

Survey on competition law in small economies

Special project for the 2009 ICN Annual Conference – Contribution of the NMa

1. Does the size of the economy affect the application of competition law, and if so how?

The Netherlands Competition Authority (NMa) agrees with the principle as put forward by the European Commission during the telephone conference preceding this survey, that what really affects the application of competition law is the size of the market in which it is applied, rather than the size of the economy.

That said, in the context of this survey, and in the light of what has been said by the participants about the interpretation of the term "small economies", the Netherlands Competition Authority has some comments on how the "size" of the economy may have an impact on how competition law is enforced.

In the OECD Secretariat Note on "Competition Law and Small Economies" of 2003, a distinction is made, based on the work of Gal and on the contributions of participants, between three categories of issues relating to:

- important economic attributes of small economies
- competition law enforcement implications of small size in the conventional sense
- implications of the legal, institutional and economic factors common in developing economies

The comments submitted by the NMa in this survey fall primarily under the second category on enforcement.

2. The Notion of a “Small economy”

The Netherlands has a small national territory (41.528 square meters). It has, however, a large, open, economy, in terms of GDP, (777 billion, 16th in the world¹). It has a high population, (16 million). Its neighbouring economies and trading partners may be larger in terms of territory or population but are treated as equal business partners.

In the Netherlands, while there are oligopolies in particular markets, there is no evidence of occasional oligopolisation being linked to the size of the national territory.

In that sense, the Netherlands has a distinct, and perhaps even unique, position among the Survey's participants. It may be that many factors coming to light in the answers filled in by other participating States will not feature in our answers, and we proffer our comments on competition enforcement in that light.

Geographically, as much of the Netherlands lies below sea level, there is a history of collective work on the building of dykes and water defences. This contributed to the development of a culture of cooperation in trade and business, which we often refer to as the “polder” model. This so-called polder model is said to be a factor in the Netherlands' extensive cartels, which led in the early 1990's to its being known as the cartel paradise of Europe. Another likely contributing factor was the traditional pillarisation of Dutch society, whereby society, and de facto, business, was segregated along religious and ideological lines (a socialist pillar, Catholic pillar, Reformed pillar, etc.). In addition, there is a ready acceptance of authority in the Netherlands, an acceptance with cultural and historical origins, indirectly connected to the limited extent of the national territory.

3. Anticompetitive Agreements

¹ Source: IMF 2007 survey.

Close relationships between those active in business : The fact that business-people know more about each other in smaller economies than in larger ones may make a difference when it comes to the enforcement of competition law.

- It may affect the prioritisation policy of the competition authority. The competition authority may be faced with wide-scale cartels in particular sectors, (such as the construction sector in the Netherlands), which have developed as a result of cultural/historical emphasis on co-operation in business. This development may be facilitated by the fact that people and operators know more about each other in a small geographic territory.
- It may affect the operation of the leniency system. Policing a cartel is easier in a smaller economy where those active in business know more about each other, especially where there is a ready acceptance of authority. As a result, the step to applying for leniency may be more difficult for an individual undertaking than in other economies where operators know less about one another. There has been significant public debate in the Netherlands about the role of the “whistleblower” in competition law. The whistleblower is frequently a disgruntled former employee, or business contact, and the close-knit nature of the business world may in fact increase the likelihood of facts being exaggerated or even fabricated, because of dissatisfaction relating to factors external to the business relationship. In addition, a small territory lends itself to a homogenous culture, and in the case of the Netherlands that is a culture in which leniency may be viewed as an undesirable form of “telling tales”.
- It may be possible for the Competition Authority to turn these issues to work in its favour. The presence of a close-knit business community and a ready acceptance of authority can be useful tools in competition enforcement, where the leaders of that business community have been persuaded of the necessity of obeying the competition rules. An example is where in 2004, after a whistle-blower had revealed the existence of shadow

accountings in the Dutch construction sector, a call on the sector to “come clean” proved effective in leading to large-scale leniency applications.

International co-operation: The limitation of the relevant market by state borders may make a difference.

- It may result in an increased need for joint investigations and information exchange with neighbouring states. The European Competition Network provides explicit rules on these issues in Regulation 1/2003, of which the NMa makes use. We have worked on several joint investigations where we suspected cross-border anti-competitive activity. These joint investigations involved planning and conducting joint dawn raids with the competition authority of a neighbouring state. Information exchange took place using articles 12 and 22 of Regulation 1/2003. The Competition Authorities made use of each other’s offices and staff to interview individuals. Joint discussions took place on issues such as the definition of the relevant product and geographic markets in the cases, but also on jurisdictional issues to avoid double jeopardy. A joint investigation does not necessarily lead to a joint finding. It may emerge in the course of the investigation that the geographic market is actually a national market or that the behaviour is different in the different states.
- It may result in more cases where the alleged infringement has an effect on markets in a neighbouring country. In the shrimps cartel case² we were faced with anticompetitive agreements between organisations of fishermen and wholesalers operating in Dutch, German and Danish territories. We consulted the other national competition authorities and discussed the issues. As a result, we calculated the fines to be imposed on the parties on the basis of the value of sales. It was presumed that all sales on the relevant market as a whole, (The Netherlands, Germany and Denmark), were affecting the Dutch market to a certain extent, using the ‘formula’

² Decision of the Netherlands Competition Authority in Case 2269 *Shrimps cartel*, 14 January 2003.

which was later adopted by the Commission for world wide cartels in its new fining guidelines.³ We will not explore this case in detail as the decision of the Competition Authority is on appeal before the Dutch Trade and Industry Appeals Tribunal.

Justification of a different focus of competition laws due to an enhanced risk of collusion.

The NMa sees no necessity for a different focus of competition law because of a potentially enhanced risk of collusion arising out of factors relating to the size of the national territory.

The NMa sees no link between the size of the national territory and the analysis of vertical restraints and sees no higher risk of foreclosure.

The size of the national territory and economy may be factors to take into consideration in the design of a national de minimus rule. In the Netherlands, the de minimus rule is contained in article 7 of the Netherlands Competition Act. Under article 7, the prohibition on anticompetitive agreements does not apply to cases where:

- no more than eight undertakings are involved and the combined turnover does not exceed € 5,500,000 (for agreements concerning goods) or € 1,100,000 in all other cases.

or

- the combined market share of the undertakings is no greater than 5% of the relevant market and the relevant turnover during the previous calendar year was no more than € 40,000,000.

³ Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, *Official Journal 2006, C 210/2, at point 18.*

In the Netherlands, the de minimus rule is under constant political pressure, especially by political parties that have a strong interest in protecting small and medium-sized enterprises. The original rule related only to the number of companies involved and their turnover. This was modified in October 2007, introducing an extra escape from the prohibition on cartels, for undertakings with a small market share. Already prior to this change, debate had risen about extending the exemption and a proposal to this end is pending before parliament in the last quarter of 2008.

The NMa does see that different enforcement tools may be more or less effective to tackle a potentially enhanced risk of collusion, and these may well relate to the size of the territory.

- For example, nationwide dawn-raids may be easier to launch in a small national territory.
- Settlement procedures may be easier to introduce. The increased transparency makes it more likely that more of the parties involved in a particular horizontal agreement will opt for settlement.
- The competition authority may itself choose to make use of the very branch organisations which in the past engineered wide-scale cartels in different sectors, to spread the message of the importance of competition in the economy. So the existence of a network may be exploited by the competition authority in its guidance efforts, in order to enforce competition law in the economy.

4. Abuse of dominance

The NMa sees no difference in relation to the conduct of dominant undertakings in a small economy.

Arguably, the size of the country may have an impact on the size of the relevant geographic market in a dominance case, leading to smaller markets. The size of a

relevant market is a factual issue which needs to be examined on a case-by-case basis. The NMa would resist any political pressure to warp the definition of a relevant market in a particular case in order to permit the “growth of a national champion” as has on occasion been called for in the media or some sectors of industry.

The small size of the national territory may affect the ease of enforcement in abuse of dominant cases. The smallness of the territory may affect the size of the market. Undertakings may be very nervous of providing evidence to the competition authority relating to the potential abuse. Individual employees may be reluctant to provide such evidence, because they feel it may impact future employment prospects in a small national territory.

5. Mergers

The NMa does not know of any differences with respect to the substance of the merger control regime, which are peculiar to small economies.

Perhaps it could be said however, that in small economies, behavioural remedies may be less difficult to monitor, due to an increased market transparency, than would be the case in a larger territory.

At the level of the procedural regime, the small geographic area may well be relevant to the definition of relevant geographic market in particular sectors. In the Netherlands, there has been political pressure to adopt a separate and stricter test for healthcare mergers to prevent the rise of large regional healthcare institutions, which could, it is thought by some, limit choice for consumers. This pressure has been resisted but a legislative amendment was passed to lower the threshold applicable to healthcare mergers.

6. Additional comment in relation to independence

The independence of a competition authority from executive and commercial influence is an important factor in all economies. In a small economy, where there are strong cultural ties between the political, legal and business elite, there may be increased risks of regulatory capture. It may be more difficult to resist political pressure than would be the case in a larger, more decentralized state with a less homogenous culture.

On the other hand, these risks may be balanced by the increased transparency in a smaller State.

A possible solution to this enforcement problem could be to encourage the concentration of related regulatory and enforcement tasks in one agency. This is the case to a limited extent in the Netherlands where the NMa has been entrusted with tasks related to the regulation of energy markets and transport markets. These regulatory activities are carried out within separate chambers (one for energy, one for transport) of the Competition Authority, but are managed by the same Board. The Legal Department and the Bureau of the Chief Economist of the Authority work both on competition and on the relevant regulatory issues.

However, for various political and financial reasons, other regulators and enforcement authorities have, since 1998, been established outside the NMa, such as the National Health Regulator and the Agency for Financial markets.

In order to preserve the integrity of the NMa, and the perception of integrity, these risks of regulatory capture are legislated for,

- through specific legislation requiring agency officials to declare their financial interests and avoid conflicts of interests. The employees and directors of the NMa are subject to rules restricting their participation in the buying and selling of shares. There are requirements imposed on those working for the NMa to declare any other interests in which they are active and which may risk conflicting with NMa interests.⁴

⁴ See in particular section 61 of the General Civil Service Regulations 2006.

- through the Authority's obligation to motivate its decisions. In addition to this obligation, the NMa uses a two-step procedure in its investigations. Under section 3(2) of the Netherlands Competition Act, the employees involved in the preparation of a report (equivalent to the EC Commission's Statement of Objections) may not be involved in the implementation of the fine. In practice, this means a statutory Chinese wall within the NMa, between the investigating team, which on finding an alleged breach of the Competition Act issues a report to the parties, and the NMa's legal service. Once the report is issued, the NMa's legal service, organises a hearing and drafts the reasoning on the basis of which the Board of Directors of the NMa adopts its decision and sanction.
- through rigorous judicial scrutiny of appealed decisions. In recent cases. The Dutch Trade and Industry Appeals Tribunal has followed the European Court of Justice's reasoning in Tetra-Laval and stated that while the NMa has a certain freedom in reaching its determinations on the value to be given to economic facts and circumstances under the Competition Act, the court is entitled to review whether the NMa has fulfilled its requirement to show the likelihood of its findings and that it has correctly interpreted the relevant legislative terminology. In particular, the court will examine, in addition to the accuracy of the facts claimed, whether the conclusions drawn by the NMa are capable of being substantiated by those facts.⁵

7. Conclusion

In spite of the small geographic size of the Netherlands, its economic position, combined with its historic and cultural circumstances, place it in a unique

⁵ Judgment of the Trade and Industry Appeals Tribunal in the Mobile Operators Case, 31 December 2007, in which it seems to follow the line of the European Court of Justice in the merger review case, Judgment of the Court of Justice of the European Communities in Case C-12/03P Commission v Tetra-Laval 15 February 2005.

position. It has an open economy with a high level of international exposure. Nevertheless, above we have identified some features of competition policy in the Netherlands that may be specific to small markets/economies, notably the close relationships within the business world, more international co-operation as relevant markets sooner overstep national borders, and a high level of political interest in the de minimus rules.