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IRA's – profiles and dilemma's

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1 Introduction

This paper provide profiles and dilemma's of Dutch IRA's, especially market regulators, in a cross-sectoral perspective. The study is part of a European cross-country study of IRA's that will be presented by the EUROSAI in 2011. Different countries use different definitions of IRA. Key question is when an agency has real regulatory powers and can be counted as independent of government and sector. A regulatory agency (also regulatory authority, regulatory body or regulator) is a public authority or government agency responsible for exercising autonomous authority over some area of human activity in a regulatory or supervisory capacity. An independent regulatory agency is a regulatory agency that is independent from other branches or arms of the government. We are especially interested and an expert in market regulators.

The Netherlands Court of Audit has been carrying out an audit programme entitled Market Supervision since 2005. The programme is a response to the growing public importance of market supervisors and the fact that they work at some distance from ministers and politicians. Its aim is to contribute to the efficient operation of supervisors and to help ministers bear their responsibilities for this supervision. In the longer term, we want to draw cross-sector lessons from these audits. We have published reports on the Authority for the Financial Markets (AFM), the Netherlands Competition Authority (NMa) and (recently, at the request of the House of Representatives) the Office of Energy Regulation (EK), which is part of the NMa.[1] In 2009 an exploratory study 'The system of supervision of financial markets' was published. The next audit in this series will investigate the supervision exercised by De Nederlandsche Bank (DNB) of the stability of financial markets. The Court of Audit has had the legal mandate to audit DNB, including its supervisory tasks, since 2007.[2] The Court has no mandate to audit DNB's tasks in its capacity as central bank of the Netherlands. The audits are all performance audits.

[1] Netherlands Court of Audit (2004), Performance of AFM Combating Dishonest Securities Trade; Netherlands Court of Audit (2005), Market Regulation; Netherlands Court of Audit (2007), Supervision of Competition by the NMa; Netherlands Court of Audit (2009), Tariff Regulation of Energy Transport..

[2] According to an interpretation of confidentiality legislation, as laid down in the Financial Supervision Act (WFT) and elsewhere, the Court of Audit has no power to inspect individual files at

2 IRA's in The Netherlands

2.1 Profiles of the Dutch independent regulatory agencies

Regulation has always been one of the core tasks of governments. During the last decades the idea set foot that some regulation could better be done by independent regulatory agencies (IRA's) instead of by the government itself. Since the introduction of the market in many parts of the Dutch society, a whole spectre of independent regulatory agencies came into existence. The development of the internal European market also demanded appointing some independent regulators.

Figure 1 IRA's in The Netherlands

We counted the following IRA's in The Netherlands:

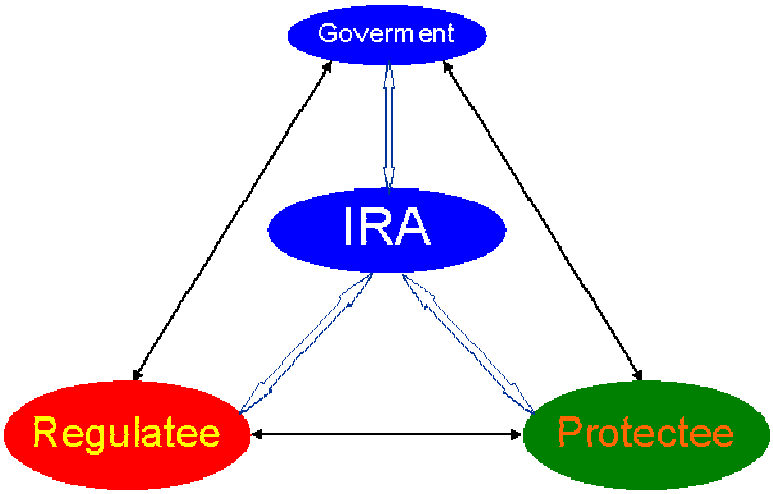
DNB and the AFM. The Court of Audit thinks its powers should be extended in this area and recently wrote about this and other restrictions on its powers to the Minister of Finance (letter from the Court of Audit, 17 November 2009, (9009068R)). The Minister of Finance appended the letter to a letter on the EC remedy and the recapitalisation of ABN AMRO and Fortis Bank Nederland (BFI/2009/497m) that he sent to the President of the House of Representatives (19 November 2009).

1. **NMa**: Nederlandse Mededingings autoriteit (Netherlands Competition authority);
2. **NMa-Energiekamer** (Office for Energy Regulation);
3. **NMa-Vervoerskamer** (Office for Transport Regulation);
4. **OPTA**: Onafhankelijke Post en Telecommunicatie Autoriteit (Independent Post and Telecommunication Authority);
5. **AFM**: Autoriteit Financiële Markten (Authority for the Financial Markets);
6. **NZa** : Nederlandse Zorg autoriteit (Dutch Healthcare Authority);
7. **Consumentenautoriteit** (Consumers authority);
8. **DNB**: De Nederlandsche Bank (Dutch Central Bank).

Some of these IRA's originated from former organic services of the ministries, like the Energiekamer, who developed from the Directie Toezicht energie (DTe), some others were successor of earlier regulators, like the Autoriteit Financiële Markten (AFM) who succeeded the Stichting Toezicht Effectenverkeer; others had no predecessor at all, like the Consumentenautoriteit.
While many IRA's carry the word 'Autoriteit' (Authority) in their name, some are identified as 'Kamer' (Chamber) so as to show that they form a separate division of a larger 'Autoriteit'. De Nederlandsche Bank, founded by King William I in 1814, the regulator safeguarding the stability of the Dutch financial institutions, simply kept it's age-old name.

Apart from the apparent preference of the colour blue in their logo's, often associated with connotations like neutrality, authority and trust, IRA's have much in common. However, there are also many differences between them. IRA's differ regarding their tasks, powers and mandate, regarding their position towards the government and towards the sector and they also differ regarding to the specific checks and balances that has been built into their specific design. Each IRA operates in it's own force field between it's specific stakeholders: government, regulate and protectee. Each IRA has it's own specific profile, thus making no IRA identical to any other. Not always these differences can be explained with logical arguments based on the specific situation of the IRA. Many peculiarities were probably determined by the organic growth of the Dutch system of market regulation through times and different political governments.

Figure 2 IRA placed in it's force field



In this chapter we will describe the profiles of the nine mentioned IRA's in The Netherlands, based on the following aspects:

1. Public interest
2. Position towards the State
3. Position towards the sector
4. Checks and balances

2.2 Public interest

In order to describe the public interest of the eight independent market regulating agencies we will look at their public regulation task, their possible other activities and the means and mandate they have in order to fulfil their task.

2.2.1 Public regulating task

All the eight regulators within our scope have a public task concerning market regulation. However, for each of them the focus of this task is different.

The NMa is commissioned with supervising the well functioning of all markets for goods and services. As such the NMa has three principal tasks:

- enforcing the prohibition on cartels;
- enforcing the rules prohibiting the abuse of a dominant market position;

- assessing proposed mergers and acquisitions (concentration), preventing dominant market positions.

As the NMa supervises all markets, on the financial markets the NMa meets two other regulators: DNB and AFM. DNB is commissioned with the prudential supervising over financial institutions: in order to guard the financial stability of The Netherlands it keeps control over the solvability and some other business economic data of a specific group of actors on the financial market, like banks, securities and investment companies and insurance companies. The AFM supervises the conduct of the whole financial market sector: savings, investment, insurance and loans. By supervising the conduct of the financial markets, AFM aims to secure the efficient operation of these markets.

So where the DNB supervises the *financial structure* of certain key players on the financial market, the AFM watches the *conduct* of *all* players on this market. The NMa guards against violating *certain restrictions* but is not limited to the financial market.

The following diagram visualises this.

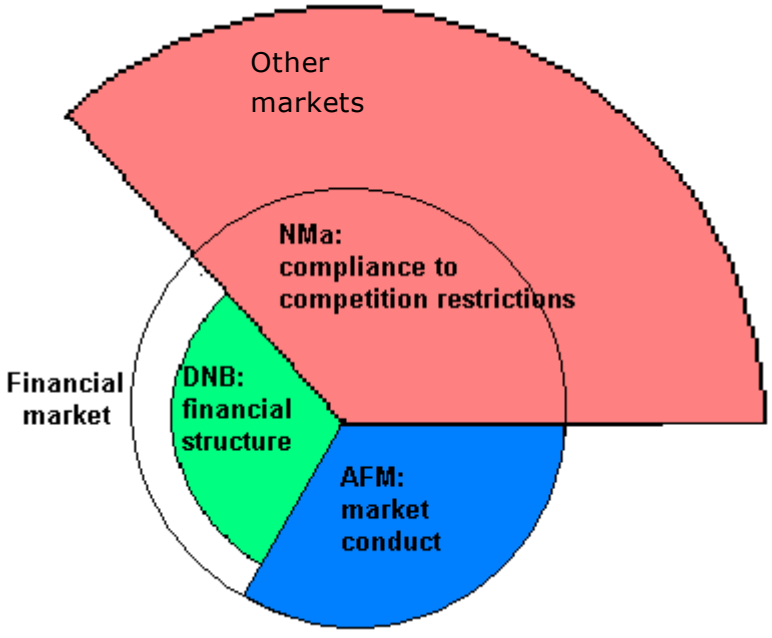


Figure 3 Public tasks of three regulators on financial markets

The specialisation of market regulators on other markets is comparable to the financial market. So on the energy market it is the specialised Energiekamer who regulates the tariffs for network operation while the NMa is responsible for the general competition policy for the energy industry as a whole.

More or less the same applies for the NZa. The health care market consists of a regulated part and a (partly) liberated part. The NZa sets rules and determines budgets and tariffs for the regulated part of the health care market and formulates and supervises conditions for well functioning of the market for the (partly) liberated parts of the market.
The Vervoerskamer and the Consumers authority (CA) mainly supervise compliance to the sector specific regulation by parties on the market. For the Vervoerskamer these parties are rail-, air and other public transportation and sea pilots. The CA is not limited to a specific market but is commissioned to watch over the consumer interest.
Also OPTA supervises compliance of parties on the Telecom market to sector specific regulation, but also guards against significant market powers of parties on this market. On all these markets the general competition policy, especially the ex post guarding on the three mentioned aspects, remains the responsibility of the NMa.

This description of public tasks of the eight market regulating IRA's makes it clear that the allocation of tasks is by no means easy to understand for an outsider. This can for some part be explained by the organic development of the system, where within several years of time new regulators were created. Another explanation is the fear for a 'supervision moloch' if all tasks would have been commissioned to the same supervisor.

Clashes of competences can and have occurred. Especially between OPTA and de NMa such disputes about the question which regulator is to deal with a certain matter, are easy to imagine. After all, OPTA's task to guard *ex ante* against significant market powers of parties on the telecom market, coincides with the *ex post* NMa-task regarding abuse of a dominant market position.

Contradicting conclusions on cable operators

The NMa can impose sanctions to a company in case of abuse of a dominant market position (ex post). OPTA can impose certain mandatory requirements to a company in case of significant market power (ex ante). Both regulators check for this whether excessive tariffs are being charged. In 2005 in the case of cable operators UPC and Casema NMa and OPTA arrived at contradicting conclusions about the level of the tariffs. The explanation given for this was that the NMa evaluates only the contemporary market, while OPTA also takes considerations on future market development into account (f.e. necessary future investments leading to higher tariffs).

Also between other regulators overlaps are likely to occur, for instance between the Consumers Authority and for instance the NMa or the AFM,

since the CA does not have a fixed market to concentrate on. Some of these overlaps raises conflicts, that may reach parliament. For example, between the NZa and the NMa in case of a planned merger of a big health care supplier and a housing corporation.
DNB offers on its website an Overlap Supervision Hotline for Financial institutions to turn to for reporting an overlap in the supervision of DNB and the AFM.

Recently pleads were made to come to a merge of the Netherlands market regulators. On 7 October 2010 Barbara Baarsma, professor in Competition Economy at the University of Amsterdam, argued that the recent government budget cuts urge the NMa, OPTA, NZa and the CA to consider merging into one organisation, like the Energiekamer and the Vervoerskamer are already part of the NMa.[3] In 2003 merging of OPTA and the NMa was already on the agenda, but then the minister of Economic Affairs thought the moment was still too early. By now however the telecom market shows a mature competing market and also the liberalisation of the postal market is practically realised. According to Baarsma the missions of the four regulators are close to one another. Merging them would allow for a more balanced weighing of interests. Integrating the Vervoerskamer further into the NMa, in which it still forms a separate 'chamber', is not considered yet. A quick liberalisation of the public transport market seems still far away so there is still need for this specialised regulator.

2.2.2 Other activities

DNB has an important role in the national and international money traffic, in the stability of the financial climate and in the monetary policy. Apart from that DNB, like all other IRA's is an important adviser of the ministry. All IRA's put much effort in providing information to the public, issuing brochures or applying other means for communication about their work, general information about the market or express their views on matters concerning their task. We did not find any other activities outside the scope of the legal tasks of the IRA's.

2.2.3 Means and mandate

Regulators have several means at their disposal for performing their task, ranging from co-operative methods (communication, advise, expressing informal views) to coercion (binding decisions, investigations and fines).

[3] Financieel Dagblad 08-10-2010

Table 1 provides an overview of the different competences of the eight regulators.

Table 1 Competences of regulators

Regulatory bodies	**NMa**	**DNB**	**AFM**	**EK**	**VK**	**OPTA**	**NZa**	**Ca**
Competences (illustrative list)								
1. Determining prices						X	X	
2. Approving rates and controlling how they are applied				X		X	X	
3. Granting permits								
4. Issuing licenses		X	X	X	X	X		
5. Control of qualifications of persons undertaking regulated activities		X	X					
6. Agreeing companies' development plans								
7. Control of quality of services provided to clients			X	X	X	X	X	
8. Issuing recommendations and orders	X	X	X	X	X	X	X	
9. Imposing sanctions	X	X	X	X	X	X	X	X
10. Consent to appoint the authorities of the regulated/supervised entities		X	X					
11. Supervising and examining the financial situation of the regulated entities		X				X	X	
12. Taking decision about liquidation of institutions		X						
13. Establishing appointed administrators		X	X					
14. Cooperation with relevant bodies aimed at preventing anti-competitive practices	X	X	X	X	X	X	X	X
15. Consent to mergers	X	X						
16. Settling disputes	X							
17. Publishing information for consumers		X	X	X	X	X	X	
18. Collecting and analysing market data	X	X	X	X	X	X	X	
19. Right to demand information from regulated companies	X	X	X	X	X	X	X	X
20. Publishing an annual (or periodic) report on the condition of the regulated market	X	X		X	X	X	X	

The table shows that the powers of the regulators differ greatly. Five of the eight regulators have powers to allow or block entrance to the market to market players: DNB, AFM, the Energiekamer, the Vervoerskamer and OPTA issue licences for entering the market. This power of the regulator can be directed even to individual persons inside the applying organisation in the case of financial institutions (DNB and AFM) by the control of qualifications of persons undertaking regulated activities and the necessary consent to appoint the members of the board of these institutions.

The ex ante regulation of tariffs in highly regulated markets like energy network management and the non liberalised part of health care differs greatly from the ex post regulation in liberated markets. The

Energiekamer and de Health Care Authority need to produce periodical decisions on tariffs and such, which have to be obeyed by the players on the market. OPTA is not obliged, but can decide to regulate process for commodities within the telecom market, which OPTA actually did for mobile services (interconnections and international roaming).
In order to make these decisions these regulators have powers to periodically ask specific information from the companies which are active on this market. The same applies for DNB, who will need annual data on solvability and other business economic matters from banks and other financial institutions. In case of reported mergers and acquisitions, the NMa is also obliged to decide whether or not it will give a permit for the merger or the acquisition and under what conditions.

These powers to make legally obligatory decisions ex ante differ from the powers regulators have in case of ex post regulating, like by NMa, the AFM, OPTA and the Consumers Authority, aiming at market players not violating basic market principles for healthy competition. In order to perform this task, these regulators react upon complaints, tips and (in the case of the NMa) companies that turn themselves in (leniency)[4], or start spontaneously their own investigation, but there is no legal obligation to do so and the regulator has significant discretionary powers in this and decisions to start such an investigation usually depend on their assessment of the impact of the violation on the market. In all cases the regulator has powers to impose sanctions which can be enforced by law. However, not in all cases the way of sanctions will be walked. The regulator can also try to reach its goal by coercing voluntary compliance, settling disputes, compromise, or even by naming and shaming by publishing violations to the public.

It should be mentioned that the Energiekamer and the Vervoerskamer do not possess any legal powers of their own. All powers are for the Board of NMa, which has status of Autonomous Administrative Agency (Zelfstandig bestuursorgaan or ZBO)

2.3 Position towards the State

To assess the position of the eight independent market regulators we will look at their legal structure, the measure of organisational independency, their autonomy in regulation and the ministerial responsibility over the regulator.

[4] The leniency procedure gives companies the possibility of a reduced penalty by reporting the violation voluntarily to the NMa.

2.3.1 Legal structure

The legal structure of the eight regulators in this paper is highly divers.

- DNB is a limited company (NV), thus a legal body, with all the shares owned by the State;
- The AFM is a foundation, thus a legal body, set up by the State;
- The Health Care Authority is by law a legal body sui generis[5];
- Also OPTA is by law a legal body sui generis[6]
- Not the NMa itself but only *the board* of the NMa (including Energiekamer and Vervoerskamer) is an Autonomous Administrative Agency (not a legal body). The staff of the NMa are employed by the Ministry of Economic Affairs;
- The Consumers Authority, finally, is an organisational part of the Ministry of Economic Affairs, but functionally separated: it is a separate administrative body that has autonomous administrative powers.

The reasons for this diversity have never bee studied. Normally the choice for a certain legal structure is made along arguments like fiscality, non-profit principle, etcetera. For our organisations these arguments are not relevant. Sometimes the choice for a limited company instead of a foundation is determined by the wish to facilitate possible changes in statutory goals. Neither this seems relevant here. Probably, like the patchwork of mandates that we found, the variety of different legal structures is related to the organic development of this system of market supervision or to different times or preferences. A real logical explanation seems absent. Neither is it clear what consequences a specific legal structure has for the position of the agency towards the ministry. There are some consequences for the role of the Netherlands Court of Audit towards the agency, see more in par. 2.5.2

2.3.2 Organisational (in-)dependency

There does not exist an objective set of indicators to asses the organisational independency from agencies towards the State. However, in 2010 Eurosai, the European Organisation of Supreme Audit Institutions, set out a questionnaire in order to make an overview of regulatory agencies in Europe. In this questionnaire nine principles or indicators were applied for assessing the independency of regulators. In

[5] Art. 3, par. 1, Wet marktordening gezondheidszorg

[6] Art. 2, par. 2, Wet onafhankelijke post en communicatie autoriteit (Wet OPTA)

this paper we will limit ourselves to these indicators. Table 2 gives the scores of the eight regulators on these nine indicators for independence.

Tabel 2 Indicators for independency

Regulatory bodies	**NMa**	**DNB**	**AFM**	**EK**	**VK**	**OPTA**	**NZa**	**Ca**
Principles/indicators of independence								
1. Clear and precise definition of the regulator's scope of tasks, competences and responsibility.	X	X	X	X	X	X	X	x
2. Structural and functional separation of the regulator from the ministry responsible for sector's policy .	X[7]	X	X	X[8]	X[9]	X	X	X[10]
3. Detailed and transparent criteria and professional requirements established for the appointment of the Head of the regulatory body and senior managers.								
4. Participation of various external authorities (e.g. legislative and executive ones) in the process of appointing the head and senior managers of the regulatory body.								
5. Clearly specified terms of office for Head and senior managers and of the allowable grounds and the due process for seeking an earlier rotation.	X	X	X	X	X	X	X	X
6. A stable source of financing, which is adequate for the tasks entrusted and resistant to political pressure.	X	X	X	X	X	X	X	X
7. Ensuring that the regulator has full autonomy as regards HR policy.		X	X			X	X	
8. Ability to pay salaries which attract and retain staff of the required caliber when public sector pay policy results in a pay freeze or cuts.		X	X			X	X	
9. Clear statement of the situations when decisions reached by a regulatory body may be challenged and the due process to be followed.	X	X	X	X	X	X	X	X

According to these indicators the measure of independence of the Dutch market regulating agencies is high. We already discussed the regulators scope of tasks, competences and responsibilities. Although this seems like a patchwork, and overlap seems likely, in general de description of these aspects is reasonably clear and precise. We also discussed the legal structure of the regulators. Regardless of the fact that not all of them have an independent legal structure, all of them do possess autonomous administrative powers. Even the Consumers Authority, which is an

[7] The Board of the NMa (including Energiekamer and Vervoerskamer) is the Autonomous Administrative Agency. The staff of the NMa are employed by the Ministry of Economic Affairs.

[8] Idem

[9] Idem

[10] The Ca is an organisational part of the Ministry of Economic Affairs, but functionally separate: it is a separate administrative body that has autonomous administrative powers.

organisational part of the Ministry of Economic Affairs, is functionally separated from this ministry.
For none of the Dutch market regulators criteria or professional requirements have been formulated for becoming their head. In case of the Health Care authority the Act on market organisation health care (Wet marktordening gezondheidszorg) states in article 4, paragraph 3: "*Appointment will be based on the expertise necessary for the performance of the duties of the Health Care authority based on social knowledge and experience".* There are some incompatibilities with other functions, especially the board of other market regulators.
In all cases the heads are appointed by the Crown, that is the cabinet, except the Consumers Authority, where it is the Minister of Economic Affairs who appoints the director. No other authorities participate in the procedure of appointment. The terms of office of the top management all regulators is clearly specified.

All Dutch market regulating agencies do have a stable source of financing, although in all cases the minister will have to approve the budget, tariffs and annual financial report. The budget of the NMa (including Energiekamer and Vervoerskamer) is a (separate) part of the budget of the Ministry of Economic Affairs.

The fact that the staff of the NMa are employed by the Ministry of Economic Affaires, prevents the NMa from having full autonomy as regards human resources policy. The same counts for the Consumers Authority. The others do have this full autonomy. The inability to pay salaries which attract and retain staff of the required calibre has sometimes caused trouble for regulators like the Energiekamer, dealing with an highly complicated regulation system. It is however, because the inherency of this problem to the specific markets and the natural limited budgets of governmental agencies, unlikely that a more independent position would allow the Energiekamer to solve this problem.

All decisions of the eight regulators can be challenged by means of clearly defined legal procedures, most of which are defined in the General Law on Public Administration (Algemene wet bestuursrecht).

We conclude that, although the formal criteria for organisational independence are not in all cases completely met, in practice the eight regulatory agencies function as very independent bodies.

2.3.3 Autonomy in regulation

The key test for independency is how autonomous IRA's are in doing their job: regulating. Although independency faces all directions in the diagram in figure 2, in this paragraph we focus on the autonomy in relation to the government.

For all three regulators that fall under the NMa (NMa itself, Energiekamer and Vervoerskamer) the minister of Economic Affairs has a right to be informed by the NMa and has access to all information and business data "as far as reasonably necessary for his task". He is allowed to formulate directives to how the Board of the NMa shall use its regulating powers. The minister has no powers to interfere in individual matters. Because of this limitation the minister is also not allowed to annihilate decisions of the Board. Finally, in case of severe neglect by the NMa of carrying out its legal tasks, the minister is allowed to take the necessary measures. All powers and means for steering and supervising for the minister have been laid down in the Law on Competition (Mededingingswet).

All other IRA's have a system comparable to the one from the NMa to perform their regulating task autonomously. Differences occur especially in the powers of the minister to work out the general formal laws into operational regulation. The powers for the minister to do this has since the WFT almost disappeared.
For the NMA it was the other way round: during the last few years the powers of the NMa to formulate it's own regulation on operational level has practically disappeared.

2.3.4 Ministerial responsibility

We distinguish a *general* ministerial responsibility and *special* ministerial responsibility.
We consider that always a general ministerial responsibility exists when government policy is been carried out by third parties, like an IRA, even in cases where the minister does not have any powers over this party. After all, it is the minister who is (partly) responsible for the design of the policy system or the legal arrangement and for possible changes in this. He is responsible for the way how effective and efficient the IRA can perform its tasks. He stipulates what powers the IRA can invoke, what means it can use and what independence it can display. In short: he is responsible for the system.
A special ministerial responsibility rests upon the specific powers the minister has towards the IRA. This responsibility is linked to the

responsibility for the system, because it is up to the minister to design the system in such a way that he is able to carry his responsibility towards parliament. However, in doing so, the minister creates special powers for him self. For instance, the minister arranges how he is to be informed, how he will supervise the IRA, and possibilities for giving directives or even instructions. It is the knowledge of this information, the effectiveness of this supervision and the use of these powers which forms the focus point of this special ministerial responsibility.

The more specific powers the minister keeps for himself in the design of the system, the less independent the IRA will be in practice. Reversed, where independence is considered important, the more reluctant the minister should be in creating powers to himself towards the IRA.

For all Dutch market regulating agencies it can be concluded that the minister is responsible for the law under which the market regulator functions, including the system in which it operates. Secondly the minister is responsible for supervising the market regulator in order to make sure that the independent body functions in a way that meets the standards of good governance, including regularity, integrity, efficiency and effectiveness.

The ministerial responsibility is ensured (safeguarded) by instruments provided by the law. For instance, the NMa will have to submit to the minister of Economic affairs the periodic financial reports and the year report including a statement of the accountant of the ministry.

As a result of the many formal and informal contacts with the NMa the Ministry of Economic affairs is well informed about the state of affairs at the NMa. The relation and communication arrangements are worked out in a statute.

We can conclude that, apart from the general responsibility of the minister for the legal systems in which the market regulatory agencies operate, there exists a special responsibility of the minister that these independent bodies function in such a way that meets the standards of good governance, including regularity, integrity, efficiency and effectiveness.

In 2007 the Netherlands Court of Audit concluded that the Ministry of Economic Affairs could have paid more systematic attention to a number of key aspects of the NMa's operations. We recommended that the Ministry makes a deliberate choice of these topics yearly on the basis of a

risk analysis. The NCA regarded as prime topics the operation of checks and balances (such as the objection and appeal procedure), ethical standards, the separation of functions (Chinese Wall), quality assurance, strategy, risk and market analysis, the quality of decisions, and information on the (economic) effect of the NMa's decisions. (NCA, 2007)

Taking into regard the fact that the law only allows the minister to formulate general directives to the market regulatory agencies, and no instructions in specific cases, there exists no specific ministerial responsibility for the actual regulatory decisions made by the agencies themselves.

Not always it is one ministry which carries the responsibility for one agency. In the case of the Vervoerskamer the minister of Economic Affairs is responsible for internal and financial management of the Vervoerskamer while the minister of Traffic carries the political responsibility for the way the Vervoerskamer performs it regulatory task. A similar division of responsibility is with the AFM: while the minister of Finance is generally politically responsible for the AFM, it is the minister of Social Affairs who is responsible for AFM's supervision on pension funds.
The other Dutch market regulators do not show such a divided ministerial responsibility.

2.4 Position towards the sector

In regulating the market the regulator is faced with parties that undergo the regulation (the regulatee) and parties that are protected by the regulation (the protectee). For instance, the Consumers authority enforces laws and regulations about doorstep selling on order to protect consumers against these risky sales practices.

Not always can regulatee and protectee clearly be distinguished. For instance, from the enforcement of honest tender rules in the telecom market by OPTA not only the consumers profit, but especially the rivalling bidders on this market.

2.4.1 Position towards regulatee

The regulated entities of the inter sector regulators like the NMa and the Consumers Authority are all companies operating in the Netherlands. Companies operating internationally also fall under their regulation of the

NMa, but in such cases the NMa co-operates with regulators in other countries and/or (depending of the number of countries involved) the EC. OPTA, the AFM, DNB, the Energiekamer, the Vervoerskamer and the Health Care authority deal only with one specific segment of the market.

The position towards the regulatee differs greatly between the market regulators.
DNB and the AFM issue licences for financial institutions without which these are not able to enter the market. DNB asks an official fee ('leges') for this, while the AFM claims a charge ('heffing'). It is not clear whether there is any relevant difference between these two typologies. The AFM-charge is differentiated in a steady and a variable part, the latter based on f.e. the number of fte working for the institution. AFM characterises the charge as a contribution for the supervising by AFM.
Access to the energy-, the transport- or the health care market is not up to the regulator but to the minister who issues licences or concessions. Finally, the markets with which the NMa and the Consumers Authority are concerned do not have any access involvement of the regulator nor the government.

Different from certain private law consumer organisations, arbitration committees or sector boards, the public law market regulators do not have any obligatory sector participation in their board or into the formulation of their regulation strategy or –policy. However, some of the regulators open their doors, eyes and ears for ideas or reactions from the field. For instance, the Health care Authority works with 'consultation documents' in which the 'field' (consisting of both regulatees and protectees) is being asked for their opinion on certain plans from the NZa.

Uniquely the NMa has a hotline for offenders against the cartel prohibition to confess their cartel in exchange for leniency.

2.4.2 Position to protectee

Market regulation has several goals. One of these goals is to protect the less powerful consumer against the sometimes larger power of the supplier. Another goal, however, is the well functioning of the market. We already mentioned the fact that in such cases the protectee doesn't necessarily have to be the consumer. It can also be the competing supplier, who benefits from the regulation. This implies that the answer to the question who is the protectee differs from regulator to regulator.

In general the protected entities from market regulation by the NMa are consumers and other companies that might be harmed by concentrations, abuse of economic power or by cartel practises. All three types of practices could diminish chances for competitors to enter the market or to participate in it. This is regarded as harmful both for the competitors as for the consumers on the market. The same counts for the AFM: an unfair and non-transparent market harms both the consumers and the institutions participating on this market.

In the case of natural monopolies like the energy transport market, such a shared interest is not the case. The Energiekamer regulates the tariffs for energy transport and maintaining the networks, mainly in the interest of the otherwise unprotected customer who has no alternative for his network. The same applies for the Vervoerskamer, the Health Care Authority and, for a part, for OPTA.

None of the regulators allows decisive influence from the protectee into the formulation of their regulation strategy or –policy. However, most of the regulators have some complaints- or tip hotline, which does not obligate the regulator to act. The board of the NMa yearly organises consultations with the NMa's stakeholders about the NMa-strategy. The advises and suggestions from stakeholders are published on NMa's website.

2.5 Checks and balances

The independency, the autonomy and powers of every regulator is limited by a system of checks and balances. It is these checks and balances that prevents the regulator from becoming a state within the State. In this paper we will discuss four elements of this system of checks and balances: supervision, accountability, transparency and appeals against its decisions.

2.5.1 Supervision

All regulators are being supervised by the minister which is responsible for them (see par. 2.3.4). Usually an information statute has been formulated, regulating what information the minister needs for this supervision.
For some regulators, however, a special supervisor has been created. The AFM has a supervisory Board (Raad van Toezicht). These boards are meant to have both a preventive and a corrective function in the

management system of the regulator, especially in the field of governance. For the AFM the main task of the Supervisory Board is to guard correct execution by the Board of the legal tasks of the AFM. For this the Supervisory Board may give general directives to the Board. The Supervisory Board cannot deal with individual regulatory cases.

Supervisory Board rebukes Board AFM
In 2009 the Supervisory Board of AFM rebukes the Board in its declaration behaviour. According to the Supervisory Board the Board had declared many items which were not declarable, or had declared them against too high amounts, too late or without proper receipts.[11]

DNB has both a Supervisory Board (Raad van Commissarissen) and a special council: 'Bankraad'. The Supervisory Board oversees the management and business aspects of the institution. The Supervisory Board approves the budget and the annual report and adopts the annual financial accounts. One member of the Supervisory Board is appointed by the government, the Commissioner of the State. The Supervisory Board has no substantive control over monetary policy, advisory, payments and the supervising task of DNB. The Bankraad has no supervising but an advisory role towards the Board.
The other regulators are only supervised by de minister. There is no internal supervisory board.

2.5.2 Accountability

All eight market regulators are accountable to the minister under who's responsibility they carry out their legal task. In some cases shared ministerial responsibility implies dual accountability, for instance for DNB to the ministers of Finance and of Social Affairs, and for the Vervoerskamer to the ministers of Economic Affairs and of Traffic. Instruments for this accountability are the periodic (mostly annual) reports and annual financial accounts.

DNB, the AFM, OPTA and the NZa have their financial accounts been audited by an external certified accountant, which is a consequence of their independent legal structure. Since the NMa (including Energiekamer and Vervoerskamer) and the Consumers authority miss this independent legal structure, it is their respective ministerial internal audit divisions auditing their financial accounts.

[11] http://www.nuzakelijk.nl/algemeen/2297365/afm-overtreedt-eigen-declaratieregels.html

The Netherlands Court of Audit has an auditing role towards all eight regulators. The basis for this differs, depending on the legal structure and on certain legal limitations in the mandate of NCA.
As NCA annually audits the financial management of all ministries and gives its opinion on their financial statements, this includes the regulators without an independent legal structure, since they are regarded as part of this ministry.
While the law demands NCA's opinion on the financial statements of all parts of central government, it is at the discretion of NCA to audit the financial management or to do performance audits. Such audits can also be done outside central government.
Since 1988 NCA has a mandate to audit independent legal bodies outside the State when they perform a legal task ('rechtspersoon met een wettelijke taak' or rwt). This mandate includes the regulators with independent legal structure, such as the AFM and the NZa. For many years DNB was excluded but in 2007 the Law on financial public management (Comptabiliteitswet) was revised in such a way that NCA got powers to audit DNB too.

In auditing regulators it is important for NCA to have access not just to general information with the auditee, but also to files on individual cases, for only in these the actual performance of the regulator can be found. The access to this type of information, however, is still a matter of severe dispute. For instance, in the case of DNB the powers of NCA to scrutinise *all* documents at the auditee, based on the Law on financial public management, collides with the '*guarantee of secrecy*' that was demanded in European directives (f.e. directive 92/49 EEC), and in the Law on financial supervision (Wet op het financieel toezicht) which was the implementation of these directives, since NCA is not mentioned among the exceptions. The same counts for the Competition law: NMa has to guarantee secrecy towards all. Also here NCA was not mentioned among the exceptions.
When two laws conflict, this is solved by the usual rules for interpretation. For instance: the specialised law overrides the more general law. In this case it is however not clear what is the more specific law: the law that regulates the secrecy or the law that regulates the powers of NCA.
Also the parliamentary history of the law counts in interpretation. A complication for DNB is that during the making of the Law on financial supervision, the minister in his explanatory memorandum explicitly excluded NCA from these exceptions and in this way stressed the fact that NCA has no access to files that can be traced back to individual persons and this statement was never contested by parliament. So, on

the basis of a historical interpretation there is no NCA-access to these files at DNB.

Since for the Competition law such explicit statements were absent in its parliamentary history, the situation was more open. We have to realise that there is no juridical authority to solve mandate conflicts between different parts of central government[12], and in such cases the actual practice is able to create its own common law. Thus NCA in several audits simply announced that it demanded access to these documents, and this access was not contested. This created a precedent which until now is regarded by NCA as the standard. However, it remains still a precarious situation.
For the Health care authority the situation lies totally different: when the Act on market organisation health care was created, NCA recommended in her advice on this law explicit mentioning of NCA under the exceptions to secrecy, and this recommendation was implemented into the new law.

Concluding this overview of NCA access to files we see that NCA has no powers to files on individual cases at DNB, there are precedents for this access at the NMa and there is explicit access at the NZa. For all other regulators it is simply unknown, since it has never been tested in a specific situation.

2.5.3 Transparency

Like accountability, transparency is one of the principles of good governance. For the sake of this paper we apply the following indicators for this transparency: transparency in operationalising the rules it maintains; transparency on its modus operandi; transparency in motivating and publishing its decisions and transparency on its own impact.

Transparency in operationalising the rules maintained by the regulator
All regulator are quite transparent in the way how they operationalised the rules they are expected to maintain. On their websites not only the the applicable laws are published, but also guidelines, policies and checklists. These are useful to instruct supervised entities on how to satisfy legislative and regulatory requirements; they are also useful for the public, so they will know what they can expect from their contracting partners on the market. OPTA even offers an *alert-service* or *RSS-feeds*, warning for any new posting.

[12] In some cases the Raad van State has been asked to *advice* on the matter.

The NMa published a number of guidelines ('richtsnoeren') especially in the field of cartels and abuse of economic power, informing regulatees 'where they are safe and where not'.
DNB has started with 'Open Boek Toezicht', a way to comply to the legal requirements of 'supervising disclosure'.
OPTA and the Consumers Authority share the 'Consuwijzer', a website where consumers rights are clearly worked out.

Transparency on its modus operandi
Regulators are (understandably) less transparent about actual operational matters. The effectiveness of cartel enforcement by the NMa for example is not served by announcing far ahead that there will be a raid on certain companies in order to confiscate the administration. However, almost all regulators do give reasonable insight into the way how they operate, the steps that they take and the procedures they follow.

DNB, OPTA and de Health Care authority have published their *approach to supervision* ('Visie op toezicht' or 'toezichtvisie'). In this document the regulator elaborates on the principles and assumptions used in designing its regulation strategy. For instance, the NZa connects its vision on supervising on three elements: 'earned trust', 'zero tolerance' and 'risk orientation'.
Although having a documented approach to supervision is not (yet) a legal requirement, the cabinet stimulates ministries and autonomous regulators to create such a document. We found no (special) toezichtvisie for the NMa, Energiekamer and Vervoerskamer and the Consumers Authority, possibly because they are regarded to be included into the toezichtsvisie of the Ministries of Economic Affairs and of Traffic. We have no explanation for the lacking toezichtvisie of the AFM.

Transparency in motivating and publishing its decisions
Transparency in motivating its decisions is a mandatory requirement of transparency for all regulators, since, as we will see below, their decisions can be challenged in court. As the General Administrative Law Act demands decisions made by public bodies to be sufficiently motivated, courts can annihilate a decision which is given without a motivation or with a motivation which is clearly insufficient. We haven't made a check on individual decisions of the eight regulator to test the effectiveness of this rule.

Although the confidentiality of company-data limits transparency to some extent, the it is regarded as good practice to publish information on case decisions on the website. Not only for transparency reasons, by the way.

Naming and shaming in the case of cartel cases is part of NMa's strategy. The NMa, Energiekamer, Vervoerskamer and OPTA publish all their decisions, with the argumentation behind it, on her website. The Consumers Authority however, publishes these as 'news item' which does not guarantee completeness. DNB is, for understandable reasons, very restrictive in publicity about its prudence supervision.

Transparency on the regulators own impact

All market regulators put much effort in measuring its own impact. This is done by means of opinion polls or satisfaction surveys. By law all regulators need to have their performance been evaluated once every four year.

Table 3 Regulators assessing their impact

Regulatory bodies	**NMa**	**DNB**	**AFM**	**EK**	**VK**	**OPTA**	**NZa**	**Ca**
Identifying and measuring of and reporting on impacts								
1. Opinion polls or satisfaction surveys	X	X	X	X	X	X	X	x
2. Publishing activity reports	X	X	X	X	X	X	X	X
3. Publishing statistical data	X	X	X	X	X	X	X	
4. Reference to market shifts and trends	X	X	X	X	X	X	X	
5. Periodical performance evaluations	X	X	X	X	X	X	X	X

The NMa for example puts much effort in giving information about the effects of their work in terms of (potential) savings for consumers as a result of their decisions. In our audit (NCA, 2007) we looked at the degree in which the general terms of the Competition Law are translated into operational criteria. We recommended that NMa should be more transparent in the way the NMa decides to apply alternative enforcement and in the way the NMa weighs other public interests in it's decisions.

Horizontal accountability

Transparency, finally, is also about accountability. Almost all regulators (except the Consumenten autoriteit) use a certain degree of horizontal accountability, by publishing their annual accounts on their website. Almost none of them organises formal discussions about this with stakeholders outside the ministry.

NMa's Annual account also presented to Parliament
NMa presents its Annual report also to parliament and it is custom for the president of the board to meet with a parliamentary committee once a year to inform parliament about it. Parliament, however can not take any action against the NMa or it's board members directly. But can only address the minister of Economic Affairs. It is the minister who is responsible.

2.5.4 Court appeals

The decisions of all Dutch market regulators can be challenged, firstly by an administrative appeal, in which the regulator is invited to reconsider its decision, and, if that doesn't help, by an appeal to a court. The appeal procedure is conform the general procedure for appeal against government decisions, arranged in the Algemene Wet Bestuursrecht (AWB, General Administrative Law Act).
In most cases an appeal to court should be brought for the Administrative Law Chamber of the regional courts. Higher appeal can be brought for the Board of Appeals for the Industry (College van Beroep voor het Bedrijfsleven or CBB), which acts as supreme court for these matters. Some decisions from the NMa, the Energiekamer and from NZa should however, be brought in first instance to the CBB, without a possibility of higher appeal.
The court judges the decision only on legal grounds, not on the effects of the decision. But, since general principles of good public governance, such as non-discrimination, or the motivation principle, the discretion of the court can go quite far.
An important difference between the administrative appeal and the appeal in court is that the administrative appeal can lead to a new decision; a court appeal to nullification of the appealed decision. Such an nullification implies that the regulator will have to decide again, taking into account the nullification of it's former decision.

Appeals can be made by all directly involved parties ('betrokkenen'). These imply both the regulatee and the protectee. In practice it appears that the decisions of the Vervoerskamer, OPTA and the NZa are only challenged by the regulated companies, while in all other cases appeals are made by both parties.
In order to get an idea of the volume of appeals: DNB was faced in 2009 with 165 administrative appeals and 38 appeals in court. AFM faced in the same year 4362 administrative appeals and 121 appeals in court. The NMA and the Energiekamer see practically all their decisions appealed. Mostly this is on substantive grounds, but part of the appeals are made for tactical reasons: during the appeal the execution of the decision to impose a fine is being suspended. In our audits on the Energiekamer we registered that the strong juridification of the regulations between regulator and regulatee often suffocates the system.

3 Dilemma's for IRA's

3.1 Introduction

Even though the creation of an IRA is the answer to many questions on many governmental issues, like how to isolate the execution of certain governmental tasks from the ever changing winds of politics, and how to enhance a more business economics management model, the creation of IRA's itself raises questions by itself and IRA's face many dilemma's.
In this chapter we will discuss some of these dilemma's on the basis of the Dutch experience with IRA's. The conclusion will be that most of the questions raised by the erection of an IRA, will remain as a dilemma, and both minister and IRA will sometimes feel like funambulist, balancing on the tight rope trying to find the optimal position between principle and practice.

As we want our examples to come from actual audits, most of these examples will concern DNB, NMa and the Energiekamer. That doesn't mean that the dilemma's are not applicable for the other IRA's.

3.2 Dilemma's concerning independency

The Dutch experience with IRA's shows that the independent position of IRA's creates at least four dilemma's: 1) the independent position of the IRA in relation to the political accountability of the minister; 2) the independent position in relation to the fact that the IRA is also an instrument of policy; 3) this second dilemma also in relation to the fact that policy has to face several competing political interests; and 4) the independency from the sector and the dangers of regulatory capture.
In this paragraph we will discuss these four dilemma's concerning the independency of the IRA.

3.2.1 Independency versus political responsibility

One of the most irritating answers a MP can get from a minister, when asking sharp questions about an IRA, is: "Since we decided to make this

agency independent, it is outside my responsibility". Is this true? Can the minister not be held accountable for the behaviour of an IRA?

Let's first distinguish ministerial responsibility, discussed in paragraph 2.3.4, from *political* answerability. Political answerability can exist even where political responsibility is absent, for instance when Parliament asks questions to the minister of Economic Affairs about the market behaviour of private companies.
Independency is not just a fashion of the time, it is generally seen as a necessity for an effective regulation: independent judgments based on specific expertise. Also many European directives or regulations demand the installation of an independent regulator.
The dilemma faced with regulators is: how to find a balance between the for effective regulation necessary independency and for an effective ministerial responsibility necessary influence of the minister? The more powers the minister has to steer the regulation, the more regulation will be dependent from 'the winds of policy'.

In the case of Dutch regulators ministers usually reserved the right to formulate directives to how the regulator shall use its regulating powers. In order not to jeopardise the autonomy of the regulator, these directives can only be general, and not instructions for individual cases.
Not always, however, it is clear where a directive stops from being general and starts becoming an individual instruction, as the next example shows.

The new policy for regulating the tariffs for national gas transport

In 2008 the minister of Economic Affairs issued a 'new policy for regulating the tariffs for national gas transport'. This 'new policy' embraced the precise figure the Energiekamer was to apply as value of the national network and an equally precise percentage for the return on investments in this network. Since GTS, a 100% daughter of Gasunie NV, 100% State owned, was the sole national gas network operator, this 'new policy' was decisive for the height of the tariffs the Energiekamer was to formulate for GTS.
In appeal (from customer organisations) the CBB (Board of Appeals for the Industry) found that by formulating these exact parameters for the costs calculation of GTS the minister infringed the autonomous and independent assessment by the Energiekamer, being the designated independent administrative authority with the specific expertise needed. The stipulation of such parameters comprises, in essence, giving instructions to the Energiekamer in respect of a decision in an individual case, which the legislature precisely was to avoid.

3.2.2 Independency versus instrument of policy

Ministerial responsibility, of course, is closely related to ministerial policy. Ministers generally conduct a policy in relation to the market: they want to achieve certain policy objectives. The establishment of a regulator is one of the activities they undertake to do so. Again we stumbled upon this dilemma in our audit on the Energiekamer.

'Policy rich' regulating

In the discussion with the Energiekamer about the extent to which the minister can and may stipulate the regulation in individual cases, the Board of the NMa noted that ex ante tariff regulation in practice cab be a "policy rich" issue. Efficient and high quality network management are the main interests of Energy with the independent monitoring to ensure. However, increasingly other interests emerge and tend to play a leading role in policies around the operation of the grid. Examples are considerations of sustainability, and security of energy supply. Just as there are trade-offs between these interests - which are not always congruent with each other - it is important that the minister takes responsibility for it. This fact implies that in practice the boundary between the policy of the minister and the domain of the independent sector-specific regulation of the Energiekamer is different than for the general ex post competition regulation by the NMa.

We recognised this fact and recommended that these considerations should find their place in the 'toezichtsvisie' (see par. 2.5.3)

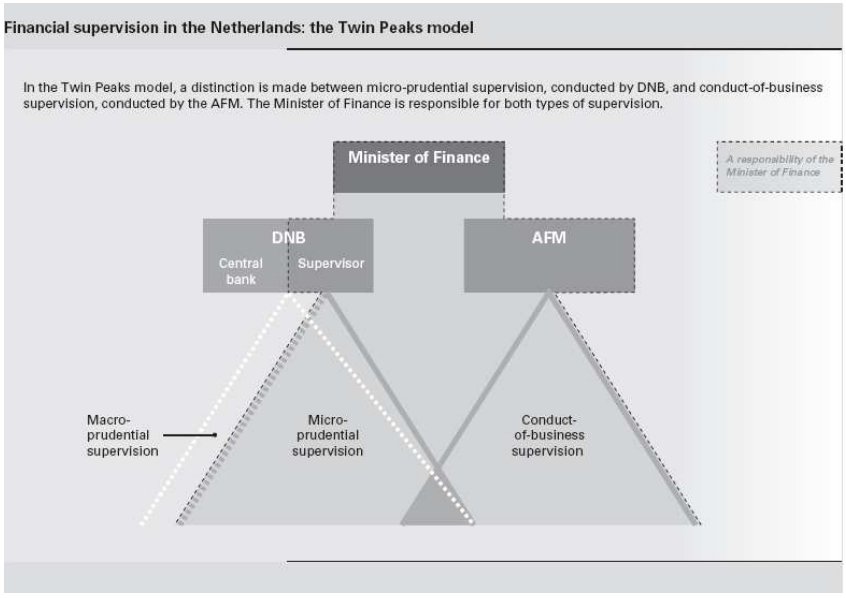
3.2.3 Political interest versus political interest

To recognise the fact that different political interests can have an influence on regulation, however, creates a further problem: how should these interests be weighed among each other, and against the interests of effective regulation?
In the example of the Energiekamer the new policy regulating the tariffs for national gas transport was motivated by two considerations: the minister of Economic Affairs wanted the national gas network operator (GTS) to be able to invest heavily into the grid, in order to make her policy of The Netherlands becoming the European gas roundabout possible. At the same time the minister of Finance, the sole shareholder of GTS, wanted a guaranteed dividend on his shares. Both were legitimate interests, but they had to compete with the formulated interests of regulation of energy transport. These interests were a network as efficiently as possible and protection of the customers against too high tariffs.

As Court of Audit our opinion was that the minister should make clear in a 'toezichtsvisie' how these rivalling interests should be weighed against each other.

A different example of conflicting interests occurred between DNB, AFM and NMa. The AFM's supervision of transparency, for example, may not always be in the interests of the stability of financial institutions or the financial system which is guarded by DNB. A similar tension might also arise between DNB's supervision and the supervision by NMa: the aim of the NMa's competition regulation is to bring about lower prices for consumers. DNB however, guards the stability of the financial institutions. If, from this argument, DNB were to impose stricter capital requirements, interests and other prices for financial products would rise.
Also the NZa's goal of affordable and accessible care may conflict with DNB's supervision of stability of health insurance companies, which may lead to consumers paying higher premiums if additional capital requirements are imposed.
Tension can also arise between two of DNB's tasks: the public interest of prudential supervision and DNB's monetary policy. An increase in interest rates to control inflation, for example, may weaken the financial position of banks and thus be at odds with promoting bank stability.
We stressed the fact that these competing interests needed to be recognised and discussed between the cabinet and the parliament, and that good arrangements should be made between ministries, between regulators and between different divisions of regulators, in protocols and, if necessary, as for AFM, in legislation.

Figure 4 Overlapping tasks, ministerial responsibility and competing interests of DNB and AFM



3.2.4 Independency from the sector and the dangers of regulatory capture

A regulator should be independent of the sector it regulates. This is a necessity in order to reach objective and generally accepted decisions. For a regulator to arrive at an objective decision, there must therefore not even be the semblance of interlocking interests.
Regulators, however, often face the risk of 'regulatory capture': the phenomenon of a supervisor being steered by the interests of those it supervises and therefore not acting independently in the public interest. This risk is generally greater at a sector-based supervisor such as DNB, AFM, NZa, the Energie- or Vervoerskamer than at a general market-based supervisor such as the NMa or the Consumenten Autoriteit. DNB and the Energiekamer, moreover, operate in fields that are dominated by small numbers of large institutions. The size and complexity of these institutions call for very intensive supervision. Also, in both instances, the system of regulation is very complex.

Risk for regulatory capture appeared one of the reasons for choosing for the 'twin peaks- model' with separated prudential and behavioural supervision in DNB and AFM.
The Energiekamer so desperately wanted to manifest itself as independent, that she retained distance towards all the force fields, including the ministry. In order to build up her credibility the Energiekamer decided on a series of hard interventions: "The first blow is half the battle". The result was an endless stream of appeals, which suffocated the regulation for more than four years. In 2003, in order to get the regulation going again, the Energiekamer decided to reach an agreement with the whole sector. In this agreement rather moderate tariff cuts were agreed, which, although there was some result, limited the effect of the regulation to a minimum.

Non reformation in peius
The agreement between the Energiekamer contained the principle of 'Non reformation in peius'. This principle means that the a appellant should never be worse off because of his appeal. According to some authors the efficiency gains that resulted were, because of this clause only half of what should have resulted from the agreement.

Finally, in 2006 the Energiekamer found the middle road: the regulation philosophy was marked by "dialogue where it can and sanctions where it should". No more agreements with the industry, but the Energiekamer retained close contacts with the energy companies.

3.3 Dilemma's concerning effective regulation

From our audits we learned that IRA's face at least three dilemma's that in some way concerns their effectiveness: 1) the ideal of transparency versus the interests of effectiveness; 2) the need for legality of public power versus the reality of a dynamic environment; 3) the principles of balance of powers and legal protection versus effectiveness. Partly associated with these three dilemma's, but slightly different is the dilemma of accountability versus the administrative burden.
In this paragraph we will discuss these four dilemma's concerning the independency of the IRA.

3.3.1 Transparency versus effectiveness

We already pointed to the argument that effective regulation might be hampered by complete transparency on actual operational matters. In paragraph 2.5.3 we mentioned that the effectiveness of cartel enforcement by the NMa for example is not served by announcing far ahead that there will be a raid on certain companies in order to confiscate the administration. The same counts for other regulators. Especially for 'catch offenders red handed' the element of surprise is often crucial.

Another aspect of effectiveness versus transparency is in anonymous reporting of tips. Most regulators have a procedure for dealing with anonymous tips. The NMa points however to the fact that it cannot guarantee that the identity of the informant will remain unknown to the defendant company. This is due to due process requirements compelling the NMa in proceedings before the courts to reveal the identity of the informant.

For DNB, being the supervisor on prudence matters, the dilemma shows itself also in another form. A key feature of DNB's supervision is that the public disclosure of an individual institution's position or the condition of the system as a whole might weaken the institution's or the system's stability. A warning of risks at a bank, for example, might lead to a bank run. By the same measure, withholding information on individual institutions does not foster public confidence in the supervision.
Questions might be asked about DNB's consideration of the various interests. The interests of current and future deposit holders might not coincide with the interests of an individual bank or the system as a whole.

The Law on financial supervision (Wet financieel toezicht or WFT) lays down how DNB should deal with public disclosure. DNB is authorised, for example, to issue public warnings. It is reluctant to issue warnings, however, because they are often not in the interests of potential or actual creditors. The WFT also requires DNB to publish decisions to issue cease and desist orders under penalty or impose administrative fines unless publication is or would be contrary to the aims of supervision. In other respects, DNB's supervision is based on the statutory duty of confidentiality in individual cases.
The DSB case showed that in the field of public disclosure there is a gap at least between what is expected and what DNB can do to live up to those expectations.

Policy in the Netherlands so far has generally been that supervisors can be held liable under civil law if they commit an illegitimate act that causes a loss. No exception is made for DNB. The limited case law available to date suggests that the courts are very unlikely to allow a claim against DNB. The potential financial and reputational losses, however, could be considerable. The costs would ultimately be borne by the state.
On the one hand, civil liability provides a means to compensate injured parties for losses caused by unlawful government acts. This can act as a deterrent as it will keep the supervisor alert. On the other hand, liability leads to the juridification of supervision and that is not always conducive to its effectiveness. Furthermore, liability has consequences for the transparency of supervision. For this reason, it is unlikely that critical reports (such as that published by the Financial Services Authority in the United Kingdom on its own inadequate supervision of Northern Rock) will be published in the Netherlands. Such public disclosure is not a problem in the United Kingdom because the supervisor there has been granted immunity. This is also the case in several other countries. Such differences between supervisory regimes can lead to 'supervision shopping' by parties that want to hold the supervisor liable.

3.3.2 Legality of public power versus demands of a dynamic environment

The need for legality of public power versus the reality of a dynamic environment can sometimes cause a dilemma for regulators. Our constitutional system demands that all exercise of power by the government by which citizens see themselves legally or practically restricted in their freedom or property must be based on a (constitutional) legal basis. On the other hand our society expects public

supervision to protect them against all kinds of dangers. Otow (2006)[13] points to this dilemma in telecom supervision, showing that developments in the field can develop so fast that the law is always running behind the facts.

The problem is sometimes solved by giving large discretionary powers to the supervisor, like it was done in the OPTA-Law. In other instances it is the legality that wins, like in the case of DNB. The Icesave case showed that in the field of public disclosure there is a gap at least between what is expected and what the law allows DNB to do to live up to those expectations (see par. 3.3.1).
The question always arises how the requirements of effectiveness of the regulation are compatible with the principles of optimal democracy.

There are other aspects of tension between the law and the demands of effective regulation, caused by the dynamic change of reality. Financial markets and institutions are increasingly international in orientation and internationally intertwined with each other. Supervision of the institutions and of the system as a whole, micro-prudential and macro-prudential supervision respectively, however, is organised along national lines.
There is no European or global oversight body to supervise cross-border institutions or the international financial system. Again the Icesave case showed the problems this lack can cause.
A solution is currently being sought in the form of improved international cooperation between national supervisors. It is being frustrated, however, by differences in legislation and the precedence taken by national interests. The main problem underlying international cooperation is the lack of agreement on burden sharing and conflict mediation. Countries are also reluctant to relinquish their national powers. The imbalance between the scale of financial institutions and the financial system on the one hand and the scale of supervision on the other remains a problem that is of vital importance to financial stability. The question that inevitably arises is: Should the scale of the banks be matched to the scale of the supervision (national) or should the supervision be matched to the scale of the banks (international)?

3.3.3 Balance of powers and legal protection versus effectiveness

Like legality of public power, legal protection against the use of such powers is an important principle of our democracy. Abundant use of

[13] A.T. Otow, *Telecommunicatietoezicht; de invloed van het Europese en Nederlandse bestuurs(proces)recht*, proefschrift, Amsterdam 2006, par. 1.5.

procedures for legal protection can, however, severely juridificate the relations the regulator and the field. A clear example of the suffocating effect of such juridificated relations is shown in the case of the Energiekamer (see par. 3.2.4).

Some ways are designed to reduce the suffocating effect of appeals. One way is to reduce the suspending effect of appeals. The NZa is an example: the suspending effect of appeal is there only for punitive sanctions. In case of a reparatory sanction, the defendant will have to ask for this suspension to the Court in a special procedure.
Another way is to limit the possibilities for appeal. Again the NZa is an example: only in case of punitive sanctions from the NZa the defendant has an appeal in court in two instances: first to the regional court and higher appeal at the CBB. In case of reparatory sanctions the CBB deals with the appeal right away, without higher appeal.

We already mentioned the in a dialectical process developed strategy from the Energiekamer to reduce the juridification of relations between regulator and regulated field, by using "dialogue where it can and sanctions where it should". Also the NMa applies more coercive methods besides sanctions, to enhance its effectiveness without causing juridification.

3.3.4 Accountability versus the administrative burden

The final dilemma we want to discuss is the dilemma of accountability versus the administrative burden this sometimes causes. Accountability is for any public institution one of the key qualifications of good governance. It receives public power, has to fulfil a public task and for this it works with public money. This implies public accounting for all of this.

Public accountability is necessary towards the ministry who is responsible for the public task and who often furnishes the public money for this (vertical accountability. Public accountability is more and more also felt towards other stakeholders (horizontal accountability).
In order to reduce the administrative burden for the agency, it is sometimes suggested that horizontal accounting can replace the vertical accounting. For a long time the Netherlands Court of Audit took the position that horizontal accounting can not replace vertical accounting. However, recently this position changed and became more nuanced. Nowadays NCA recognises that there are possibilities for complementing vertical accounting with horizontal accounting, but then horizontal accounting will have to meet certain standards, and will have to work

from the same basic principles, assumptions and definitions. In practice such uniform approach has not even been reached between ministries. It will be the challenge for the next few years to reach that uniform approach, both within government and among government and other public institutions.

4 Closing remarks

In this paper we have not attempted to provide a full scale overview of the Dutch Independent regulatory agencies. First of all we limited ourselves to market regulators and secondly we tried to work mostly with empirical knowledge coming from our audits.

The profiles we described of the IRA's will never provide a full description of each agency. The profiles do show similarities and differences in aspects which are especially important for our work as an audit office. Probably from other points of view different characteristics will be more prominent.
Also our description of dilemma's does not aim to solve the problem; to the contrary. The examples we gave are meant to open up the discussion, to show how questions are related and basic values sometimes compete. There is no scientific way to provide answers to these problems. It is our society which will have to decide how to weigh all these interests, basic principles and values and find a balance between them. For this we aimed to contribute with this paper, especially from our unique position, with access to information which others can get only with difficulty, and by comparing cases from our audits.

There are still many questions we did not touch in this paper. Some of these have to do with studying the field of IRA's: can we discover a trend of agentification? Is the trend in IRA's fragmentation or centralisation? Should we make a distinction between regulatory, executive and supervisory agencies?. Other questions are more focussing on the profile of IRA's: does the agency really have autonomous regulatory competence? How independent is the agency? We have applied certain more or less objective criteria, but quite probably other criteria might be more relevant for real autonomy or independency. Finally there are remaining questions about political aspects: how far should political accountability go?
Some of these questions will certainly be included in future audits coming from our Market Supervision Programme. Other questions need a scientific approach which cannot be reached in an audit. For this we count on continuing close cooperation with the Netherlands Institute of Government.

Annex I Literature of NCO

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