sector has not been included in the survey, because of the different nature and goals of the tasks of the financial regulators. With the implementation of new European legislation, the supervision and regulation of the financial sector will be further harmonized.<sup>1</sup> Also more supervisory tasks will be attributed to the European Central Bank in order to create a single supervisory Mechanism.<sup>2</sup>

2. **Is the whole set of European Union' secondary legislation for economic sectoral regulation transposed into national law and/or practically implemented?**

In general EU secondary law has been implemented in national law. Due to the influence of EU economic regulation the independent position and the powers of the national regulatory authorities have increased. These authorities should behave independently from the market parties. Also they should be positioned at arm's length of politics (the parliament and the responsible Minister). They should be able to exercise their regulatory powers, implying the power to make economic and legal choices, in an autonomous way.<sup>3</sup>

It turns out that controversies may arise regarding the implementation of European institutional requirements relating to the independence and powers of national regulatory authorities. For instance, the Dutch Telecommunications Act and Media Act both provide for a regulatory obligation for cable operators to give access to the cable to competing companies for the resale of broadcasting services (the broadcasting of television and radio stations). The European Commission is of the view that these regulatory obligations violate EU law (the EU Framework for the regulation of the electronic communications sector). In its opinion the national regulatory authority is responsible for conducting a market analysis, for assessing whether Significant Market Power (SMP) exists in this market and for examining what kind of regulatory obligations should be imposed on the market party having SMP.<sup>4</sup> Currently, the European Commission is investigating this matter in the context of an Infringement procedure. The Netherlands has responded to the reasoned opinion of the

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<sup>1</sup> On 13 December 2011, the reinforced Stability and Growth Pact (SGP) has entered into force with a new set of rules for economic and fiscal surveillance. These new measures, the so-called "Six-Pack", are made of five regulations and one directive. The recently adopted "Two-Pack" is aimed at strengthening the surveillance mechanisms in Europe. This Two-pack consists of two pieces of legislation. One regulation is aimed at enhancing the surveillance of EU area Member States experiencing serious difficulties regarding their financial stability. The other regulation ensures a further strengthening of fiscal surveillance. European Commission, *The Two-Pack on Economic Governance, Establishing an EU Framework for Dealing with Threats to Financial Stability in Euro Area Member States*, Euro Economy, Occasional Paper, 2013.

<sup>2</sup> Proposal for a COUNCIL REGULATION conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, COM/2012/0511-C7-0314/2012-/2012/0242(CNSI).

<sup>3</sup> S.A.C.M. Lavrijssen & A.T. Ottow, 'The Legality of Independent Regulatory Authorities', in: L. Besselink, F. Pennings & A. Prechal (red.), *The Eclipse of Legality*, Alphen aan den Rijn: Kluwer Law International 2011, p. 73-95.

<sup>4</sup> According to Article 14 paragraph (2) of Directive 2002/21/EC, "An undertaking shall be deemed to have significant market power if, either individually or jointly with others, it enjoys a position equivalent to dominance, that is to say a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers". Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (O.J. 2002, L 108/33).

Commission.<sup>5</sup> Recently the cable companies started a civil procedure against the State for adopting the relevant Legislation. The District Court in The Hague declared that the legal provisions obliging the cable companies to resell the broadcasting services were not in harmony with EU law. They were therefore considered to be illegal and were set aside by the national judge.<sup>6</sup> This case is one of the examples that illustrates that the European requirements regarding the independence of authorities and the attribution of regulatory powers to these authorities may be in tension with the Dutch interpretation of constitutional principles such as the principle of legality. According to this interpretation independent authorities can only be attributed implementing powers; they should have no or limited leeway to make economic and legal choices. This Dutch view and the possible tensions with the institutional requirements following from EU law, will be further discussed under questions 8,9 and 10.

**3. Is economic sectoral regulation only aimed at introducing competition in sectors where there is State monopoly? If not, what are its other purposes (implementing an internal market, defining universal service obligations, consumer protection, etc.)?**

The promotion and protection of competition is only one of the core objectives that the relevant legislation aims to protect. In addition to consumer protection, one other main goal of the different acts governing the energy, electronic communications and the health care sectors is the protection of the right of universal service of the consumers. This means that consumers should have access to affordable and high quality services on non-discriminatory terms. The parliamentary explanatory documents that are linked to the different acts refer to the interests of affordability, accessibility, quality and sustainability. For example, the Dutch Media Act requires that the Dutch Media Authority ensures that there is a high quality and varied supply of media services. They should be accessible and affordable for everyone in the Netherlands, at the national, regional or local level. Therefore the Act, amongst others, imposes legal requirements on the public and commercial broadcasting organizations. Another example is the Act on Healthcare and Market Regulation (Wet Marktordening Gezondheidszorg; WMG). Pursuant to this act the Dutch healthcare authority is obliged to pay due consideration to the public interests of universal access, quality and affordability.<sup>7</sup> Especially under the influence of EU secondary legislation, more explicit reference is made to these (non-competition interests) by the legal provisions of the Acts themselves. For instance, Article 5 of the Dutch Electricity Act refers to Article 36 of Directive 2009/72/EC, laying down the goals that national regulatory authorities should take into account when applying the electricity directive.<sup>8</sup> A similar provision can be found in Article 1.3 of the Telecommunications Act, referring to Article 8 par 2-5 of Directive 2002/21/EG.<sup>9</sup>

**4. Is economic sectoral regulation an *ex ante* control, aimed at defining obligations for companies in the regulated sectors *a priori*, or an *ex post* control, aimed at upholding competition provisions in case of infringement ?**

Generally, economic sectoral regulation provides the basis for the *ex ante* regulation of market parties having Significant Market Power.<sup>10</sup> These parties can be imposed regulatory obligations relating to the granting of network access or essential services to competitors, the tariffs and conditions for granting network access, the quality of services and to the retail prices. In addition to the *ex ante* regulatory powers, the competent national authorities also have the power to act *ex post*, e.g. by taking enforcement action (such as imposing fines) against parties that violate legal provisions that are laid down by the legal acts or conditions or obligations following from regulatory decisions.

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<sup>5</sup> Overzicht ingebrekestelling per departement, *Kamerstukken II 2013/2014*, 21 109, nr. 214 (PD overview of infringement procedures per Ministry).

<sup>6</sup> Rb. Den Haag 29 januari 2014, *ECLI:NL:RDBHA:2014:1004* (wederverkoopverplichting analoge pakket).

<sup>7</sup> MvT Wet Marktordening *Kamerstukken II 2004/2005*, 30 186, nr. 3, p. 1. (Memorandum concerning the Act on Healthcare and Market Regulation).

<sup>8</sup> Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC Text with EEA relevance (*O.J.* 2009, L 211/55).

<sup>9</sup> Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive)(*O.J.* 2002, L 108/33).

<sup>10</sup> *Supra* footnote 4.

In the railway sector economic regulation is mainly based on an ex post regime, meaning that regional railway companies have to negotiate with the holder of the national concession for having access to certain essential services (see also under 5). All railway companies involved in the provision of transport services have to negotiate with the operator of the national railway infrastructure for having access to the infrastructure. In the event of a dispute between the operator of the network and other railway companies, the ACM may be asked to settle the dispute.

**5. Has the implementation of an economic sectoral regulation prompted the emergence of competition in the relevant sectors? Did new entrants manage to fit in regulated markets? If not, why?**

In most sectors economic sectoral regulation has stimulated competition. New entrants can be seen in the electronics communications sector (e.g. Vodafone, T-Mobile, Tele2) and in the energy sector (e.g. Dong, Greenchoice, Nederlandse Energiemaatschappij, Gazprom, Atoomstroom, Endesa). The provision of railway services on the national railway system is reserved to the National Railways (Nederlandse Spoorwegen). New entrants, however, can compete for the provision of transport services on the regional railways and some new players operate in the regional/local market for the provision of rail services to train passengers. They are dependent of the National Railways for the provision of certain essential services, such as the provision of space on the train stations and relevant information on arrival and departure times. A recent market scan of the Dutch Authority for Consumers and Markets (ACM) showed that the regional railway companies face difficulties in competing with the owner of the national concession. According to the ACM a main problem is that the specific regulation for the railway sector does not provide for clear ex ante rules ensuring that the regional companies have fair and non-discriminatory access to the essential services that have to be provided to them by the owner of the national concession.<sup>11</sup>

Currently a political discussion is ongoing related to the question whether the Netherlands has gone too far in liberalizing and privatizing the provision of essential services. Some political parties are in favor of making the Minister concerned responsible for the provision of the essential services again. They want to withdraw the legal requirements concerning the unbundling of the energy companies and to reintegrate the operation of the rail network with the provision of the transport services.

**6. Has the implementation of an economic sectoral regulation directly or indirectly lead to the total or partial privatisation of publicly owned companies?**

Economic sectoral regulation has led to partial privatization of energy supply companies. Some supply companies have been sold to large foreign supply companies (RWE/Essent, Nuon/Vattenfall). The national electricity grid and the national gas grid are fully owned by the State. The distribution networks are owned by local and regional authorities such as provinces and communities. The owners of the energy networks are not allowed to sell their shares to private parties. The Law on independent system operation contains, amongst others, the following prohibitions: a prohibition of privatization and a group prohibition. The first prohibition entails that energy networks may not fall in the hands of private parties. The group prohibition stipulates that system operators and undertakings that generate, supply or generate energy may not form part of the same group. The Law on independent system operation imposes stricter unbundling requirements for the distribution companies than the provisions of the EU Energy directives.<sup>12</sup> The Act was very controversial. The energy companies started procedures at the civil court claiming that the Act was illegal and inconsistent with EU law. In last instance, the Dutch Supreme Court referred the case to the ECJ with three questions regarding the compatibility of the prohibitions of the Act with Article

<sup>11</sup> ACM 'Quickscan Personenvervoer 2013' <https://www.acm.nl/nl/publicaties/publicatie/12277/Quickscan-personevervoer-per-spoor-2013/> (consulted 3-3-2014) (Quickscan Transport of Persons).

<sup>12</sup> The Dutch legislation required ownership unbundling of the distribution companies, whereas the energy directives merely required legal unbundling of the distribution companies. See about the EU unbundling requirements, C. Jones, *EU Energy Law. The Internal Energy Market*, Vol. 1, Leuven: Claeys & Casteels 2006, p. 96-100.

345 TFEU<sup>13</sup> and Article 63 TFEU, which deals with the free movement of capital. The ECJ formulated its preliminary ruling on 22 October 2013 and, in fact, upheld the Dutch measures at stake, provided that particular conditions were met.<sup>14</sup>

When the telecommunications market was liberalized by the end of the eighties of the former century, the State company for Post Telecommunications and Telegraphy (PTT) was formed into a separate legal entity and privatized.<sup>15</sup> On the occasion of the partial privatisation of PTT, by the sale in 1994 of a first tranche of shares representing 30% of its capital and in 1995 of a second tranche representing a further 20%, the Articles of association of the company were amended in order to introduce a special share, called a 'golden share', for the benefit of the Netherlands State. In 1998, PTT was divided into two limited liability companies, namely Koninklijke KPN NV ('KPN') for telecommunications services and TNT Post Groep NV, which subsequently became TPG NV ('TPG'), for postal services.<sup>16</sup> On that division, the Netherlands State's special share in PTT was amended to give the State a special share in each of the two new companies.<sup>17</sup> This golden share in KPN was sold in 2005. The State sold all its shares in KPN in 2006. The golden share in TNT was sold after the ECJ ruled that the national rules governing the golden share were not in harmony with Article 56(1) EC (now: Article 63 TFEU).

The liberalization of the railway sector has led to the unbundling of the railway company and the owner of the railway infrastructure. The state is still the owner of the holder of the national concession for the exploitation of rail transport services on the national railway, though it has the structure of a limited liability company and been placed at arm's length of the State. Critical comments on the quality of its performance and a lack of effective coordination with the national network operator (Prorail), which is also owned by the Dutch State, prompted political discussions as to whether the governmental supervision of the holder of the concession and the network operator should be strengthened.<sup>18</sup>

## 7. Which economic sectors would you like to address more specifically in terms of regulation?

### *Health care sector*

One interesting sector to address is the healthcare sector.<sup>19</sup> The Dutch healthcare sector is characterised by a distinction between cure (medical services) and care (long term aid provided to mentally and physically disabled persons and elderly people). This section will focus on the cure medical services, as these services have already undergone far-reaching system changes in recent years. The long term care services are still heavily regulated with limited scope for competition, though these services will also be gradually subjected to competition.<sup>20</sup> The process of the introduction of more competition is governed by several laws in the health care sector. Moreover, a special independent regulator (Dutch Healthcare Authority; NZa) has been founded to supervise and to regulate the process of introducing competition and to safeguard the public interests of affordability, accessibility and good quality of healthcare.<sup>21</sup> The system changes in the healthcare sector are based on three pillars.

<sup>13</sup> Which is an 'an expression of the principle of the neutrality of the Treaties in relation to the rules in Member States governing the system of property ownership.' See *Ibid.* para. 29.

<sup>14</sup> Joined Cases C-105/12 to C-107/12 *Staat der Nederlanden t. Essent NV (C-105/12), Essent Nederland BV (C-105/12), Eneco Holding NV (C-106/12) and Delta NV (C-107/12)* [2013] ECR I-0000.

<sup>15</sup> Letter of the Minister of Finance, 16 November 2996, Fin 2006-0087001.

<sup>16</sup> Joined Cases C-282/04 and C-283/04, *Commission of the European Communities v Kingdom of the Netherlands* [2006] ECR I-09141 par. 4-12.

<sup>17</sup> *Ibid.*

<sup>18</sup> Brief van de Staatssecretaris van infrastructuur en milieu over het spoor: vervoer- en beheerplan, *Kamerstukken II 2013/2014*, 29 984, nr. 464. (PD letter of the state secretary of infrastructure and the environment on the train system).

<sup>19</sup> This paragraph is based on S.A.C.M. Lavrijssen & S.A. de Vries, 'The Protection of Public Social Service Interests in the Netherlands', in: J. van de Gronden, U. Neergaard & M. Krajewski (red.), *The Changing Legal Framework for the Protection of Services of General Interest in the EU*, The Hague/Cambridge: Asser Press 2009, p. 383-420.

<sup>20</sup> The NZa is currently developing the system for the different financial incentives in the long-term care. See to this matter the Brief van de Staatssecretaris, *Kamerstukken II 2013/2014*, 30 597, nr. 380 (PD letter of state secretary).

<sup>21</sup> <http://www.nza.nl> (consulted 3-3-2014).

The first pillar for the change of the regulation of the healthcare sector is the transformation of the system of public health insurance into a system of private health insurance. Under the old system all citizens who did not reach a certain income threshold (or were not civil servants) were obligatory insured on the basis of the Health Insurance Fund Act (Ziekenfondswet). Persons not meeting the conditions of the Ziekenfondswet and civil servants had to conclude agreements with private health insurers. In 2006 the new Health Insurance Act (Zorgverzekeringswet (ZVW)) entered into force.<sup>22</sup> This act has abolished the dual system of public and private health insurances and has replaced it with one private system of health insurance. In other words, the private insurance companies are the bodies managing the basic health care schemes in the Netherlands.

The second important pillar of the changes in the healthcare sector is the introduction of new integral tariff structures (the so-called diagnose-treatment-combinations; DBC's), making it possible that for various medical services the tariffs are determined by the free play of market forces. Gradually the Minister of Health will leave more room for price competition in the provision of healthcare

The third important pillar for the introduction of competition in the healthcare sector is the adoption of the Act on Healthcare and Market Regulation (WMG) that completes the system changes in the healthcare sector.<sup>23</sup> On the basis of the WMG the healthcare sector will gradually be liberalised. This Act has established the Dutch Healthcare Authority (NZa); the independent sectoral regulator that is charged with the application of the WMG.

Under supervision of the Minister of Health, the NZa has the power to regulate the provision of health care in services markets that are not opened up for competition on the basis of a decision of the Minister of Health (Articles 7, 50 and 57 WMG). In case the Minister has left leeway for tariff competition, the NZa may take regulatory measures in case competition is distorted to the detriment of the consumers. For instance, the NZa may make use of its normal general regulatory powers, such as its power to adopt rules concerning the way agreements are concluded and their conditions in order to promote the transparency of the healthcare markets or the promotion of competition (Article 45 WMG). This power is broadly formulated. It is assumed that on the basis of this power the NZa may deal with unreasonable pay conditions, unreasonable contract terms and exclusive supply arrangements.<sup>24</sup> The NZa also has a specific regulatory power that may be applied in a liberalised market on the basis of which it may impose specific obligations on healthcare providers or health insurers. It should be noted that the Dutch legislator was inspired by the European electronic communications directives when designing this specific regulatory power for the NZa.<sup>25</sup> In case one of the above mentioned entities has a dominant position within the meaning of Article 102 TFEU which may frustrate the development of a competitive market, the NZa can designate it as having SMP. On that basis it may impose specific regulatory remedies, such as tariff regulation, transparency conditions, unbundling obligations and supply obligations (Articles 47 and 48 WMG). For example, a health insurer with a SMP position can be obliged to refrain from contracting an excessive amount of healthcare which leads to the exclusion of other health insurers.

As the Minister progressively decides on the liberalization of the healthcare sector, competition in the health care sector has not yet fully developed. In addition the NZa has hardly made use of its competition powers on the basis of the WMG.<sup>26</sup> Furthermore, a consolidation wave is taking place in the hospital sector. According to some critical academics the competition authority, ACM, too readily approves the mergers between

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<sup>22</sup> Wet van 16 juni 2005, houdende regeling van een sociale verzekering voor geneeskundige zorg ten behoeve van de gehele bevolking (Zorgverzekeringswet), *Stb.* 2005, 358 (Health Insurance Act).

<sup>23</sup> Wet van 7 juli, houdende regels inzake marktordening, doelmatigheid en beheerste kostenontwikkeling op het gebied van de gezondheidszorg (Wet Marktordening Gezondheidszorg), *Stb.* 2006, 415 (Act on Healthcare and Market Regulation).

<sup>24</sup> W.T. Algera & J.J.M. Sluijs, 'Marktordening in de gezondheidszorg', *SEW Tijdschrift voor Europees en Economisch Recht* 2007-5, p. 177-178, at p. 181 & MvT Wet Marktordening Gezondheidszorg, *Kamerstukken II* 2004/2005, 30 186, nr. 3, p. 64. (Memorandum concerning the Act on Healthcare and Market Regulation).

<sup>25</sup> W. Sauter, 'Aanmerkelijke marktmacht (AMM) in de zorg', *Markt & Mededinging (M&M)* 2007-1, p. 3-11.

<sup>26</sup> M. Varkevisser, *Patient choice, competition and antitrust enforcement in Dutch hospital markets*, Rotterdam: Erasmus University Rotterdam 2010, and M.P.H. Wiggers, *De NMa en de NZa in de curatieve zorgsector, Een toetsing aan het Europees mededingingsrecht*, Nijmegen: Radboud University 2013.

neighbouring hospitals and ignores or underestimates possible detrimental effects for competition (see question 14 regarding the cooperation between the ACM and the NZa).<sup>27</sup>

### *Media sector*

One other interesting sector is the Media sector. The Dutch Media Authority, called 'het Commissariaat voor de Media' (CvdM)<sup>28</sup>, is charged with the supervision of the compliance with the Media Act.<sup>29</sup> The Media Act implements the EU provisions on the Audiovisual Media Services.<sup>30</sup> The Authority is also responsible for the supervision and enforcement of the Act on the fixed prices for books.<sup>31</sup> The Act on the fixed book prices obliges publishers and importers of books to charge a fixed price for their publications. The supervisory activities of the Media Authority concern radio, television, video on demand and Dutch book publications. The Authority has to protect the independence, pluriformity and the accessibility of the available media services and books in the Netherlands. At the same time it promotes the freedom of information in the Netherlands. When applying and interpreting the Media Act, several questions issues regarding the interpretation and application of EU Law have arisen. The Council of State, the highest administrative Court in media cases has asked several preliminary questions to the ECJ (see question 20).<sup>32</sup>

## **II. Organisation of economic sectoral regulation**

### **8. Is economic sectoral regulation implemented by one or several independent authorities? If so, on what grounds was this choice made and how is this independence guaranteed?**

Originally economic sectoral regulation was implemented by several independent authorities. As will be discussed below, some of these authorities merged into the Authority for Consumers and Markets (ACM) in 2013.

#### **Media Authority (Commissariaat voor de Media)**

The Media Authority was founded in 1988 on the basis of the Media Act. To ensure a pluriform supply of media services and the freedom of information, the Media Authority has been attributed an independent status. The Media Authority also applies the Act on the fixed prices for books (see question 7). The Minister of Education, Culture and Science cannot give case-specific instructions to the Authority. However, the Authority should account for the exercise of its tasks to the Secretary of State, for instance by reporting on its activities to the Minister and by submitting the budget to the Minister for approval. The Authority is financed by the Media budget of the government and by the supervisory costs that have to be paid by commercial media companies.

#### **Independent Postal and Telecommunications Authority (Onafhankelijke Post en Telecommunicatie Autoriteit)**

The Independent Postal and Telecommunications Authority (OPTA) was created in 1998. The OPTA was granted an independent status, meaning that it could not receive case-specific instructions from the responsible Minister. The main reasons for granting this independent status were the legal provisions from the EU telecommunications directives that

<sup>27</sup> E. Loozen, M. Varkevisser & E. Schut, 'Dutch Authority for consumers and markets fails to meet standard of proof in recent hospital merge decisions', *European Competition Law Review*, forthcoming.

<sup>28</sup> <http://www.cvdM.nl/> (consulted 3-3-2014).

<sup>29</sup> Wet van 29 december 2008 tot vaststelling van een nieuwe Mediawet (Mediawet 2008), *Stb.* 2008, 583 (Media Act).

<sup>30</sup> Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) (*O.J.* 2010, L 095/1).

<sup>31</sup> Wet van 9 november 2004, houdende regels omtrent de vaste boekenprijs (Wet op de vaste boekenprijs), *Stb.* 2004, 600 (Act on the fixed prices for books).

<sup>32</sup> Case C-89/04 *Mediakabel* [2005] ECR I-04891; Case C-23/93 *TV10 SA v Commissariaat voor de Media* [2004] ECR I-04795 and Case C-148/91 *Vereniging Veronica Omroep Organisatie v Commissariaat voor de Media* [1993] ECR I-00487.

required that the national authorities had to be positioned independently from the undertakings that were still fully or partly owned by the State (see also under question 9 for the discussion of the characteristics of this independent status). Also the Netherlands State still was the owner of the shares in the incumbent (PTT) at that time. Furthermore, the creation of an independent authority was favored because there was a belief that there was a need for an independent and objective expert judgment in the application of EU Law in the telecommunications sector.

### **Netherlands Competition Authority (Nederlandse Mededingingsautoriteit)**

Also the Netherlands Competition Authority (NCA) became active in 1998. The NCA was created for the enforcement of national and EU competition law. Unlike the OPTA and the Media Authority, the NCA was not granted an independent status from the start. The Minister of Economic Affairs felt it necessary to be able to control and guide the NCA in its initial stage as it had to apply vague norms that were not crystallized yet. Nevertheless the NCA could operate in quite an independent fashion in the first years of its existence. The NCA was granted a formal independent status in 2005, meaning that the Minister could not give case-specific instructions to the NCA anymore (see also under question 9).

### **Energy Authority (Dienst Toezicht en Uitvoering Energie)**

The supervisory authority for the energy sector started as an authority that fell under the responsibility of the Minister of Economic Affairs. During the parliamentary discussions on the adoption of the Electricity Act 1998, the results from a Ministerial working group on supervision were published. The report 'Zicht op Toezicht' (A view on supervision) introduced the Chamber model (kamermodel). This was a model for positioning sector specific regulation and supervision within the Netherlands Competition Authority, in case there would be a large degree of overlap and interaction between the sector specific regime and the general competition law regime. According to then responsible Minister of Economic Affairs this chamber model would also be appropriate for the supervision and regulation of the energy sector. This position was eventually formalized in the energy legislation. At first the director of the Energy Chamber had been attributed autonomous powers, though he was subordinate to the NCA in exercising these powers. When the NCA was attributed an independent status, the director of energy did not have formal decision-making powers anymore. Nevertheless, the profile of the Energy Chamber as a separate entity within the NCA remained clear.<sup>33</sup> The Board of the NCA delegated certain tasks and powers in the energy sector to the director of the Energy Chamber.<sup>34</sup>

Despite the fact that the political ambition was to create less new supervisors several new authorities were created over the years.

### **Netherlands Healthcare Authority (Nederlandse Zorgautoriteit)**

The Netherlands Healthcare authority became active in 2006. This authority has an independent status and cannot receive case-specific instructions of the Minister, though certain general regulatory powers can be guided/controlled ex ante and ex post by the Minister of Health (see under questions 7 and 9).

### **Consumer Authority (Consumentenautoriteit)**

With the implementation of the European regulation on the enforcement of consumer protection law, the Netherlands Consumer Authority was created in 2007.<sup>35</sup> The Consumer Authority was charged with the public and private enforcement of EU and national consumer protection law. Formally it did not have an independent status, but it could function at arm's length of the Minister of Economic Affairs. The Consumer Authority has merged into the newly created Authority for Consumers and Markets (see below).

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<sup>33</sup> S.A.C.M. Lavrijssen, *Onafhankelijke Mededingingstoezichthouders, regulerende bevoegdheden en de waarborgen voor good governance*, Den Haag: Boom Juridische Uitgevers 2006, p. 145.

<sup>34</sup> See Besluit organisatie, mandaat, volmacht en machtiging NMa, *Stcrt.* 2009,14 819. (Decision on the Powers of the NMa).

<sup>35</sup> Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation) (O.J. 2006, L 364/1).

### **Netherlands Gaming Authority (Kansspelautoriteit)<sup>36</sup>**

As of April 2012 the Netherlands Gaming Authority has taken up its mandate. This Authority, has an independent status, meaning that the Minister of Security and Justice cannot give case-specific instructions (see under question 9). The authority supervises the Gaming Act (Wet op de Kansspelen). It provides permits for the delivery of gaming activities and may take enforcement action in case market parties in the gaming sector violate the provisions of the Act (e.g. in the case of the supply of internet gaming services, which is not yet a legal activity in the Netherlands).

### **Authority for Consumers and Markets (Autoriteit Consument en Markt)<sup>37</sup>**

In 2013 the Independent Postal and Telecommunications Authority, the Consumer Authority and the Netherlands Competition Authority merged into a new supervisor: The Authority for Consumers and Markets (<https://www.acm.nl/en/>).<sup>38</sup> The merger was mainly motivated by efficiency, effectiveness and synergy reasons. The idea is that (overlapping) powers across different legal frameworks can be exercised in a more effective and consistent way if they are attributed to a single authority. This authority will be in the position to evaluate what type of remedies will be most suitable to deal with certain market failures. The exchange of relevant information that is gathered on the basis of different acts can be facilitated. Moreover, the new authority can benefit from cost savings and synergies as the expertise of highly qualified civil servants and back office support can be used in a more efficient way. As the healthcare sector is still in a transition phase, it was decided that the NZa will not yet merge with the ACM. The NZa has to make an assessment and weigh different factors when choosing between different instruments (general regulatory measures, SMP-instrument and/or enforcement powers) to deal with competition problems in the healthcare sector. The possible efficiency gains that could result from bringing the SMP-powers to the ACM, probably would not compensate for the expected disadvantages (loss of possibility to make a full consideration regarding the use of instruments) as many parts of the health care sector are still in a transition phase. However, it is expected that the SMP-instrument of the NZa will be attributed to the ACM in the long run.

The cooperation between the above mentioned different regulatory authorities is governed by a number of statutes and cooperation agreements.<sup>39</sup> There is furthermore a relation statute between the ACM and the different Ministries.<sup>40</sup> In addition to these cooperation documents there is a regular consultation process between the different sectoral regulatory authorities.<sup>41</sup>

## **9. Are these authorities independent of the regulated economic sectors? If so, how is this independence guaranteed?**

The abovementioned authorities have been granted the status of Independent Administrative Authority (zbo-status). This means that they can to some extent operate independently from politics (parliament and the Minister). The responsible Minister cannot give them case-specific instructions anymore. Furthermore, these authorities have to function independently from private parties and the Netherlands State's own financial interests in the regulated sectors. There is a General Framework Law on Independent Administrative Agencies, harmonizing to a limited extent the reasons, structure, Ministerial powers and political accountability of the agencies.<sup>42</sup> Accordingly, the degree of independence may vary across the different authorities. The Minister may also keep some important powers that may influence the functioning of the authorities, including the power to formulate policy rules, the power to adopt or approve the budget, the power to annul general or specific decisions of the authorities and the power to appoint the members of the boards of the authorities.

<sup>36</sup> <http://www.kansspelautoriteit.nl/> (consulted 3-3-2014).

<sup>37</sup> <https://www.acm.nl/nl/> (consulted 3-3-2014).

<sup>38</sup> Wet van 28 februari 2013, houdende regels omtrent de Instelling van de Autoriteit Consument en Markt (Instellingswet Consument en Markt), *Stb.* 2013, 102 (Act governing the rules establishing the ACM).

<sup>39</sup> See for example the overview of cooperation of the ACM <https://www.acm.nl/nl/organisatie/samenwerking/samenwerking-nationaal/protocols> (consulted 7-3-2014) provided by the NZa. <http://www.nza.nl/organisatie/overdenza/samenwerking/> (consulted 7-3-2014). See also question 14.

<sup>40</sup> Relatiestatuu ACM en Ministeries 2013, *Stcr.* 2013, 9237. (Relation statute the ACM and the Ministries).

<sup>41</sup> [http://www.dnb.nl/binaries/intentieverklaring\\_marktoezichthoudersberaad\\_tcm46-251000.pdf](http://www.dnb.nl/binaries/intentieverklaring_marktoezichthoudersberaad_tcm46-251000.pdf) (consulted 3-3-2014).

<sup>42</sup> Wet van 2 november 2006, houdende regels betreffende zelfstandige bestuursorganen (Kaderwet zelfstandige bestuursorganen), *Stb.* 2006, 587 (General Framework Law on Independent Administrative Agencies).

The position of the ACM and its (perceived lack of) independence were highly debated in parliament and by several scholars during the parliamentary procedure regarding the creation of the ACM. The Second Chamber asked the Minister to explore the legal limits of EU law and several motions and amendments to strengthen the control of the Minister were proposed. However, these were not adopted. In the Senate controversies arose regarding the decision of the Minister not to grant separate legal personality to the ACM. Unlike the NCA, the OPTA did have legal personality. Not having legal personality means that the ACM does not have its own budget and cannot hire its own personnel. Officially the personnel of the ACM are civil servants of the Minister of Economic Affairs, though the latter cannot give them instructions regarding the exercise of their tasks. The fear existed that the personnel would have loyalty problems and that in the yearly discussion regarding the budget the independent position of the ACM would be challenged. The Senate also raised questions regarding the compatibility with EU law of the power of the Minister to annul decisions of a general nature on the basis of *ultra virus* arguments in the regulated sectors. The Minister committed not to use this annulment power in the regulated sectors. On the other hand the Senate asked the Minister to strengthen his control on the application of general competition law and general consumer law, as these areas are not governed by specific EU law provisions regarding the political independence of the implementing authorities. The Minister reacted to these requests by reintroducing his power to disapprove policy guidelines that are adopted by the ACM in the area of competition law and consumer law.<sup>43</sup>

Ultimately the Senate consented to the law, after having received commitments of the Minister to enhance the independence of the ACM in the regulated sectors on the one hand and to reduce it in the areas of competition law and consumer law on the other hand. Unlike the ACM, the Gaming Authority, the Media Authority and the Healthcare Authority do have legal personality. Consequently, it may be concluded there is quite some variation in the design of the independence of the administrative authorities that are charged with the application of economic law. This leeway is allowed for by the General Framework Law on Independent Administrative Authorities.

**10. Do these authorities have a regulatory power? If so, is it a general regulatory power for the sectors concerned or a narrower regulatory power limited to certain specific aspects of regulation?**

The principle of the “Primacy of the Legislator” is a key constitutional principle in the design of the powers of independent administrative authorities that are charged with the application of economic regulation in the Netherlands.<sup>44</sup> According to this principle, merely providing a legal basis for administrative action by the legislator is not enough. The democratically elected legislator should adequately regulate powers that are delegated to (independent) administrative authorities. In principle the legislator cannot delegate the power to adopt general binding rules or any other power implying a significant degree of discretion to independent administrative authorities. The legislator can only delegate the power to adopt general binding rules to independent authorities under strictly circumscribed circumstances, i.e. when it concerns the power to adopt technical implementation rules or in special circumstances, provided that the rules are subject to approval by the competent Minister. The principle of the “Primacy of the Legislator” is not written down in the constitution or in a formal legal act. The principle is included and specified in the “Instructions for Drafting Legislation” (soft law) (*Aanwijzingen voor de Regelgeving*).<sup>45</sup> The Ministerial departments should take these instructions into account when drafting legislation, but they do not have binding force.<sup>46</sup> The “Principle of the Primacy of the Legislator” can be seen a political interpretation of the principle of legality.<sup>47</sup>

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<sup>43</sup> *Kamerstukken II 2012/13*, 33 622, nr. 2,3,4,10,16 & 17. (PD Act governing the rules establishing the ACM).

<sup>44</sup> S.A.C.M. Lavrijssen & A.T. Ottow, ‘The Legality of Independent Regulatory Authorities’, in: L. Besselink, F. Pennings & A. Prechal (red.), *The Eclipse of Legality*, Alphen aan den Rijn: Kluwer Law International 2011, p. 73-95.

<sup>45</sup> *Aanwijzing 124 van Aanwijzingen voor de Regelgeving*, *Stcrt.* 1996, 177, p. 16.

<sup>46</sup> W. Voermans, *Toedeling van Bevoegdheid*, Den Haag: Boom Juridische Uitgevers, 2004, p. 41.

<sup>47</sup> S.A.C.M. Lavrijssen, *Onafhankelijke mededingingstoezichthouders, regulerende bevoegdheden en de waarborgen voor good governance*, Den Haag: Boom Juridische Uitgevers 2006, p. 73.

Accordingly, in principle the Dutch legislator holds the view that independent administrative authorities cannot be attributed powers that involve policy choices; they only implement policy decisions of the legislator and the Minister. Though there are exceptions to this rule. As mentioned above the Health Care Authority has been attributed a quite broad power to adopt general regulatory measures, but these measures can be annulled by the Minister of Health. Research also shows that the distinction between policy-making and policy-implementation is difficult to make in practice.<sup>48</sup> For instance, even where decisions appear to be purely concerned with the implementation of policy, the complexity of the economic and legal analysis that must be carried out before a decision on, for example, tariff regulation can be made, entails that an implementing regulatory authority must often make difficult socio-economic choices. Very often the independent authorities have to interpret open and vague norms when applying their powers and they have to make economic and legal choices when doing so. While the national authorities have no or limited powers to adopt general binding rules, they proactively draw up policy rules for the interpretation and application of open norms. Policy rules are, in legal terms, only binding for the authorities themselves, unless the application of these rules due to special circumstances leads to disproportionate results for one or more interested parties (Art. 4:84 Dutch General Administrative Law Act, hereafter GALA).<sup>49</sup> Despite this, policy rules can also have external regulatory effects since the market participants take into account and anticipate the way in which the authorities intend to exercise their regulatory and sanctioning powers. This explains why, the Minister of Economic Affairs decided to strengthen the control of the competition authority.<sup>50</sup> This meant that the competition authority's policy rules had to be approved by the Minister. With the adoption of the Act establishing the ACM this power was maintained for the areas of competition law and consumer law, but was disapplied with regard to the regulated sectors. Furthermore, the Minister has adopted sanctioning guidelines regarding the way the ACM should exercise its powers to impose fines in competition law cases.

Due to the focus on the distinction between policy-making and policy-implementation by the Dutch government, there is a risk that the authorities' powers are formulated in a too restrictive way. Examples in the energy and telecommunications sectors showed that the authorities' powers were too narrowly designed with the consequence that they could not adequately exercise their powers and effectively contribute to the realization of the goals of the European directives in the Netherlands in the past.<sup>51</sup> In the meantime, under the influence of EU law, the authorities' powers have to be broadened and may imply a significant degree of discretion, in that the authorities may make economic and legal choices when exercising their regulatory powers, e.g. when adopting tariffs and conditions related to network access in the energy sector.<sup>52</sup> At the same time the Minister of Economic Affairs in the Netherlands has adopted a significant amount of Ministerial rules and policy guidelines. These rules regulate - sometimes in a quite detailed manner- how the ACM should exercise its regulatory powers in the energy sector when adopting technical codes, tariffs methodologies and conditions governing networks access.<sup>53</sup> At this moment it is not clear from the outset how these types of Ministerial rules relate to the European independence requirements that follow from the European energy directives. The European independence provisions of the energy and

<sup>48</sup> S.A.C.M. Lavrijssen, *Onafhankelijke mededingingstoezichthouders, regulerende bevoegdheden en de waarborgen voor good governance*, Den Haag: Boom Juridische Uitgevers 2006 and L. Hancher, P. Larouche & S.A.C.M. Lavrijssen, 'Principles of Good Market Governance', *Journal of Network Industries* 2003-4, p. 355-389.

<sup>49</sup> Article 4:84 GALA reads: "The administrative authority shall act in accordance with the policy rule unless, due to special circumstances, this would affect one or more interested parties disproportionately in relation to the objectives of the policy rule." *Algemene Wet Bestuursrecht, Stb.*1993, 693 (General Administrative Law Act).

<sup>50</sup> Minister Maria van der Hoeven, 'De toekomst van het marktwerkingsbeleid en -toezicht', in P. Kalbfleisch, J. van Sinderen, A. van den Enge, M. van Oers en P. van Bergeijk (red.), *Trust en antitrust, Beschouwingen over 10 jaar Mededingingswet en 10 jaar NMa*, The Hague: NMa 2008, p. 47.

<sup>51</sup> L. Hancher, P. Larouche & S.A.C.M. Lavrijssen, 'Principles of Good Market Governance', *Journal of Network Industries* 2003-4, p. 355-389.

<sup>52</sup> Art. 35 and 37 of Directive 2009/72 of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54 (O.J. 2009, L 211/55); Art. 39 and 41 of Directive 2009/73 of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55, (O.J. 2009, L 211/94) and Art. 3 of Directive 2002/21/EC, as amended by Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services, (O.J. 2009, L 337/37).

<sup>53</sup> <https://www.acm.nl/nl/onderwerpen/energie/wet--en-regelgeving/wet--en-regelgeving-energie/> (consulted 3-3-2013).

communications directives<sup>54</sup> mention the principle of independence of NRAs (National Regulatory Authority) towards the government and legislator.<sup>55</sup> These provisions provide for specific minimum rules on personnel, financial and functional independence, leaving still significant leeway for the Member States to realize the political independence of the NRAs.<sup>56</sup> It is provided, that policy rules or government instructions may not deal with how the regulators exercise their regulatory powers. It is not yet clear what the exact legal meaning of these independence requirements will be, as in practice regulatory matters can hardly be divided in policy-making and policy-implementation.<sup>57</sup>

**11. Do these authorities take part in drafting the relevant legislation for regulated sectors, through notice procedures for instance?**

They can participate in internet consultations on draft legislation that are organized by the responsible ministries. The ACM can also be asked by the Minister of Economic Affairs (also on behalf of other Ministers) to do an impact assessment of draft legislation, examining the competition law and policy implications of proposed new legislation. The ACM can make such assessments also on its own initiative.

**12. Do these authorities have a sanctioning power toward companies of the regulated sectors? If so, what kind of sanctions can they adopt and under which procedure? Do these procedures guarantee compliance with provisions of Article 6§1 of the CPHRFF?**

Economic public law is enforced on the basis of administrative law in the Netherlands. The ACM and the other authorities can impose administrative fines. The maximum amount of these fines is set by the law. They can also adopt stop orders, periodic penalty payments and give instructions to companies as to how to comply with the law. The procedure for the imposition of fines is regulated by the GALA and additional provisions in sector specific economic legislation. The rights of defense are secured by introducing procedural rights for the interested parties, like the right to not incriminate one self, the right to legal privilege, the right to be heard about the main points of objections formulated in a draft decision and the right of access to documents. Internal Chinese walls are required, meaning that civil servants that were active in the investigatory stage of a certain case are not allowed to be involved in the decision-making phase.<sup>58</sup> Furthermore, interested parties may make use of an internal administrative appeal procedure to contest the decision with the authority, before they appeal the decision at the administrative court (see under 3).

**13. Is every economic sector regulated by a specific authority, or are there some authorities exercising their powers in several sectors?**

See the answers under questions 8 and 9.

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<sup>54</sup> This part is based on S.A.C.M. Lavrijssen & A.T. Ottow, 'The Fragility of Independent Agencies in the EU', *Legal Issues of Economic Integration* 2012-4, p. 419 - 445.

<sup>55</sup> Art. 35 of Directive 2009/72/EC, art. 39 of Directive 2009/73/EC, and art. 3 of Directive 2002/21/EC, C.J. Hanretty, P. Larouche and A.P. Reindl, *Independence, Accountability and Perceived Quality of Regulators*, Brussels: A CERRE Study 2012, p. 15. The Energy directives are most explicit in formulating the independence principle.

<sup>56</sup> For instance, the European energy and electronic communications directives do not provide for specific rules regarding the appointment procedure of board members of the supervisors, or rules for sanctioning staff that has violated the independence rules. The electronic communications directive does not provide for specific rules on the length of the term of the board members nor on the renewability of the terms, C.J. Hanretty, P. Larouche and A.P. Reindl, *Independence, Accountability and Perceived Quality of Regulators*, Brussels: A CERRE Study 2012, p. 14.

<sup>57</sup> *Ibid*, p. 14.

<sup>58</sup> See for a discussion of the concept of "Chinese walls" Case C-36/92/P *SEP v Commission* [1994] ECR I-01911 (Conclusion of Advocate General Jacobs).

**14. How are economic sectoral regulatory authorities' competences articulated with those, when appropriate, of a transverse authority in charge of assessing compliance to competition law?**

As stated in question 8 the cooperation between the sectoral regulatory authorities is governed by several cooperation protocols and a regular consultation between the sectoral regulatory authorities. The relations between the sectoral regulatory authorities and the Ministries are governed by the relation statute.<sup>59</sup> The relation statute entails a number of obligations on the ACM to communicate with the ministries on internal organisation as well as external cooperation.<sup>60</sup> With regards to the obligation on the ACM to cooperate with sectoral regulatory organisations in other member states this is governed by article 7 (3) (b) of the Act governing the rules establishing the ACM.<sup>61</sup>

The following section will address the cooperation between the ACM and the NZa as an example. The ACM is responsible for the application of several overlapping legal regimes. A consistent application of these regimes is guaranteed by the fact that the Board of the ACM has the sole decision-making power in all these areas. Both the ACM and the Dutch Healthcare Authority (NZa) have competition related powers in health markets.<sup>62</sup> The powers of the NZa and the ACM may concur, especially as regards the power of the NZa to regulate SMP-undertakings and the power of the ACM to enforce the prohibition on the abuse of a dominant position. Moreover, the NZa and ACM will apply similar competition law concepts in exercising their powers. In order to ensure a consistent and effective application of the general competition rules and the sector-specific competition rules in the healthcare sector, the WMG contains obligations as regards the co-operation between the NZa and the ACM (Articles 17 and Articles 18 WMG). On the basis of the WMG the authorities have concluded a co-operation agreement.<sup>63</sup> In case of a concurrence of powers, it is, in principle, for the NZa to take the lead in dealing with the case (Article 18, par. 1 and par. 3 WMG). Therefore the ACM will refer cases concerning an alleged violation of the prohibition on the abuse of a dominant position to the NZa. In the event of a case with cross border effects, the ACM will in principle take the lead, because pursuant to Regulation 1/2003 national competition authorities have the duty to apply European competition law (and have the discretion to apply the national competition rules in parallel with the Treaty provisions on competition).<sup>64</sup> In case the NZa and the ACM have differing views on the interpretation of competition law concepts, the WMG provides that the views of the ACM takes precedence over those of the NZa (Art. 18, par. 4 WMG).

Furthermore, the ACM and the NZa advise and assist each other in exercising their powers. For example, the NZa provided opinions to the ACM in cases dealing with merger control in the healthcare sector. Although the ACM took note of these opinions, they were not binding. The NZa has stopped giving these opinions with the entry into force of the new healthcare specific merger test in January 2014. This test entails a new obligation for parties in the health care sector (health care providers) to notify mergers above certain thresholds to the NZa. The NZa has to assess the merger impact assessment that the merging parties have to submit when notifying the merger. The NZa has to disapprove the merger if it follows from the assessment, that the relevant stakeholders have not been involved in the process in a careful way (clients and personnel) or when the accessibility of certain crucial healthcare services is put under pressure. After the NZa has approved the merger, parties have to check whether the merger also has to be notified to the ACM. In the healthcare sector lower notification

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<sup>59</sup> See for example the overview of cooperation of the ACM <https://www.acm.nl/nl/organisatie/samenwerking/samenwerking-nationaal/protocols> (consulted 7-3-2014) provided by the NZa. <http://www.nza.nl/organisatie/overdenza/samenwerking/> (consulted 7-3-2014).

<sup>60</sup> Relatiestatoot ACM en Ministeries 2013, *Stcr.* 2013, 9237. (Relation statute the ACM and the Ministries).

<sup>61</sup> Wijziging van de Instellingswet Autoriteit Consument en Markt en enige andere wetten in verband met de stroomlijning van het door de Autoriteit Consument en Markt te houden markttoezicht, *Kamerstukken II* 2010/2011, 33 622, nr. 3, ( PD Changes to the establishment Act of the ACM in order to streamline market supervision).

<sup>62</sup> S.A.C.M. Lavrijssen & S.A. de Vries, 'The Protection of Public Social Service Interests in the Netherlands', in: J. van de Gronden, U. Neergaard & M. Krajewski (red.), *The Changing Legal Framework for the Protection of Services of General Interest in the EU*, The Hague/Cambridge: Asser Press 2009, p. 383-420.

<sup>63</sup> Protocol tussen de Nederlandse Mededingingsautoriteit en de Nederlandse Zorgautoriteit, 2006. <http://www.rijksoverheid.nl/documenten-en-publicaties/kamerstukken/2006/07/17/protocol-tussen-de-nederlandse-mededingingsautoriteit-en-de-nederlandse-zorgautoriteit.html> (consulted 3-3-2014) (Cooperation protocol NZa-NMa).

<sup>64</sup> W. Sauter, 'Aanmerkelijke marktmacht (AMM) in de zorg', *Markt & Mededinging (M&M)* 2007-1, p. 3-11.

thresholds apply than in other sectors. The healthcare providers can only go ahead with the merger if both authorities have given the green light.

### **III. Judicial review of economic sectoral regulatory authorities' decisions**

An extensive overview of the effect of European Administrative law on Dutch Administrative law can be found in Widdershoven 2010.<sup>65</sup> An overview of the Dutch Administrative procedure is made by Widdershoven 2012.<sup>66</sup>

#### **15. Are all economic sectoral regulatory authorities' decisions subject to judicial review? If not, which decisions are not subject to such checks and why?**

In principle administrative decisions of the economic sectoral regulatory authorities (ACM, NZa, Kansspelautoriteit) are subject to judicial review by an administrative judicial body for the addressees or other interested parties, for example penalty decisions or concentration decisions.<sup>67</sup> An interested party according to Article 1:2 of the GALA is a person whose interests are directly affected by a decision.<sup>68</sup> Decisions (or Orders) of general application, such as certain generally binding regulations or policy rules, are not subject to such a direct administrative judicial review.<sup>69</sup> However, interested parties have the possibility to start a civil tort case against general regulatory measures of the sectoral economic regulators for which no direct administrative judicial review is available (see question 16 and see for instance the SplinQ case discussed under question 20). The illegality of a regulatory measure can also be invoked in the context of an administrative appeal against an administrative decision that is based on the regulatory measure concerned. If the administrative court deems the regulatory measure illegal, it may disapply the act and annul the administrative decision that was based on it. There is furthermore sector specific legislation, which deviates from the general rule that decisions of general application are not open for direct judicial review by the administrative courts. For example in the gas and electricity sector decisions of general application related to technical codes, tariff-structures and conditions for access to the networks are open to judicial review by an administrative judicial body.<sup>70</sup> Recent proposals by the Minister to abrogate this possibility of judicial review raised many controversies and the Minister decided to reconsider his original plans.

In order for an appeal against a decision to be admissible the addressee of a decision or another interested party, may contest the decision before the administrative organ in a complaints procedure. However, according to Article 7:1a GALA, a stakeholder can apply for a decision of the administrative organ to pass over the complaints procedure.<sup>71</sup> After closure of

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<sup>65</sup> R.J.G.M. Widdershoven, 'L'influence du droit européen sur le droit public néerlandais', in : J.B. Auby (Ed.), *L'influence du droit européen sur les catégories du droit public*, Parijs: Dalloz 2010.

<sup>66</sup> R.J.G.M. Widdershoven, 'European Administrative Law' in: R. Seerden (Eds.), *Administrative Law of the European Union, its Member States and the United States*, Cambridge-Antwerp-Portland: Intersentia 2012.

<sup>67</sup> According to Article 1:3(1) of the GALA an 'Order' means a written decision of an administrative authority constituting a public law act. According to Article 1:3(2) of the GALA an 'Administrative decision' means an order which is not of a general nature, including rejection of an application for such an order. See also for a general overview of Dutch administrative law, M. Van Hooijdonk & P. Eijssvoogel, *Litigation in the Netherlands, Civil procedure, Arbitration and Administrative Litigation*, Den Haag: Wolters Kluwer International 2012.

<sup>68</sup> Article 1:2 of the GALA reads: "1. 'Interested party' means a person whose interests are directly affected by a decision. 2. Interests entrusted to administrative authorities are deemed to be their interests. 3. The interests of juristic persons are deemed to include the general and collective interests which they particularly represent pursuant to their objects and as evidenced by their actual activities."

<sup>69</sup> General Administrative Law Act, Appendix 2 Article 1.

<sup>70</sup> Specifically, in for example the energy sector, according to Article 82 of the Electricity Act, representative organizations are considered to be interested parties in decisions based on that act. Currently, the legislator proposes to reduce the scope of the additional sector specific provisions relating to legal protection in the energy sector.

<sup>71</sup> The administrative authority can respond positively to this request if none of the other interested parties have lodged a complaint without making a similar request and when the case is suitable to be dealt with directly by the administrative courts. Article 7:1a GALA reads: "Article 7:1a 1. In derogation from article 7:1 the applicant may in his notice of objection request the administrative authority to consent to direct appeal to the administrative court. 2. The administrative authority must in any event refuse the request if another notice of objection that does not contain a similar request has been filed against the decision, unless the other notice of objection is manifestly inadmissible. 3. The administrative authority may consent to the request if the case lends itself to such a procedure. 4. The administrative authority shall decide on the request as soon as possible. A consenting decision shall be taken as soon as it is reasonable to assume that no new notices of objections will be filed. Articles 4:7 and 4:8 do not apply. 5. If the administrative authority consents to the request, it shall without delay forward the notice of objection to the competent court after endorsing it with the date of receipt. 6. A notice of objection received after

the complaints procedure the addressee of the decision or another interested party can start a procedure before the administrative court against the decision of the sectoral regulatory authority. The administrative court can only annul an administrative decision, if the written or unwritten rule or principle that is violated aims to protect the interests of the parties invoking this rule or principle. This is the so called relativity principle (8:69a of the GALA).<sup>72</sup> This principle was at issue in the SNS case of the Administrative Jurisdiction Division of the Council of State, which is discussed under question 20.

**16. Which system of jurisdiction is competent to verify these decisions? When relevant, is the same system of jurisdiction competent to control the decisions of the authority in charge of assessing compliance to competition law?**

The administrative courts are the competent courts to review decisions enacted by the different sectoral regulatory authorities. The Dutch judiciary, for historical reasons, has 3 highest (or supreme) courts that may deal with competition law and economic regulation cases. Within the system of administrative courts, specific courts are designated to deal with the decisions of the different sectoral regulatory authorities in first instance and appeal. These are the District Court of Rotterdam, the Trade and Industry Appeals Tribunal (College van Beroep voor het Bedrijfsleven) and the Administrative Jurisdiction Division of the Council of State (Raad van State). The Central Appeals Tribunal (Centrale Raad voor Beroep) mainly deals with social security cases and will therefore be left out of for further consideration for the present review. The administrative courts apply the rules of the GALA. This act lays down the general rules of Dutch administrative law. Amongst others, it contains the principles of good governance for administrative authorities, rules governing the adoption of decisions by the administrative authorities and the rules governing the judicial review of acts of administrative authorities, including the competences of the administrative courts.

The District Court of Rotterdam and the Trade and Industry Appeals Tribunal are specialized courts in the area of competition law and economic regulation. They are part of the system of administrative courts and as such, in principle, apply the rules of the GALA. There are however a number of provisions in specific laws which deviate from the general rules of the GALA. In the Electricity Act for example direct judicial review of generally applicable regulations is allowed for whereas this possibility is excluded by the GALA (Article 8:3).<sup>73</sup>

The District Court of Rotterdam is the court of first instance to review decisions adopted by the ACM, when it concerns penalty and merger control decisions on the basis of the Competition Act, and also the court of first instance when it concerns penalty decisions on the basis of the sector specific acts.

The Trade and Industry Appeals Tribunal is the court of first and only instance concerning regulatory decisions enacted by the ACM (for example in the energy-sector, or telecommunications sector). It is also competent in higher appeals against judgments, which fall within the above mentioned competence of the District Court of Rotterdam, such as penalty and merger decisions of the ACM.

The Administrative Jurisdiction Division of the Council of State is the highest court of appeal against administrative decisions, in which that competence has not been explicitly assigned to another administrative court. As such under certain circumstances it is called upon to rule on matters related to sectoral economic regulation. It is furthermore the court of higher appeal with regard to decisions of the Gaming Authority (Kansspelautoriteit), The Media Authority and decisions of the Dutch Data Protection Office (College Bescherming Persoonsgegevens or CBP). It is also competent to deal with decisions made by commodity boards

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consent has been given shall likewise be sent to the competent court without delay. Notwithstanding article 8:41.1, no court fee will be charged if this notice of objection does not contain a request as referred to in paragraph 1."

<sup>72</sup> This article 8:69a reads: "The administrative judge shall not nullify a decision on the ground of the violation of a rule of law or a general principle of law, if this rule does not serve to protect the interests of those invoking it."

<sup>73</sup> Article 8:3 GALA reads: "No appeal lies against: a) a decision laying down a generally binding regulation or policy rule, b) a decision revoking or determining the entry into force of a generally binding regulation or policy rule, and c) a decision approving a decision laying down a generally binding regulation or policy rule or revoking or determining the entry into force of a generally binding regulation or policy rule."

(publiekrechtelijke beroepsorganisaties) of which the preliminary reference in the *Wouters Case* provides for an interesting example<sup>74</sup> (see question 20).

The civil judge may furthermore fulfill a supplementary role with regard to the decisions of sectoral regulatory authorities.<sup>75</sup> In that case the Supreme Court (Hoge Raad) is the highest court. Although the civil courts cannot review judgments delivered by the administrative courts, or administrative decisions of sectoral regulatory authorities which have become final, they are competent to deal with certain damage claims against the actions of sectoral regulatory authorities. Such damage claims before the civil judge can entail claims against factual acts of the sectoral regulatory authorities, for example on the grounds of publishing incorrect information on possible anti-competitive behavior of undertakings (such as press releases).<sup>76</sup> The civil courts may also handle civil tort cases against general regulatory measures of the sectoral economic regulators for which generally no direct administrative judicial review is available. The civil judge may come to the conclusion that the adoption and enforcement of an act that violates the law is a wrongful act according to civil law. The civil court can also declare parliamentary acts and regulatory acts unbinding if they are contrary to EU law.<sup>77</sup> In order to have the national court declare legislation contrary to EU law parties have to start a civil tort case against the State.

The members of the different highest administrative courts and the Supreme Court seek to ensure coherence in their case-law by consultations and meetings. Recently the highest administrative courts have been attributed two new instruments to promote the development and unity of law across the different areas of administrative and civil law. The president of the Administrative Jurisdiction Division of the Council of State (or of the other highest administrative courts) may refer a case to an independent Advocate-General. This Advocate-General will be a member of the court but does not participate in the judiciary of the court and will keep a certain distance of the chamber that handles the case concerned. He will be asked to formulate an Opinion about legal questions that are of importance for all the highest courts and which have not yet been answered or have not yet been dealt with in a consistent way. The Advocate General could deal with questions in the area of general administrative (procedural) law, European or international law and issues on the cross-section of administrative and civil law. Secondly cases may be referred to a "Grand Chamber". The cases in which a general issue of law justifies asking the Advocate General to formulate an opinion, generally also will be cases that can be referred to the Grand Chamber. Upon referral to a Grand Chamber, the Administrative Jurisdiction Division of the Council of State can deal with special cases in a chamber of five members. Normally the Administrative Jurisdiction Division of the Council of State deals with cases in a chamber of one or three members. It will be possible that the presidents of the Trade and Industry Appeals Tribunal, the Administrative Jurisdiction Division of the Council of State (Raad van State), the Central Appeals Tribunal (Centrale Raad voor Beroep) and a member of the Supreme Court take part in the Grand Chamber. Also the other highest administrative courts may decide to refer a case to a Grand Chamber. Members of the Trade and Industry Appeals Tribunal and of the Central Appeals Tribunal are deputy-judges with the Administrative Jurisdiction Division of the Council of State. Members of the Administrative Jurisdiction Division of the Council of State are deputy-judges with the other highest administrative courts. There are also informal meetings and consultations between the members of the highest courts.<sup>78</sup>

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<sup>74</sup> Case C-309/99 *Wouters* [2002] ECR I-01577.

<sup>75</sup> HR 24 februari 2012, *ECLI:NL:HR:2012:BT6689* (Ladbrokes v. Stichting Nationale Sporttotalisator) and HR 24 februari 2012, *ECLI:NL:HR:2012:BQ9210* (Essent; Eneco; Delta vs. Staat).

<sup>76</sup> Gerechtshof 's-Gravenhage, 24 februari 2005, *ECLI:NL:GHSGR:2005:AS9694* (Accel Group v Staat der Nederlanden).

<sup>77</sup> Rb. Den Haag 29 januari 2014, *ECLI:NL:RDBHA:2014:1004* (wederverkoopverplichting analoge pakket).

<sup>78</sup> E. Mak, *Judicial Decision-Making in a Globalised World. A Comparative Analysis of the Changing Practices of Western Highest Courts*, Oxford: Hart Publishing 2013. See for specific examples for cooperation between the highest courts the report by K. Mortelmans, *The Contribution of the EU's Administrative Supreme Courts to Improving the Preliminary Procedure, Conclusions of the Hague Working Group*, <http://www.aca-europe.eu/seminars/Santander2008/Mortelmans.pdf> (consulted 3-3-2014)

**17. Which kind of legal recourse is open against these decisions? What are the relevant legal proceedings in this matter?**

Decisions by the sectoral regulatory authorities are reviewed on their legality. This legality review can imply a review of both law and fact.<sup>79</sup> Procedural aspects and the respect of the principles of good administration are reviewed fully. If the application of a legal norm, does not imply a degree of discretion, the courts fully review the application of the law.

Generally, the administrative courts limit themselves to only marginally reviewing the legal and economic assessments of the decisions of administrative authorities which imply a degree of discretion. In Dutch administrative law a distinction is made between the discretion in policy and discretion in assessment. Discretion in policy allows the authority discretion to determine which decision it should take *if* the conditions for legal action in the relevant legislation have been met. Discretion in assessment allows the authorities certain discretion to determine *if* the legal requirements to exercise power have been met under certain conditions. The administrative court will review the decisions taken on the basis of policy discretion only marginally. In such a case it will only establish whether the authority concerned acted reasonably. The Court will also only marginally review decisions on the basis of discretion in assessment. Even in the case of discretion in assessment or of policy discretion, the courts fully review whether the decisions are adequately motivated and comply with the principle of due care. In the area of competition law, the courts apply an intensive review of the application of the principles of good administration by the administrative authority. They may also apply a more intensive review of discretion in assessment in the area of competition law (see under 18).<sup>80</sup>

If the administrative judge finds the appeal well founded according to Article 8:72 of the GALA he or she can decide:

- to fully or partially annul the decision of the authority,
- to give the authority binding instructions for the adoption of new decision,
- to fully or partially substitute the authority's decision with his/her own judgment.<sup>81</sup>

**18. Which control does the judge exercise on these decisions? Does he monitor the formal requirements, legal proceedings and/or reasons for these decisions? For which kind of decisions does he have limited control? In contrast, for which kind of decisions does he exercise thorough control?**

According to the GALA the administrative court is competent to fully review both facts and law and this may entail an intensive review (see question 17). The type of control that is actually exercised by the administrative judge, however, depends on the sectoral regulatory authority, the type of decision it enacts, the nature of the discretion it entails, and the sector in which the decision is enacted.<sup>82</sup>

With regard to the decisions of the ACM concerning the application of Articles 101 TFEU and 102 TFEU and Articles 6 and 24 of the Dutch Competition Act the District Court of Rotterdam as well as the Trade and Industry Appeals Tribunal apply an intensive review. This review entails a full review of the procedural elements of the case as well of the application of the law to the facts, which may imply a significant degree of discretion in assessment. Especially in

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<sup>79</sup> S.A.C.M. Lavrijssen 'More Intensive Judicial Review in Competition Law and Economic Regulation in the Netherlands; Vice or virtue', in O. Essens, A. Gerbrandy, S.A.C.M. Lavrijssen (red.) *National Courts and the Standard of Review in Competition Law and Economic Regulation*, Groningen: Europa Law Publishing 2009, p. 178.

<sup>80</sup> *Ibid* page 179.

<sup>81</sup> Article 8:72 reads: "1.If the district court declares an appeal well-founded, it shall annul all or part of the challenged decision. 2.If a decision or part of a decision is annulled, this entails the annulment of the legal effects of the decision or the annulled part of the decision. 3.The district court may direct that the legal effects of the annulled decision or the annulled part of the decision shall be allowed to stand in full or in part. 4.If the district court declares an appeal well-founded, it may order the administrative authority to take a new decision or to perform another act in accordance with its judgment, or it may rule that its judgment shall take the place of the annulled decision or the annulled part of the decision. 5.The district court may set the administrative authority a time limit for taking a new decision or performing another act, and if necessary it may grant provisional relief. In the latter case the district court shall determine the date on which the provisional relief shall cease. 6.The district court may rule that provisional relief shall cease at a time later than the judgment date. 7.The district court may rule that, if or as long as the administrative authority fails to comply with the judgment, it shall forfeit a penalty in an amount determined in the judgment and payable to a party designated by the court. Articles 611a to 611i of the Code of Civil Procedure apply *mutatis mutandis*."

<sup>82</sup> See footnote 73.

relation to the fines imposed by the ACM, this review implies that the courts replace the assessment of a fine made by the ACM, with their own assessment.<sup>83</sup> For example in *Modint* the Trade and Industry Appeals Tribunal, after critically reviewing the economic and legal analyses conducted by the ACM, came to a different appreciation of the agreement leading to the ACM penalty.<sup>84</sup>

When considering the application of certain exceptions to the cartel prohibition both the District Court Rotterdam and the Trade and Industry Appeals Tribunal are more reluctant to replace his/her judgment with that of the ACM, especially considering the complexity of the balancing test which the exceptions require.<sup>85</sup>

With regard to decisions of the ACM on merger control the District Court of Rotterdam is willing to replace the judgment of the ACM with its own judgment whilst the Trade and Industry Appeals Tribunal is more reluctant in doing so.<sup>86</sup> For example in *Nuon/Reliant* the Trade and Industry Appeals Tribunal, in assessing whether the ACM (then still NMa) had properly reviewed a merger, applied the *Tetra Laval* standard as developed by the Court of Justice.<sup>87</sup> Although the Trade and Industry Appeals Tribunal applied a similar test before the *Tetra Laval* judgment was handed down by the ECJ, it explicitly referred to the Court's reasoning in the judgment.<sup>88</sup>

#### **19. While exercising his power of judicial review, how does the judge keep himself informed (appointment of experts, specialised and contradictory investigation, resort to universities, international sources consultation, etc.)?**

As discussed under question 16, the members of the different highest administrative courts and the Supreme Court may make use of various instruments to ensure coherence in their case-law. Furthermore, in order to keep themselves informed in exercising their power of judicial review the courts call upon deputy judges (*rechter-plaatsvervanger*) from practice and academia, to partake as judges in certain cases. The GALA (art. 8:47 and 8:60) gives the court the possibility to appoint experts. However in economic regulation courts hardly make use of this instrument. Furthermore, the District Court of Rotterdam has established an Expert center for financial and economic law, which, for example, organizes seminars on recent developments in European and Dutch competition law and issues competition law newsletters. The Dutch training institute for the judiciary (SSR) offers specific training courses on EU law, economic regulation and administrative law.

Until recently the ACM was advised by an Independent Advisory Committee during the complaints stage, against the decisions of the ACM on the basis of the Competition Act 1998. This independent advisory committee, consisting out of experts, who reviewed the complaints against the decisions and formulated an advice to the ACM, provided for expert input to which reference could be made during the court proceedings. The ACM was however not obliged to follow the advices of this committee.

There has been a proposal of the Minister to abrogate the complaints stage against penalty decisions of the ACM.<sup>89</sup> However due to critical concerns raised by the advisory body of the Council of State, the government decided to withdraw this proposal. The Minister proposed to

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<sup>83</sup> S.A.C.M. Lavrijssen 'More Intensive Judicial Review in Competition Law and Economic Regulation in the Netherlands; Vice or virtue', in: O. Essens, A. Gerbrandy, S.A.C.M. Lavrijssen (red.) *National Courts and the Standard of Review in Competition Law and Economic Regulation*, Groningen: Europa Law Publishing 2009, p. 182.

<sup>84</sup> *Ibid*, CBB 28 october 2005, *LJN: AU5316* (*Modint*).

<sup>85</sup> S.A.C.M. Lavrijssen 'More Intensive Judicial Review in Competition Law and Economic Regulation in the Netherlands; Vice or virtue', in: O. Essens, A. Gerbrandy, S.A.C.M. Lavrijssen (red.) *National Courts and the Standard of Review in Competition Law and Economic Regulation*, Groningen: Europa Law Publishing 2009, p. 182.

<sup>86</sup> S.A.C.M. Lavrijssen 'More Intensive Judicial Review in Competition Law and Economic Regulation in the Netherlands; Vice or virtue', in: O. Essens, A. Gerbrandy, S.A.C.M. Lavrijssen (red.) *National Courts and the Standard of Review in Competition Law and Economic Regulation*, Groningen: Europa Law Publishing 2009, p. 187.

<sup>87</sup> CBB 28 November 2006, *LJN: AZ3274* (*Nuon v NMa*) and Case C-12/03P *Tetra Laval* [2005] ECR I-987.

<sup>88</sup> S.A.C.M. Lavrijssen 'More Intensive Judicial Review in Competition Law and Economic Regulation in the Netherlands; Vice or virtue', in: O. Essens, A. Gerbrandy, S.A.C.M. Lavrijssen (red.) *National Courts and the Standard of Review in Competition Law and Economic Regulation*, Groningen: Europa Law Publishing 2009, p. 189.

<sup>89</sup> Wijziging van de Instellingswet Autoriteit Consument en Markt en enige andere wetten in verband met de stroomlijning van het door de Autoriteit Consument en Markt te houden markttoezicht, *Kamerstukken II* 2010/2011, 33 622, nr. 3, ( PD Changes to the establishment Act of the ACM in order to streamline market supervision).

make the engagement of the Independent Advisory Committee optional.<sup>90</sup> The proposal is currently subject to debate in the Senate.

**20. Which role does the administrative Supreme Court take toward these decisions? What are the major decisions of supreme administrative justice in economic sectoral regulation matters?**

As explained in the answer to question 16 there are multiple highest administrative courts in the Netherlands. Which court is responsible for reviewing the decisions of a sectoral regulatory authority or of the ACM depends on the way the legislator has allocated the judicial competences in the different policy areas. In addition to the cases already discussed, there are a number of major decisions in the field of economic sectoral regulatory matters and competition law of which the following are the most relevant:

**Preliminary reference cases**

*Wouters*: In this case the Administrative Jurisdiction Division of the Council of State referred questions to the Court of Justice in relation to a decision of the National Bar to prohibit partnerships between law and accountancy firms. As the National Bar is a commodity board, its decisions are subject to (higher) appeal before the Council of State. One of the most important questions answered by the Court was whether the National Bar, as a commodity board, could be considered to be an undertaking or an association of undertakings for the purposes of EU competition law. The Court held that the National Bar qualified as an association of undertakings, but not as an undertaking.<sup>91</sup> The Court furthermore accepted that protecting the independence of lawyers, by prohibiting them from setting up partnerships with accountancy firms, even though this constituted a restriction of competition, was permitted, as it was necessary for the 'proper practice of the legal profession, as organized in the Member State concerned'.<sup>92</sup> The case sheds the light on the application of the inherent restrictions doctrine regarding the way non-competition interests can play a role in Article 101(1) TFEU.<sup>93</sup> This case is of importance not only for EU law but also for the national legal system. The interpretation of the terms undertaking and association of undertakings, also impacts the case-law of the Trade and Industry Appeals Tribunal as it strives to ensure a consistent interpretation of competition law concepts with the interpretation given to those terms by the Court of Justice and the Council of State.

*VEWM*: Before the liberalization of the electricity market, the distributor SEP, had a monopoly in the public distribution of electricity in the Netherlands. The distribution of energy by SEP in the Netherlands was, amongst others, made possible by import contracts that had been concluded by SEP with a number of foreign energy producers. After the liberalization of the electricity market the monopoly was partially retained through a decision of the DTe, in relation to the existing cross border electricity distribution contracts, that were concluded before the liberalization of the electricity sector. The DTe took this decision in order for SEP to be able to honor its obligations to the foreign contracting-parties. A number of competing undertakings challenged this decision before the Trade and Industry Appeals Tribunal. The Tribunal decided to refer questions to the Court of Justice. Directive 96/92/EC on the internal electricity market included a possibility of applying a transitional regime allowing Member States to seek derogations in cases where long-term contracts concluded before the liberalization might not be capable of being honored on account of the directive's provisions.<sup>94</sup> The Kingdom of the Netherlands, however, had not followed the appropriate derogation procedure prescribed by the directive. Because this procedure had not been followed, the Court of Justice held that

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<sup>90</sup> Wijziging van de Instellingswet Autoriteit Consument en Markt en enige andere wetten in verband met de stroomlijning van het door de Autoriteit Consument en Markt te houden markttoezicht *Kamerstukken II* 2010/2011, 33 622, nr. 3, nr. 4, nr. 5. (PD Changes to the establishment Act of the ACM in order to streamline market supervision).

<sup>91</sup> Case C-309/99 *Wouters* [2002] ECR I-01577.

<sup>92</sup> Case C-309/99 *Wouters* [2002] ECR I-01577.

<sup>93</sup> See to that matter E. Pijnacker Hordijk, 'Beoordeling van duurzaamheidsinitiatieven onder het kartelverbod', *Markt & Mededinging* 2013-6 and S.A.C.M. Lavrijssen, 'The Protection of Non-Competition Interests; What Role for Competition Authorities after Lisbon?', *European Law Review* 2010-5, p. 634-659.

<sup>94</sup> Article 24 of Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 Concerning common rules for the internal market in electricity (O.J. 1996, L27/20) provided the regime for derogations. In order for a derogation to be approved the Commission had to be notified.

allowing for such derogation outside of the system of the directive was contrary to principle of non-discrimination.<sup>95</sup>

*KPN*: In this case questions were asked by the Trade and Industry Appeals Tribunal to the Court of Justice in relation to the obligation of KPN to provide third parties access to certain subscriber information in order for the new entrants on the voice telephone market to be able to create their own directories.<sup>96</sup> KPN provided the basic information, such as name and address and the telephone number allocated to the subscribers, but requested a high price for additional information. The third parties complained to the OPTA that KPN refused to provide them with the additional information for a reasonable price. The OPTA rejected their complaints. The Court of Justice had to answer several questions in relation to the obligation of KPN, as a provider of a Universal Service under Article 6 (3) of Directive 98/10, to provide the subscriber information. The Court held that as regards to the information outlined in this Article, KPN could only charge the costs of making that data available to third parties. Concerning the additional information, KPN was not obliged to provide for this information, and could ask for tariffs beyond the minimum payment. The minimum payment was 'only the costs of actually making those data available to third parties.' According to the Court the invoice for the additional information could entail 'apart from the costs of making that provision, the additional costs which he has had to bear himself in obtaining the data provided that those third parties are treated in a non-discriminatory manner.'

*Mediakabel*: Mediakabel sought to provide a pay-per-view service of television programs intended for reception by the public.<sup>97</sup> In order to do so it required a permit from the Dutch Media Authority. Mediakabel challenged the Media Authority's competence to grant such a permit. It held that the pay-per-view service could not be classified as a television broadcasting service but should be classified as an information society service supplied on individual demand within the meaning of the third sentence of Article 1(a) of Directive 89/552. Consequently, Mediakabel held that the service it provided fell outside the scope of application of that directive and thus outside of the competence of the Media Authority. In appeal the Council of State decided to ask a number of preliminary questions to the Court of Justice in relation to the concept of 'information society service' and 'television broadcasting service'. First and foremost the Court held that the concept of 'information society service' is not formulated in opposition to the concept of 'television broadcasting service'. The Court of Justice also held that in order to determine whether a service falls within the concept of 'television broadcasting service' the question has to be answered whether the broadcast of programs is intended for reception by the public, regardless of the manner in which the images are transmitted. The service provided by Mediakabel, the Court held, could be considered to be a television broadcasting service and the Media Authority was thus competent to issue a permit.

*T-Mobile*: In this case the Trade and Industry Appeals Tribunal referred questions to the Court of Justice regarding the interpretation of Article 101(1) TFEU. It asked which criteria must be applied when assessing whether a concerted practice has as its object the prevention, restriction or distortion of competition within the common market within the sense of Article 101 (1) TFEU. In answering that question the Court of Justice reaffirmed that in the case of an object restriction there is no need to investigate whether the anti-competitive behavior has the effect of restricting competition. Furthermore, it shed light on the objectives of competition law by considering that Article 101(1) TFEU is designed to protect not only the immediate interests of individual competitors or consumers but also to protect the structure of the market and thus competition as such. The national court also asked questions regarding the application of the presumption of the causal link between the concerted practice and the succeeding market conduct.<sup>98</sup> In essence the national court wanted to know whether this presumption also applied if there had been only one meeting establishing the concerted practice. The Court answered this question affirmatively.<sup>99</sup>

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<sup>95</sup> Case C-17/03 *VEMW* [2005] ECR I-04983.

<sup>96</sup> Case C-109/03 *KPN* [2004] ECR I-11273.

<sup>97</sup> Case C-89/04 *Mediakabel* [2005] ECR I 04891.

<sup>98</sup> Case C-8-08 *T-Mobile* [2009] ECR I-04529.

<sup>99</sup> *Ibid*, para [62].

*UPC*: When the municipality of Hilversum sold its right to exploit the broadcasting cable network to UPC it included in the selling agreement an obligation related to the tariffs that UPC could maintain for its users.<sup>100</sup> Those tariffs could not exceed a certain amount. UPC sought to have this part of the agreement annulled and started proceedings before the national court. The court of appeals in Amsterdam referred preliminary questions to the Court of Justice regarding the scope, the application and the interpretation of the electronic communications directives. The Court of Justice held first and foremost that the selling agreement fell within the scope of the Electronic communications Networks and Services directives. It reasoned that Article 2(c) of the Framework Directive on electronic communications must be interpreted as meaning that a service consisting in the supply of a basic cable package falls within the definition of an 'electronic communications service'. Consequently that service falls within the substantive scope both of that directive and of the specific directives constituting the regulatory framework applicable to electronic communications services, in so far as that service entails primarily the transmission of television content on the cable distribution network to the receiving terminal of the final consumer. It subsequently had to determine whether a municipality could be considered to be a national regulatory authority and could consequently make rules related to the tariffs for the users living within its territory. The Court answered this question negatively. This case is of importance as it illustrates that local governments, cannot take up the roles of the national regulatory authorities that are charged with the application of the European regulatory framework for the communications sector. Therefore, they cannot restrict the freedom of the suppliers to set tariffs for the transmission of television content on the cable distribution networks to the final consumers.

#### National cases

*LUP*: In this case the Trade and Industry Appeals Tribunal reviewed a decision by the energy supervisor (DTe) in relation to the tariff code for energy-producers.<sup>101</sup> Energy producers importing energy from over the borders were, under this decision, excluded from paying the transport tariffs to the network operators. The DTe had partially based its decision on the agreements made between the different European energy regulators. These agreements were established with the view of coming to a harmonized importers tariff. The Trade and Industry Appeals Tribunal held that the DTe had not exceeded its authority by basing its decision related to the tariffs on these agreements. The case is interesting for national law because by assessing the reasonableness of the national decision in 'light of the consultations on a European level' the Tribunal obliged the DTe to give consideration to the European agreements, even though they did not have a binding character.

*HMG*: This case concerned the scrutiny of judicial review of the Administrative Jurisdiction Division of the Council of State of the decisions of the Dutch Media Authority in relation to his duty of loyal cooperation with sectoral regulatory authorities in other Member States.<sup>102</sup> The considerations of Directive 89/552/EEG included an obligation on the sectoral regulatory authorities to cooperate with each other in the case of possible overlap between different legal regimes. The Dutch Media Authority had taken a decision under national law in relation to a provider of television programs, even though the provider was established in Luxembourg, without contacting the relevant Luxembourg authorities. The Council of State, assessing this specific point of appeal of the television provider objecting to the decision, held that under the principle of loyal cooperation the Dutch Media Authority should have at least, brought the matter up in the consultations with the sectoral regulatory authorities. A second decision taken by the Dutch Media Authority was also annulled by the Council of State on the grounds that the Dutch Media Authority had, again, not respected the principle of loyal cooperation. Although the second time the Dutch Media Authority had taken the decision after consulting the Luxembourg authorities, this consultation had not lead to a resolution of a problem of double supervision. This meant that the broadcasting companies concerned fell under the supervisory regime of two different Media authorities, which was seen as contrary to the goals of Directive 97/36/EG by the Council of State.<sup>103</sup>

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<sup>100</sup> Case C-518/11 *UPC Nederland BV t. Gemeente Hilversum* [2013] ECR I-0000.

<sup>101</sup> CBB 2 augustus 2002, *LJN: AE6773* (Ectrabel e.d. t. DTe).

<sup>102</sup> ABRvS 10 april 2001, *Mediaforum 2001/6* (HMG t. CvDM).

<sup>103</sup> Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (O. J. 1997, L 202/60).

*Vereniging van Reizigers*: In this case a consumer organization, the Association of Travelers (Vereniging van Reizigers), complained to the ACM about the prices maintained by KLM and SLM, on the flight between Paramaribo and Amsterdam.<sup>104</sup> When the ACM decided not to start investigations in the possible violations of competition law the Association of Travelers filed a complaint with the ACM. When the ACM rejected the complaint, the Association of Travelers started court proceedings against the ACM on the basis of the rejection decision. In appeal the Trade and Industry Appeals Tribunal had to decide on the question whether there was an obligation for the ACM to act on the complaint of this consumer organization. The tribunal held that in principle the ACM has an obligation to decide on the complaints submitted before it by stakeholders, and to take action in case of the violation of competition rules. This obligation however does not arise where the complaining party cannot, or has not met the minimum motivation requirements for the complaint.<sup>105</sup> The decision whether to investigate a complaint, is limited by the general principles of good administration. Having regard to the foregoing the ACM cannot limit itself to a single reference to a priority policy when rejecting a complaint. The ACM will have to be able to explain why the complaint itself, given the content of the alleged infringement, and in light of the prioritization criteria, does not justify (further) investigation. With this case the Trade and Industry Appeals Tribunal leaves limited leeway to the ACM to determine whether or not to pursue an investigation and imposes strict motivation requirements.

*Open Universiteit Nederland (OUN)*: In this case the OUN requested a license from the Ministry of Education Culture and Science to provide at home higher educational courses in law.<sup>106</sup> When the state secretary granted the license to two other educational institutes the LOI and NTI objected to the granting of this license. The State Secretary rejected these objections and the LOI and NTI subsequently started proceedings before the district court of The Hague. In appeal against the district court's judgment, the Administrative Jurisdiction Division of the Council of State had to determine, amongst others, whether the OUN could be regarded as an undertaking, because it was unclear whether the provision of higher educational law courses constituted an economic activity. In developing the response the Council of State refers explicitly to the Court's case law C-41/90, Höfner en Elser as well as to case C-35/96, Commission vs. Italy to determine whether an educational service can be considered to be an economic activity. After seeking the advice of the European Commission the Council of State held that, considering the fact that the higher education is paid for by the Dutch government, and that the higher education serves social, cultural and educational purposes, providing law courses cannot be defined as an economic activity. Consequently the OUN could not be defined as an undertaking for the purposes of EU competition law. Alike *Wouters* this case is illustrative of the fact that the Council of State is called upon to interpret the term undertaking, which is an important concept in competition law. The case furthermore demonstrates that in applying EU law the Council of State gives weight to considerations of public interest in determining the scope of competition law.

*Wegener case*: Wegener is the owner of a number of (local) newspapers in the Netherlands. When Wegener sought to acquire the only competing newspaper in a region Wegener had to receive permission from the ACM. The ACM allowed Wegener to own both local newspapers under a number of conditions that guaranteed the independence of the two newspapers, such as the requirement of separate independent editors and the requirement that local newspapers were to continue to focus the content of the newspapers on the region. Wegener appealed against this decision before the Rotterdam District Court and in Higher Appeal before the Trade and Industry Appeals Tribunal. The District Court did not see sufficient ground for the imposition of the above mentioned conditions as the ACM had not sufficiently proven that there were competition problems in the newspaper markets. It therefore decided to annul the decision of the ACM.<sup>107</sup>

The Tribunal came to a different verdict and upheld the requirements of the ACM decision, with an interesting exception.<sup>108</sup> Considering the requirement related to the content of the newspaper, the Tribunal held that such a requirement was contrary to the freedom of press as the ACM was not to intervene in the content of the newspapers. Accordingly, the Tribunal

<sup>104</sup> CBB 20 augustus 2010, *ECLI:NL:CBB:2010:BN4700* (Vereniging van Reizigers), para 7.2.4 -7.2.5.

<sup>105</sup> CBB 20 augustus 2010, *ECLI:NL:CBB:2010:BN4700* (Vereniging van Reizigers).

<sup>106</sup> ABRvS 30 januari 2013, *NJB 2013/404* (Open Universiteit Nederland).

<sup>107</sup> Rb. Rotterdam 20 september 2000, *ECLI:NL:RBROT:2000:AA9482* (Wegener).

<sup>108</sup> CBB 5 december 2001, *ECLI:NL:CBB:2001:AD6693* (Wegener).

changed the wording of the decision from: 'the newspapers should focus on the region' to 'the newspapers should continue to be distributed in the region'.

*Interoperability:* In this case the Trade and Industry Appeals Tribunal asked questions to the Court of Justice in relation to Article 28 of the Universal Services Directive.<sup>109</sup> The case is currently pending before the Court of Justice. The case arose when the ACM fined KPN, a telephone operator, for the tariffs it charged on its competitors for using its fixed networks for phone calls to non-geographical phone numbers, which were substantially higher than those it charged for the geographical numbers. KPN argued that the Dutch Interoperability decision of the Minister does not provide for competence to apply fines in relation to the tariffs it charges to its competitors for the use of its non-geographical phone lines, as these do not constitute a public phone service in the sense of the directive, nor does KPN through these tariffs control the services provided to the end users. The ACM argued to the contrary. One of the central questions the Court of Justice has to answer is whether the Dutch Interoperability Decision is in accordance with EU law. The question should be answered whether Article 28 of the Universal Services Directive provides the ACM for a ground to impose penalty decisions in relation to the tariffs maintained by KPN or whether the tariff regulations and penalties should be based on the designation of KPN as a SMP-party in accordance with the regular market analysis procedure of the European electronic communications directives. The future judgment of the ECJ will probably shed new light on the division of responsibilities between the national authority and the Minister in the area of the protection of universal service in the electronic communications sector.

*MTV:* The state funded Dutch Public Television provider (NPO) is responsible for the provision of public television. In this case MTV and a number of other television providers objected to the Media Authority's decision to approve a new task granted to the NPO by the state.<sup>110</sup> The new task consisted in distributing a number of digital theme channels. MTV and others argued that the Media Authority, in adopting the decision, should have reviewed the effects this decision could have on its competitors, in other words whether it would distort competition. The Administrative Jurisdiction Division of the Council of State agreed with MTV. It held that, considering the fact that the Dutch system regarding the financing of public television, and the transposed national audio-visual legislation, was the subject of a Commission investigation, the Media Authority ought to have reviewed the possible competition distorting effects of its decision. By not doing so the Media Authority had violated the community principle of loyal cooperation. This case illustrates the obligation the Council of State places on the Media Authority to also review the effects its decisions have on the distortion of competition.

*SplinQ:* SplinQ is a website provider which sells books. The books sold on its website are sold for a price below that established in the Act on the fixed prices for books.<sup>111</sup> According to this act there is a set price for selling books to end users. SplinQ is able to sell the books for a lower price by using a cashback system, through which customers get part of their payment reimbursed because they buy the book from a website with advertisements. Part of the income from the advertisements made by SplinQ is then reimbursed to its customers. The Media Authority deemed this practice in violation of the Fixed Book Price Act and issued a warning to SplinQ. In response SplinQ started civil proceedings to have its selling practice declared lawful. In appeal the Supreme Court agreed with SplinQ. It held that considering the EU free movement of goods, and the tension between this freedom and the Fixed Book Price Act, the Act should not be interpreted extensively as to prohibit the cashback system employed by SplinQ.

*SNS:* This case before the Administrative Jurisdiction Division of the Council of State concerned the expropriation by the Minister of Finance of securities, including shares, subordinated bonds and participation certificates, and the subordinated private loans and future claims of SNS Bank and SNS REAAL on 1 February 2013.<sup>112</sup> Numerous organisations

<sup>109</sup> CBB 12 februari 2014, *AWB 13/889* (KPN t. ACM).

<sup>110</sup> ABRvS 13 oktober 2010, *ECLI:NL:RVS:2010:BO0270* (MTV).

<sup>111</sup> HR 21 december 2012, *Mediaforum 2012/4* (CvdM/SplinQ).

<sup>112</sup> ABRvS 25 februari 2013, *ECLI:NL:RVS:2013:BZ2265* (SNS REAAL). The English version of the judgment can be found on the website of the Council of State [http://www.raadvanstate.nl/pers/persberichten/tekst-persbericht.html?id=489&summary\\_only=&category\\_id=8&q=SNS](http://www.raadvanstate.nl/pers/persberichten/tekst-persbericht.html?id=489&summary_only=&category_id=8&q=SNS) (consulted 7-3-2014).

and individuals challenged the expropriation by the Minister. In Appeal the Council of State held that, with the exception of future claims, the Minister could expropriate the SNS securities and loans. The objections made by the parties related to possible violations of EU competition law, and the argument that the expropriation constituted state aid, were dismissed by the Council of State on the basis of Article 8:69a of the GALA which contains the relativity principle. The Administrative Jurisdiction Division of Council of State considered that the state aid and EU competition law provisions do not serve to protect the interests of the expropriated parties. The Council of State argued that this appropriation was based on the fact that SNS Bank was unable by itself to overcome the capital shortage arising mainly from losses on its real estate portfolio. In addition, De Nederlandsche Bank (the Dutch central bank) had demanded that a long-term solution to the capital shortage be found by 31 January. However, this proved impossible. Without the minister's intervention, SNS would most likely have gone bankrupt, which would also have entailed the bankruptcy of ASN Bank and Regio Bank. Due to the deposit guarantee system, a bankruptcy would also have had major consequences for other Dutch banks and the State. In view of this situation, the minister was entitled to conclude that the stability of the financial system faced a serious and immediate threat.

### List of Abbreviations

<b>ACM:</b> Authority for Consumers and Markets	(Autoriteit Consument en Markt)
<b>ABRvS:</b> Administrative Jurisdiction Division of Council of State	(Afdeling Bestuursrechtspraak Raad v. State)
<b>CBB:</b> Trade and Industry Appeals Tribunal	(College van Beroep voor het Bedrijfsleven)
<b>CBP:</b> Dutch Data Protection Office	(College Bescherming Persoonsgegevens)
<b>CvdM:</b> Dutch Media Authority	(Commissariaat voor de Media)
<b>DBC:</b> Diagnose-treatment-combinations	(Diagnose behandelings combinaties)
<b>DTe</b> Energy Authority	(Dienst Toezicht en Uitvoering Energie)
<b>GALA:</b> General Administrative Law Act	(Algemene Wet Bestuursrecht)
<b>HIFA:</b> Health Insurance Fund Act	(Ziekenfondswet)
<b>HR:</b> Supreme Court	(Hoge Raad)
<b>NCA:</b> Netherlands Competition Authority	(Nederlandse Mededingings Autoriteit (NMa))
<b>NGA:</b> Netherlands Gaming Authority	(Kansspelautoriteit)
<b>NRA:</b> National Regulatory Authority	(Nationale Regulerende Autoriteiten)
<b>NZa:</b> Dutch Healthcare Authority	(Nederlandse Zorg Autoriteit)
<b>OPTA:</b> Independent Postal and Telecommunications Authority	(Onafhankelijke Post en Telecommunicatie Autoriteit)
<b>PD:</b> Parliamentary Documents	(Kamerstukken)
<b>Rb:</b> District Court	(Rechtbank)
<b>SMP:</b> Significant Market Power	(Aanmerkelijke marktmacht)
<b>SSR:</b> The Dutch training institute for the judiciary	(Studie Centrum Rechtspleging)
<b>WMG:</b> Act on Healthcare and Market Regulation	(Wet Marktordening Gezondheidszorg)
<b>ZVW:</b> Health Insurance Act	(Zorgverzekeringswet)
<b>ZBO:</b> Independent Administrative Authority	(Zelfstandig Bestuursorgaan)

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HR 21 december 2012, *Mediaforum 2012/4* (CvdM/SplinQ)

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