THE NETHERLANDS

2002

1. Executive Summary

1. In this document an impression is given of the work of the Netherlands Competition Authority (hereinafter: 'NMa') in the year 2002. An English version of the official annual report can be downloaded at the website of the NMa, (http://www.nmanet.nl) under the heading 'News and Publications' – 'Download Publications'. All cases and Guidelines can also be downloaded at this website.

2. In the year 2002 the NMa nine times reported reasonable suspicion that the Competition Act had been contravened. Six times a fine was imposed (including procedural fines), totalling an amount of almost € 100 million. As much as 187 complaints where handled and 66 decisions on notifications of concentrations were made.

3. At the end of 2002 the NMa had 303 employees. Next to competition regulation the NMa also monitored on the basis of sector specific rules, by means of the Office of Energy Regulation (*'DTe')* and the Office of Transport Regulation (*'Vervoerkamer')* which are so-called Chambers within the NMa.

2. Changes to competition laws and policies, proposed or adopted.

2.1 *Summary of new legal provisions of competition law and related legislation.*

2.1.1 *Implementation of EC Transparency Directive*

2. As of 15 February 2002, the Commission Directive 2000/52/EC of 26 July 2000 (OJ L 193)
4. amending Directive 80/723 EEC on the transparency of financial relations between member states and public undertakings was implemented in the Competition Act. This implementation consists of obligations for certain undertakings to have a separated administration for different activities, the keeping of those data and the supplying thereof to the Commission. Further, clauses that are necessary for the execution and enforcement of those obligations were introduced into the Competition Act.

2.1.2 Energy regulations

5. Negotiations since 1998 between the Ministry of Economic Affairs and the electricity producers resulted in the Electricity Production Sector Transition Act of 21 December 2000. The Act provides for (i) rules for the assignment of rights and obligations after the termination of the joint operation agreement of the electricity production sector, (ii) rules for compensation of the costs burdened by the sector in this regard and (iii) rules for the transfer to the State of the shares in the company designated as the grid manager of the national high-voltage grid. On the 1st of July 2003 Parliament agreed on the Act.

2.1.3 Transport regulations

6. The Office of Transport Regulation (*Vervoerkamer*) is a so-called Chamber within the NMa. This Chamber, which will be established officially on 1 January 2004, will be the sector specific supervisor of the railway sector, other public transport as tram-, metro- and bus transport and the Airport Schiphol, as well as pilots. The supervision will be based upon transport regulations and will focus on the compliance with legal obligations with regard to services in the transport sector. In addition, the Office of Transport Regulation will carry out studies on the market behaviour of undertakings in this sector.

7. On 1 January 2002, the first regulatory duties within the framework of the Passenger Transport Act of 2000 took effect. As of that moment the Office of Transport Regulation, although formally still in the process of being set up, became operational within NMa. The Office of Transport Regulation currently supervises municipal transport companies in the Netherlands pursuant to the Passenger Transport Act 2000 ('Wet Personenenvervoer 2000'). In this act, the requirements are laid down which the different market players in the public transport sector other than train must fulfil to effectuate an adequate functioning of the market.

8. In spring 2002, the Railway Bill was adopted by the Lower House and in 2003 by the Upper House. It will enter into force on 1 January 2004 pending implementation decrees. This Bill regulates, among other things, a restructuring of the Dutch railway sector and its monitoring from a competition point of view. The Railway Act will prescribe a separation between management, maintenance and the distribution of capacity on the one hand and the offering of transport services on the other. Upon entering into force of the Railway Act, the Office of Transport Regulation will monitor that all transport companies will have access to the railway infrastructure and necessary accommodations. In addition, the Office of Transport Regulation will monitor if the capacity of the railway infrastructure will be distributed in a reasonable, non-discriminatory manner and will monitor the tariffs.

2.1.4 Evaluation of the Competition Act, Electricity Act and the Gas Act

9. The Competition Act, which entered into force on 1 January 1998, has been evaluated by the Minister of Economic Affairs in 2002. In that year, also the Electricity Act of 1998 and the Gas Act have been evaluated. The evaluation studies related to the economic, legal and efficiency aspects of the Acts. Amendments are expected to be made on the basis of the outcome of the evaluations, such as a strengthening of the available instruments or investigation tools of the NMa, such as the possibility of searches in private premises and the power to impose higher fines on companies which do not co-operate with an investigation.

2.2 Other relevant measures, including new guidelines

10. In this paragraph an outline is given regarding the Guidelines the NMa published in the year 2002, as well as some other major developments not concerning cases.

2.2.1 Guidelines Remedies (17-12-2002)

11. In December 2002, NMa published the Guidelines on Remedies. In these guidelines, NMa presents its present insights into remedies in relation to proposed mergers and take-overs. The guidelines give insight into the substantive requirements that remedies must meet and the way remedies should be submitted and implemented. NMa invited the parties involved to offer comments and suggestions during a consultation round. The responses have resulted in a number of amendments to the definitive guidelines.

12. NMa's guidelines are consistent with the policy of the European Commission in this area. The guidelines deal with 'structural remedies' and 'behavioural remedies'.

2.2.2 Guidelines for the Healthcare sector (14-10-2002)

13. In October 2002, NMa drew guidelines for the healthcare sector. Through the publication of these, NMa wishes to make it simpler for providers and insurers of healthcare to assess forms of co-operation and practices themselves in the light of competition rules. In fact, the guidelines bring together the conclusions of the assessments made by NMa in more than 390 cases in the healthcare sector dealt with by NMa. A consultation round preceded the adoption of the guidelines.

2.2.3 Leniency Guidelines (28-06-2002)

14. Through the publication of its Leniency Guidelines, NMa has introduced a leniency scheme to promote the detection of cartels. On 5 March 2002, NMa published a consultation document on its website containing a draft of the Leniency Guidelines. The consultation document was also sent to market players, organisations representing market players and other regulators. Due to the number of comments made during the consultation procedure, NMa amended the Guidelines. The Guidelines relate, in particular, to agreements between and practices of companies that restrict competition and which may be considered to be very grave infringements of the prohibition on cartels.

15. The order in which NMa is informed of cartels and the moment at which NMa is informed are decisive in determining the degree of leniency. The system is set out in the following table:

	NMa has not yet started an investigation	**NMa has already started an investigation**
First informant, not a leader of the cartel	Right to immunity	Right to immunity from 50% to possible full immunity
Second or subsequent informant or leader of the cartel	Possibly 10% to 50%	Possibly 10% to 50%

16. In order to qualify for leniency, companies have to meet a number of cumulative conditions. The company must provide all the information it has or acquires with regard to the cartel. This must be information that NMa does not already have in its possession. The information must make it possible to start an investigation or must have added value for a current investigation. To qualify for fine immunity or a reduction in the fine of more than 50%, a company may not have been the leader of the cartel and may not have encouraged any other company to participate in the cartel. The company must give its full co-operation to the investigation and must refrain from all practices which could obstruct NMa's investigation.

17. Together with the publication of the Leniency Guidelines, a Leniency Office was set up within NMa. Applications for leniency may be submitted to the Leniency Office. In 2002, one request for leniency was granted. In addition, a number of requests are being processed and a number of exploratory investigations are taking place which may result in an application. In relation to the interests involved, these are not discussed further in this report.

2.2.4 The NMa Agenda 2003 (18-12-2002)

18. At the end of 2002 the NMa published its NMa Agenda 2003. NMa Agenda 2003 sets out NMa's plans for the coming year and its priorities in relation to these.

2.2.5 Parliamentary inquiry into the construction industry

19. In the spring of 2002, the Lower House of the Dutch Parliament decided to hold an parliamentary inquiry into fraud and cartel behaviour in the construction industry. The Minister of Economic Affairs entered into working agreements with the Commission of Inquiry to avoid undesirable interference between investigations carried out by NMa and the Commission of Inquiry. At the request of the Commission of Inquiry, NMa provided much information on competition law and NMa's investigations into the construction industry. Apart from the role of construction companies, the Commission of Inquiry investigated, for instance, NMa's role as the competition authority. In its final report, the Commission of Inquiry referred to NMa's present approach as diligent, industrious and thorough.

20. However, the report also criticised choices made by NMa in the past. The Commission of Inquiry criticised NMa for being remiss in law enforcement, for setting priorities in a one-dimensional way and for being too passive in obtaining the parallel administrations referred to hereunder: The Commission of Inquiry also concluded that extending NMa's statutory powers may be necessary if its present powers prove inadequate. The results of the parliamentary inquiry are the subject of consultation between the government and Parliament. Since the beginning of 2002, NMa has made more capacity available and deployed this capacity in the investigation of cartels.

2.2.6 NMa Investigation of cartel infringements in the construction sector

21. At the beginning of 2002, NMa set up the Construction Industry Taskforce to carry out intensive investigations into possible infringements of the Competition Act in the construction industry, mainly bid-rigging. In the autumn of 2001, the possibility of large-scale irregularities in the construction industry emerged. Partly on the basis of evidence in the highly publicised 'parallel administration' of the company Koop Tjuchem, NMa started various investigations. At the end of 2002, the Construction Industry Taskforce consisted of 30 people.

2.2.7 Forensic IT

22. In the year 2002 the NMa invested heavily in methods for investigating the electronic data of companies ('Forensic IT') and invested in a computerised information processing system. This has led to considerable efficiency gains. In many cases, an investigation requires that NMa orders companies to make documents available for inspection during unannounced visits (dawn raids) to the companies. NMa makes copies of paper documents for its investigation. The documents, which thereafter are investigated are scanned into the system, can be selected automatically and can be identified for inspection.

23. Evidence of cartel agreements may also be found in the electronic archives of companies. The data and documents which NMa may order a company to make available for inspection may include, for instance, digital data at a particular location. In carrying out its investigations, NMa makes copies of original data media, such as floppy disks, hard disk drives or CD-ROMs. The main aim of this forensic recording and 'seizure' of electronic data is to spend no more time than is necessary at the company. The actual investigation of the electronic data takes place on NMa's premises. NMa carries out focused searches through the data for particular documents which are important for the investigation in question. Of course, this electronic investigation takes place on the basis of guarantees which ensure that the interests of the defence are not jeopardised. For instance, the so-called 'search terms' used to identify relevant documents in the company's administration are recorded in so-called protocols and data which NMa may not investigate, pursuant to the Competition Act, is not included in the investigation.

2.3 Government proposals for new legislation

2.3.1 Mandatory implementation of EC Regulation 1/2003

24. As from 1 May 2004, Regulation 1/2003 on the execution of the articles 81 and 82 of the EC Treaty will apply. Although Regulation 1/2003 will have direct effect, it is necessary to implement some items into national legislation. The NMa will be designated as the only competition authority in the Netherlands that can apply the articles 81 and 82 of the EC Treaty and that will have the power to declare EC regulations on block exemptions to be inapplicable. Further, national legislation will provide for the designation of officials that will be charged with rendering assistance to the European Commission and for the necessity of a judicial authorization in case of entering a house or in case of sifting through.

2.3.2 Amending the Competition Act as a result of its evaluation

25. As a result of the evaluation of the Competition Act and of the debate in Parliament as to the fraud in the construction sector, we wish among other things to strengthen the investigation powers of the NMa, such as the possibility of searches in private premises, the ability to impose higher fines on companies that do not co-operate with an investigation and the ability to fine individual persons. Further, the Dutch merger control will be aligned with the current European Merger Regulation.

2.3.3 NMa as an independent authority (NMa ZBO)

26. At this moment, the NMa is part of the Ministry of Economic Affairs. In order to prevent political influence on individual cases, the NMa ZBO Bill was proposed in the year 2000. Another important element of the Bill is that the NMa will not be headed by one director-general, as is now the case, but by a board of three members. Further, the Bill provides for the possibility to pass the procedure for lodging an objection over under certain conditions and to appeal directly to the administrative court in Rotterdam. The Bill has already been adopted in the Lower House. In 2002, the then Minister of Economic Affairs requested a stay of proceedings from the Upper House.

2.3.4 Commercial activities by government organisations (Markt en Overheid)

27. In 2001 a Bill was proposed to regulate commercial activities by government organisations. In August 2001, the Cabinet requested the Lower House to a stay, pending a new Bill. It is expected to be proposed early next year.

2.3.5 *Energy regulations*

28. Since 2001 the Dutch market is gradually opening up for both electricity and gas. On 1 January 2002 the electricity market was opened to the second group of customers, the first group being large volume users. The group of captive customers has now been reduced to those customers having at their disposal a connection to the grid with a total maximum value of 3.80 A. Since 1 July 2001 customers (including households) are free to choose their supplier of sustainable electricity. The liberalisation date for those consumers with a total maximum transmission value of 3.80 will be postponed from the 1st of January 2004 to the 1st of July 2004, which yet needs to be laid down in legislation. Another planned postponement which yet needs to be laid down in legislation is the postponement until 1 January 2005 of the possibility for regional distribution companies to be privatised.

29. Presently, preparations are being undertaken for the implementation of the Gas and Electricity Directives. The implementing legislation will be sent to Parliament before the end of 2003. It contains the following elements: regulations on the quality of the networks, the sharpening of the regulations for unbundling of the networks, the introduction of fining as a regulatory instrument and the introduction of

more supervisory powers for the regulatory authority DTe and the Minister of Economic Affairs. It is planned to enter into force on the 1st of July 2004.

2.3.6 Transport regulations

30. At this moment, the Aviation Bill (voorstel *Wet Luchtvaart*) is in Parliament. It regulates the supervision of tariffs that air companies must pay Schiphol Airport. The Office of Transport Regulation will monitor if Airport Schiphol does not abuse its dominant position a sole supplier. There are special clauses for tariffs and negotiations between Schiphol Airport and the Air Companies.

3. Enforcement of competition laws and policies

31. In this paragraph an overview of significant cases is given which the NMa dealt with in the year 2002. In Appendix A the statistics and key figures regarding the year 2002 are given. In this paragraph firstly action against anti-competitive practices and abuse of dominant position will be discusses. Thereafter merger regulation is highlighted. Following these chapters on competition regulation, very shortly the attention is drawn to sector specific which the NMa monitors and enforces, by means of the Office of Energy Regulation (*Dte*) and the Office of Transport Regulation (*Vervoerkamer*). The latter is also a so-called Chamber within the NMa. Due to the scope of the report, the sector specific work is not discussed in detail.

3.2 Action against anti-competitive practices, including agreements and abuses of dominant positions

3.2.1 Summary of activities of the NMa

3.2.1.1 Cartel – investigations

A.1 Formal report stating reasonable suspicion

32. In 2002, NMa's aim was at least to achieve further growth in pro-active activities compared to the previous year. The most important proactive activity, carrying out investigations into infringements of the Competition Act, increased sharply from six investigations in 2001 to 28 investigations in 2002. In 2002, NMa carried out investigations into possible infringements of the prohibition on cartels in a variety of sectors. Not all the investigations led to the conclusion or provided evidence that the Competition Act had been infringed. In nine cases, NMa drew up a formal report (statement of objections) which concluded that there was a reasonable suspicion that competition rules had been contravened. A report has drawn up with a view to imposing a sanction. Contraventions of the prohibition on cartels where:

Mobile telephone operators

33. In July 2002 the NMa drew up a report on the five mobile telephone operators due to an agreement entered into by Vodafone N.V., KPN Mobile N.V., Dutchtone N.V., Ben Nederland B.V. and O2 (Netherlands) B.V. which restrains competition. This relates to an agreement to reduce jointly and almost simultaneously the fee paid to dealers for selling telephone subscriptions. As a result, consumers pay more for the purchase of a mobile telephone in combination with a subscription. Agreements between undertakings that restrain competition are prohibited under the Competition Act. One of the factors of competition between mobile telephone operators is the fee operators pay to dealers. As a result of the agreement entered into jointly by the operators, price competition has decreased since August/September 2001. Dealers receive a so-called subscription fee from the operators when a consumer takes out a mobile telephone subscription. The dealer uses this fee to offer the consumer a mobile telephone, which is sold in combination with the subscription, at a lower price. The report contains a reasonable suspicion that an

infringement has been committed. In December 2002 a total fine of € 88 million was imposed. (see below section A.2. Sanctions). Parties filled for administrative appeal.

Cleaning services branch

34. In August 2002 NMa drew up a report on Organisation of Businesses in the Cleaning and Business Services Industry (*Ondernemersorganisatie Schoonmaak- en Bedrijfsdiensten – OSB*) and a number of its large members for giving advice on prices and co-ordinating price increases. NMa's research showed that OSB offered its members, for instance, a model for calculating hourly rates. OSB also explicitly advised its members to increase their tariffs annually and even sometimes in the interim on the basis of a percentage price increase set by OSB. OSB used the advice on prices as a means of co-ordinating the price increases of its members. As a result, price competition was excluded to a large extent. A number of OSB's members also infringed the Competition Act because they were directly involved in agreeing and co-ordinating price increases. Furthermore, the majority of these companies actually adopted the price recommendations. The advice on price increases related, in any event, to the period from January 1998 up to the end of 2000. The members of OSB represent 60 to 70 percent of the total market turnover of the cleaning branch. The total turnover of the branch in 2000 amounted to approximately € 2.4 billion. In March 2003 the NMa imposed fines totalling almost € 17 million (€ 16,975,550). Parties filed for administrative appeal.

Bicycle manufacturers

35. Following an investigation, NMa has drawn up a report on four bicycle manufacturers due to a reasonable suspicion that they had entered into price agreements and exchanged sensitive competitive information. A report was also drawn up on two branch organisations. According to NMa, these associations strongly urged their members, the bicycle retailers, not to do business with two large suppliers of company bicycles. According to NMa, Koninklijke Gazelle B.V., Accell Group N.V. (Batavus B.V., Koga B.V., Sparta B.V.) and Giant Europe B.V., which represent 70 to 80 percent of the Dutch market, entered into price agreements with each other in relation to the sale of bicycles. In addition, Gazelle, Accell, Giant and Union B.V. each participated in a system involving the exchange of sensitive competitive information. These agreements relate to the period from 1998 up to the present.

36. A report has also been drawn up on the branch organisations, Bovag and Netherlands Christian Association of Bicycle and Motorcycle Retailers (*Nederlandse Christelijke Bond van Rijwiel- en Motorhandelaren - NCBRM*) in relation to their infringement of the Competition Act. These associations strongly urged their members, the bicycle retailers, not to do business with two large suppliers of company bicycles. According to Bovag and NCBRM, the profit margin which these two suppliers give retailers on the sale of company bicycles was too low. In addition, Bovag and NCBRM have given their members advice on various occasions regarding the prices and tariffs to be charged to customers, for instance for service and maintenance. Following the company visits, Gazelle and Bovag drew up guidelines for their employees to ensure compliance with the Competition Act. The sanctioning procedure is still going on.

Construction industry

37. As mentioned above, in the autumn of 2001, the possibility of large-scale irregularities in the construction industry emerged. At the beginning of 2002, NMa set up the Construction Industry Taskforce to carry out intensive investigations into possible infringements of the Competition Act in the construction industry. Partly on the basis of evidence in the highly publicised 'parallel administration' of the company Koop Tjuchem, NMa started various investigations. In 2002, a reasonable suspicion that the prohibition on cartels had been infringed was recorded on five occasions. The sanctions procedures which followed this

were concluded in 2003. In 2003, the investigation was continued with full force, which will also be the case in 2004.

- Construction companies in relation to permanent co-operation: Amsterdam, North-South underground

38. Following notification by the municipality of Amsterdam, NMa investigated the developments surrounding the tender for the North-South underground railway in the capital. On 1 November 2002, NMa drew up a report on two companies. It appeared from the investigation that these construction companies had entered into a master agreement at the end of 2000, in which mutual competition and competition with their competitors was restricted. This co-operation took the form of an agreement with a permanent character between potential competitors in relation to their market behaviour. NMa therefore suspects the companies of an infringement of the Competition Act. The sanctioning procedure is still going on.

- Construction companies with regard to tenders for the municipality of Scheemda

39. At the end of November 2002, NMa drew up a report on four road construction companies. A reasonable suspicion arose from the investigation that these companies had had prior consultation and had entered into price agreements with regard to the tendering of maintenance work on asphalted roads in the municipality of Scheemda in the period from 1998 up to and including 2000. In this investigation, NMa made use of data from the parallel administrations of Koop Tjuchem and other evidence. In April 2003 fines totalling € 1,232,000 were imposed. Parties filed for administrative appeal.

- Construction companies in relation to asphalt plants in the north of the Netherlands

40. At the beginning of December, NMa concluded an investigation into possible cartel agreements in relation to asphalting works in the provinces of Groningen, Friesland and Drenthe. A report was drawn upon 13 road construction companies due to a reasonable suspicion that the companies regularly coordinated their behaviour in subscribing to tenders. This took place in the years 1998 and 1999. Ten companies or parts of companies were involved in this on a regular basis and three companies were involved incidentally. The sanctioning procedure is still going on.

- Construction companies in relation to asphalt plants

41. Shortly after the asphalt case in the north of the Netherlands, NMa announced that it suspected 18 road construction companies of entering into cartel agreements in relation to three asphalt plants in which they participated. NMa drew up a report which set out the reasonable suspicion that the construction companies had co-ordinated the affairs of the three asphalt plants. The 18 construction companies entered into agreements with regard to the price of asphalt, the planning and allocation of asphalt production and divestments and investments in the asphalt plants. The agreements related to the years from 1998 up to and including 2002. The sanctioning procedure is still going on.

- Construction companies in relation to the construction of athletics tracks

42. At the end of December, NMa concluded an investigation into possible cartel agreements by five construction companies with regard to the construction, maintenance and renovation of athletics tracks. NMa suspects the construction companies of systematically co-ordinating their subscription behaviour and dividing the assignments amongst themselves. This co-ordination took place up to and including the year 2000 and involved tens of projects. The sanctioning procedure is still going on.

43. In 2003 the investigation into possible infringements of the Competition Act in the construction industry will continue. NMa announced this at the end of 2002 in its NMa Agenda 2003. At the beginning

of 2003, NMa concluded the investigation into cartel agreements in relation to large infrastructural works in the region of Haarlemmermeer, including Schiphol Airport. NMa suspects eight companies of consulting each other and dividing assignments amongst themselves.

44. NMa's suspicion relates to the period from the beginning of the years 1998 up to and including 2000 and relates to 15 large infrastructural projects. NMa started its investigation in January 2002 and bases its findings, for instance, on data from the parallel accounts of the company Koop Tjuchem and material encountered during company visits in April and December 2002.

A.2. Sanctions

45. In most of the above mentioned cases the sanctions procedures was still going on at the end of 2002. Three sanctions procedures were concluded in cartel cases in 2002.

Veterinary pharmaceuticals: refusal to supply

46. In 2000 NMa started an investigation into the practices of Coöperatieve Nederlandse Veterinair-farmaceutische Groothandel UA (AUV) and Aesculaap B.V. These companies are active, for instance, in the market for veterinary pharmaceuticals. Of all veterinary surgeons in the Netherlands, 90 percent are affiliated to UAV for the procurement of veterinary pharmaceuticals. AUV offers a range of products which includes more than 90 percent of all the veterinary pharmaceutical products available in the Netherlands. Aesculaap, which also sells AUV products, is the only other wholesaler in the Netherlands with a full assortment of veterinary pharmaceuticals.

47. The investigation led to the conclusion that AUV had infringed the prohibition on cartels by systematically refusing to supply pharmaceuticals to veterinary surgeons. AUV refused to supply its products to veterinary surgeons who did not adhere to its internal rules, for instance with regard to the pricing of AUV's products and the policy with regard to the setting up of practices by members. AUV entered into an agreement with Aesculaap in relation to this exclusionary policy. In 1998, AUV submitted an application for exemption from the prohibition on cartels for, amongst others, this exclusionary policy. Following a provisional assessment by NMa, AUV deleted parts of its constitution and withdrew the application for exemption in mid-2000. However, NMa reached the conclusion that AUV and Aesculaap had refused to supply goods and had applied its exclusionary policy after this date. Fines were imposed for this period.

48. The level of the fines was determined by multiplying 10 percent of the turnover involved for the period from mid-2000 up to and including the date of the report, 15 February 2001, by a factor of 2. Practices such as this are *very grave* infringements, for which NMa sets the factor at between 1.5 and 3, in accordance with the Guidelines for the Setting of Fines. In determining the factor, the horizontal nature and the interrelationship of the practices were taken into account. Since these practices relate to the entire Dutch market, they had a considerable economic effect on the market. The (potential) loss incurred by competitors, buyers and consumers as a result of the infringement is considerable. The fine imposed on AUV was set at € 9,700,000 on these grounds. Since Aesculaap's involvement carried less weight, the amount of the fine imposed on Aesculaap was reduced by 50 percent. The fine was set at € 750,000. Parties filed for administrative appeal.

Mobile telephony: joint reduction in payments to dealers

49. NMa established that Ben, Dutchtone, KPN Mobile, O2 and Vodafone had entered into cartel agreements with regard to the reduction of standard payments to dealers for mobile telephone subscriptions (see also paragraph 2.1.1.A.1. above). The investigation arose from various reports around September 2001, for instance in the media. The (potential) damage was as great. The infringement took place in any

event from 13 June 2001 up to and including 31 December 2001, with regard to Ben, Dutchtone and Vodafone, and up to 31 October 2001 with regard to KPN Mobile and O2. As this is a *very grave* infringement, a factor of between 1.5 and 3 applied. In this case, the factor determined was not publicised because this would have resulted in the disclosure of sensitive commercial information. NMa set the fines for Dutchtone, KPN Mobile and O2 at € 11.5 million, € 31.3 million and € 6 million respectively. The fine imposed on Ben was increased by 10 percent to € 15.2 million because Ben took the initiative to enter into a cartel agreement. The fine imposed on Vodafone was also increased by 10 percent to € 24 million because Vodafone had encouraged the others to participate in the infringement. Parties filed for administrative appeal.

Texaco: co-ordinated discount campaign

50. NMa fined Texaco and three Texaco filling stations for a co-ordinated discount campaign in the Nijmegen region. The NMa has imposed a fine of € 1 million on Texaco Nederland B.V. and fines of between € 25,000 and € 48,500 on each of the Texaco filling stations. Texaco took the initiative in the campaign which involved sharp reductions in the price of petrol, LPG en diesel by the operators of four Texaco filling stations. The reason for this campaign was the arrival of a Tango filling station in the immediate neighbourhood. The cost of the price reduction was borne by Texaco Nederland B.V., initially in full and later partially.

51. NMa established that in the period from 15 April 2000 until 17 July 2000 the four Texaco filling stations applied the same discounts. During the first week, Texaco filling stations offered a discount of NLG 0.30 (approx. € 0.135) on the recommended price for petrol and diesel and consequently charged up to NLG 0.15 less than the price charged by Tango. Prior to this campaign, co-ordinated consultation took place between the filling station owners involved. In mid-April this discount campaign was announced through a joint advertisement in the regional daily newspaper, De Gelderlander. In the period after this, lower price discounts were offered jointly.

A.3. Exemptions

Decisions relating to the healthcare sector

52. In 2002, NMa took three decisions on applications for exemption which originated from the healthcare sector. These related to the application submitted by the pharmaceuticals manufacturer, Astra Zeneca, for exemption of its prohibition on supplying medicines to third parties which is imposed on hospitals, the decision on the application by Zorgverzekeraars Nederland in relation to the 'Solidarity Protocol' and the decision on the application by CZ, VGZ and Univé for a joint tender for two types of medicine, for which the applicable pricing regime was to cease as of 1 January 2003.

3.1.1.2 Abuse of dominant position

53. Most cases concerning abuses of dominant positions are small. Two bigger cases are highlighted down below.

Interpay

54. The financial sector, which plays a central role in the Dutch economy, is characterised by a very high degree of concentration and a high degree of opaqueness and cross holdings. For these reasons, the sector was the subject of a systematic investigation. The investigation into payment transactions in the Netherlands and the market position and practices of Interpay was intensified in 2002. Interpay was set up and is fully owned by eight banks in the Netherlands and is the sole provider in the Netherlands of support services, such as debit-card payments, smartcard payments, payments by credit card and giro transfers. In

April 2003, NMa announced that it suspected Interpay of abusing its dominant position by charging retailers rates for debit-card transactions which were too high. NMa also suspects that the competition between banks is limited by the fact that Interpay operates as the central sales office for network services with regard to debit-card transactions. For this reason, NMa drew up a report on Interpay and ABN AMRO Bank, Rabobank, ING Bank, Fortis Bank, SNS Bank, Friesland Bank, Van Lanschot Bankiers and Bank Nederlandse Gemeenten, which are the shareholders of Interpay. Interpay and the banks which are its shareholders will respond to the report in 2003 during the sanctions procedure. After this, NMa will decide whether it will impose a sanction.

55. In June 2002, partly in relation to the investigation into Interpay, an information and consultation document on electronic payments was published. (see paragraph 3.1.1.3 on 'Monitoring Markets')

Endemol

56. An investigation into the possible abuse of a dominant position by Endemol, producer of TV programs, was concluded in 2002. During its preliminary investigation into the position and practices of Endemol, NMa found no evidence from which it appeared that the television producer had infringed the Competition Act. The reason for the investigation was a broadcast of a news programme, Reporter. In this programme, mention was made of large discounts that Endemol received as a 'large user' when purchasing facility services, which it supposedly did not pass on to its customers, the television stations. In addition, Endemol was accused of conditional sales. As a television producer, it was alleged that Endemol was only willing to provide television broadcasting companies with certain programmes in combination with other programmes. Reporter inferred from this information that Endemol possibly had abused its dominant position. The programme gave NMa cause to investigate whether Endemol had in fact infringed the Competition Act. No evidence of this was found in the material gathered by NMa and from the interviews with the various parties involved.

3.1.1.3 Monitoring markets

57. Next to competition cases, the NMa also monitors markets on a more general level, for example by looking at market structure. Some of these markets are monitored of a more structural basis.

CD sector

58. In 2002 NMa started monitoring research into the CD sector in the form of a sector scan. NMa analysed the market structure and price formation. In addition, NMa ascertained the extent to which price formation in the Netherlands with regard to CDs deviated from that in other countries. In April 2003, NMa published the results of this monitoring research. It appeared from the research that a number of special characteristics of the CD sector in the Netherlands contribute to the fact that retail prices in the Netherlands are relatively high. The sector scan did not provide NMa with a concrete reason to suspect that record companies had entered into illegal price agreements with regard to the sale of CDs.

59. The considerable spread of consumer prices also gave NMa no reason to assume that record companies dictate the sales prices retailers charge for their CDs or that retailers entered into price agreements at the national level. NMa therefore decided not to start a competition investigation into cartel agreements in the sector.

Fixed to mobile phone calls

60. In August 2002 NMa published a report on an investigation started in 2001 into the level of rates for telephone calls from the fixed telephone network to a mobile number. In this report the NMa defined the relevant market for mobile call termination. The conclusion was that each of the five mobile operators

in the Netherlands has a dominant position on their own mobile network with regard to the termination of calls. After all, a mobile operator experiences no serious competition in setting its tariffs for the termination of calls on its own mobile network, due to 'calling party pays' principle. As a result, mobile operators have hardly any incentive at all to charge at competitive rates.

61. This report is important for a further investigation into whether the level of terminating tariffs is permissible. Initially the initiative for further action was left to the Independent Post en Telecommunications Authority (*OPTA*), as a number of disputes were pending with regard to the level of termination tariffs. This method of operation was consistent with agreements set out in the co-operation protocol between NMa and OPTA. Due to legal proceedings which had been filed, however, it was not clear at the beginning of 2003 what legal possibilities were open to OPTA in this regard. Since several operators increased their termination tariffs in the spring of 2003, NMa took over the investigation in April 2003.

Financial sector

Information and consultation document Financial sector

62. In mid-2002 NMa published an information and consultation document within the framework of its research into the banking sector, in general, and electronic payment processing, in particular. Network services for debit-card transactions, in particular, and the role of Interpay was central to this. In the document, NMa gives attention to the competitive characteristics of the banking sector in the Netherlands and concludes that the Dutch banking sector reveals characteristics which justify NMa's special attention. This special attention is necessary due to the high degree of concentration, the complex cross shareholdings between banks, high barriers that make it difficult for business customers to switch banks and the high (financial) barriers to entry experienced by new entrants in developing a good reputation, name recognition and a branch office network. By means of focused questions, NMa has given market players the opportunity to respond to the document and has received various responses.

Financial Sector Monitor

63. In 2002, the Minister of Finance and the Director-General of NMa agreed that the financial sector would be monitored on a permanent basis within the framework of NMa's regulatory duties. For this purpose, the Financial Sector Monitor was launched by NMa. This market monitor will provide an annual overview of relevant developments in the financial sector starting in 2003 from the perspective of competition law.

Petrol market

64. In mid-2000, NMa started an investigation into agreements and the practices of oil companies which possibly restricted competition. In December 2001, NMa published a paper in which it stated that the present system of agreements between oil companies and filling station operators removes the incentive to compete. Since, in the opinion of NMa, the cumulative effect of these agreements has a strong restraining effect on competition on the Dutch market, NMa announced that it will declare the European block exemption for vertical agreements to be inoperative in this case. In 2002, NMa gave the market players the opportunity to present their opinions with regard to the intention announced at the end of 2001 to revoke the application of the European exemption for vertical support agreements between oil companies and filling station operators. In addition, NMa carried out further research into the effect of this proposed intervention. In March 2003, on the basis of this research, NMa concluded that there was insufficient evidence, in its opinion, that prohibiting the support system would result in lower retail prices. NMa is no longer convinced that this measure would have the intended effect, namely increased

competition between the companies. For the time being, it has been decided not to intervene in the petrol sector, but to monitor the sector in the coming years.

Construction industry

65. In support of the investigation into the construction industry, NMa commissioned research into 100 of the largest construction projects put out to tender by public authorities in the period from 1998 to 2001. Special attention was paid to syndication. The researchers concluded that syndication may be necessary for carrying out large projects, but a consequence of this is that construction companies are able to co-ordinate their market behaviour on a small scale. It also provides companies with a potential means of imposing sanctions by excluding competitors from future syndicates. The larger the project, the greater is the likelihood of syndication,. According to the researchers, this does not mean, however, that syndicates are necessary wherever they occur. In 2003 NMa will advise the Ministry of Economic Affairs on the operation of the present prohibition on cartels in relation to syndication agreements.

3.1.2 Summary of activities of courts

66. In 2002, the District Court of Rotterdam ruled on 15 cases involving NMa. Three cases deserve attention in this annual report because they were important to NMa, in particular in relation to the substantive application of competition law. In Case No. 1 (NOS/HMG vs Director-General of NMa/Telegraaf), the Court ruled on a case of the abuse of a dominant position relating to the applicability of intellectual property rights. The Libertel case is important for the appreciability test and the (limited) applicability of the European block exemption for vertical agreements. Finally, in the SEP case the Court ruled on the abuse of a dominant position in the case of a refusal to supply.

67. In addition, the judgment by the Presiding Judge of the District Court of The Hague in interlocutory proceedings brought by Vodafone is important in relation to NMa's right to publish information on its activities and the outcomes of these activities.

NOS/HMG vs Director-General of NMa/Telegraaf

68. The judicial appeal in NMa's Case No. 1, NOS/HMG vs Director-General of NMa/Telegraaf, relates largely to the degree to which a refusal to supply programme listings, which are protected by intellectual property rights, may result in the abuse of a dominant position. As NMa stated in the decision on the administrative appeal, in accordance with European case law, exercising intellectual property rights may only give rise to abuse of a dominant position in exceptional cases. In the Magill ruling, the European Court of Justice stated four 'special' or 'exceptional' circumstances which give rise to abuse. NMa argued—in contrast to NOS and HMG—that these conditions do not apply cumulatively. The District Court of Rotterdam concurred in this. It noted in this regard that a concept such as 'special' or 'exceptional' circumstances leaves room for the development of law and for taking into account specific aspects of the case under consideration. According to NMa, exceptional circumstances were indeed present in this case which gave rise to an abuse of a dominant position. The Court first established what the relevant market was and whether a dominant position on this market existed. In the Court's opinion, the weekly programme listings of the broadcasting companies constituted the relevant market. The television broadcasters, in fact, have a monopoly with regard to the use of their own programme listings, by which a dominant position is established. NOS also has a dominant position because, in accordance with the Media Act (*Mediawet*), it has at its disposal the programme listings of the public broadcasting companies. NOS therefore has a *de facto* monopoly on the 'combined' programme listings of the public broadcasting companies. Furthermore, in the opinion of the Court, NOS's monopoly is reinforced by prohibiting parties other than NOS to reproduce or publish these 'combined' programme listings.

69. The Court concurred with NMa's three main considerations with regard to the abuse of a dominant position. Firstly, the Court ruled that NOS's programme listings are indispensable to the product that newspaper De Telegraaf wishes to offer, namely a weekly TV guide. Secondly, the Court is of the opinion that every form of competition on the derived market for the weekly publication of programme listings—without the involvement of the present providers of these data (the broadcasting companies)—is excluded by the refusal to supply these data. Finally, according to the Court, there is no objective justification for NOS to refuse to grant a licence, neither on the grounds of a general exceptional interest, nor—as was argued—on the grounds of intellectual property rights.

Libertel

70. Central to the *Libertel*[1] case was the approval clause in so-called service provider agreements. In accordance with the service provider agreements, which Libertel, now called Vodafone, entered into with various service providers, the service providers were permitted to offer mobile telephone subscriptions for their own account and risk in the Netherlands via the Libertel network. The service provider agreements included a clause prohibiting service providers from transferring their subscription databases to a third party in the event of the termination of these service provider agreements or a cessation of the service provider's activities. The Court did not consider whether the obligation to obtain approval had the purpose or consequence of restricting competition. The Court accepted NMa's argument that there was an appreciable restriction due to (i) the limited number of players on the market, (ii) Libertel's position, which was not insignificant, and (iii) the fact that Libertel was not only active as a provider of mobile telephone services, but also had its own mobile telecommunications network. On the basis of these considerations, the Court expressly did not give an opinion on NMa's argument that, in principle, appreciability is a given in the event of a 'limited objective' (in other words, provisions with the purpose of restricting competition). In short, the Court based its decision with regard to appreciability only on the general characteristics of the case and not on market share.

71. The second element which the Court found in favour of NMa was the argument that the approval clause was not covered by the European block exemption for vertical agreements because this clause, according to the Court, does not relate to the (main) purpose of the (vertical) service provider agreements, namely the sale of air time. Since the approval clause only applies on termination of the service provider agreements or cessation of the service provider's activities, it is not in accordance with the definition of a vertical agreement contained in Article 2 of the block exemption. This was the first ruling in which the Court expressed an opinion on the provisions of this block exemption and, by doing so, has shown a willingness to interpret the contents of this exemption according to its purpose.

SEP

72. In de *SEP* case,[2] amongst other issues, the Court had to express an opinion on whether NMa was correct in its assessment that N.V. Samenwerkende elektriciteitsproductiebedrijven (SEP) had abused its dominant position because it had refused to import and transmit electricity on behalf of Norsk Hydro (refusal to supply). SEP was the national grid manager, now TenneT. The Court noted that SEP, as the owner and manager of the national grid, the main transmission grid for public electricity supply, had control of an 'essential facility', for which there was no alternative. The refusal to supply, ascertained by NMa (in essence, this is what the the conditions which SEP imposed on Norsk Hydro amounted to), is relevant in competition law, since SEP—as a *de facto* monopoly on the relevant market—made it

[1] Court of Rotterdam 11 September 2002, Reg. Nos: MEDED 00/2176-SIMO, MEDED 00/2177-SIMO and MEDED 00/2190-SIMO (Vodafone Libertel and Unipart Group vs Director-General NMa and Unipart and Libertel).

[2] Court of Rotterdam, 26 November 2002, Reg. No.: 00/1002 MEDED (SEP).

impossible for Norsk Hydro to transmit the electricity it required. As a result, Norsk Hydro was excluded from (further) competition with distribution companies in the Netherlands. This is the derived market for the sale of electricity, on which SEP's shareholders are active. On the basis of the above, the Court decided that NMa had rightly concluded that SEP had abused its dominant position. The ruling in this case is also important for the interpretation of the Electricity Act of 1998 and for NMa's policy on fines.

Interlocutory proceedings Vodafone Libertel N.V.

73. The judgment[3] in the interlocutory proceedings brought by Vodafone is important in relation to NMa's right to publicise and make transparent its activities and the results of these.

74. NMa intended to publish a report, which set out the results of market research in the area of mobile telephony. This survey was important, partly in relation to whether the five companies which provide mobile telephony in the Netherlands on an 'interconnection' basis have a dominant position and possibly abuse this position by charging excessive interconnection rates. Interconnection means that a subscriber of company A can call a subscriber of company B.

75. The report was partly based on data which the companies had submitted at NMa's request. On requesting the data, NMa had asked the companies to indicate which data should be considered confidential. NMa was of the opinion that it had treated the data marked confidential with care by only including data and research results in the report which could not be traced to individual providers and the data which they had provided. In a ruling of 1 October 2002, the Court ruled in interlocutory proceedings that NMa had not exercised sufficient care. In any event, NMa should have consulted Vodafone before publishing the report.

76. The Court was also of the opinion that Vodafone was legally obliged to provide the requested information. Given this obligation, it was appropriate that NMa exercise caution in publishing a report based partly on data that parties were obliged to provide. The Court also referred to the parliamentary debate on the Competition Act, in which it appears that information relating to undertakings must be treated with the utmost care. The Court also considered it justified that NMa sent the report to OPTA, the Director-General of Competition of the European Commission and the Ministry of Economic Affairs.

3.2 Mergers and acquisitions

3.2.1 General

77. In 2002 a total of 66 decisions were made on notifications of concentrations. In 2002, no investigations occurred within the framework of an application for a licence.

78. The NMa is carrying out further work to make its method of assessment transparent. In 2002, NMa published guidelines regarding remedies. In addition, NMa carried out research in certain sectors without the necessity of doing so in relation to the concrete notification of a concentration. The desired effect of such research is twofold. Firstly, it may produce results which, when published, provide the sector in question with insight into the lines along which any future merger or acquisition will be assessed. As a result, companies may themselves make a better estimate of the outcome of any assessment by NMa in a concrete case. Secondly, NMa is well-prepared, should it receive a notification from the sector researched. In December 2002, NMa, after consultation within the sector, published a memorandum with the findings of research into concentrations in the energy sector. In the memorandum, NMa gives its provisional insights with regard to the assessment of future concentrations in the energy sector. In addition NMa

[3] Judgment of the District Court of The Hague in interlocutory proceedings of 1 October 2002 (KG 02/1016).

intends to carry out or commission research into the factors that determine market power on the wholesale electricity market, in co-operation with the Market Surveillance Committee (MSC). This research will focus on defining the product market and the geographical market and defining market power.

3.2.2 Statistics on number, size and type of mergers notified and/or controlled under competition laws;

Table 1. Key figures on merger regulation

	2002	**2001**
Notifications of concentrations	77	135
Withdrawn	8	8
Decisions in the notification phase	66	138
Not applicable due to the turnover threshold	2	7
Not applicable, not a concentration	1	-
Licence required	1	2
Decisions in the licensing phase	0	1
Summary decisions	19	45
Cases in which the term was suspended	51*	67
Completed within four weeks	21	77
Prenotification discussions	16	18
Informal opinions	18	35
* Of which 7 cases completed within four weeks		

Table 2. Size of mergers and acquisitions investigated

Joint turnover of the companies involves	**Number of concentrations assessed**
≤ 250 million	8
250 – 500 million	9
500 – 1,000 million	7
1,000 - 2,000 million	7
2,000 - 5,000 million	11
≥ 5,000 million	21
Total*	63
* Excluding decisions relating to the non-applicability of concentration regulation (3 decisions)	

Table 3. Scope of merger regulation

Sectors in which concentrations were assessed in 2002	**Number**
Construction	11
Energy and waste processing	10
Financial services	2
Retail and wholesale	14
Transport	3
Healthcare	2
IT services and telecommunications	9

Sectors in which concentrations were assessed in 2002	**Number**
Hospitality industry and recreation	1
Manufacturing of goods	1
Other services	13
Total	*66*

3.2.3 Summary of significant cases.

79. In 2002, no investigations occurred within the framework of an application for a licence. NMa concluded that a licence was required for the take-over of Casema by the American company Liberty, but an application was not submitted by the companies. In a number of cases, NMa carried out an extensive investigation in the initial phase. An example of this is the take-over of the construction company HBG by the BAM-NBM group, which NMa was able to approve in the notification phase after a thorough investigation, on condition that the interests in asphalt plants were divested. In the cases Liberty/Casema and DSM/Brokking an extensive investigation took place in the notification phase.

Case 3052 / Liberty Media – Casema

80. *Parties and market definition*: The notified transaction relates to the take-over of Casema Holding B.V. (Casema) by Liberty Media Corporation (Liberty). Liberty is active in the Netherlands through United Pan-Europe Communications N.V. (UPC). Both parties are active in the area of the transmission of radio and television signals and the bundling and selling of standard and enhanced packages. Two tiers can be distinguished in this market, namely the *upstream* and *downstream* segments. Liberty is also a supplier of programmes. In addition, the activities overlap, for instance in the area of Internet access and Internet network access. Finally, both parties are active in the area of telephony, leased lines and data (network) services.

81. *Consequences of the concentration in the area of radio and television signals and the bundling of packages:* Each cable operator has a dominant position with regard to the distribution of radio and television signals in its coverage area. A consequence of the concentration in question is that UPC and Casema jointly will have a dominant position in a larger number of areas. If a national market for the transmission of radio and television signals and for the bundling and sale of packages via the cable is assumed, the parties have a combined market share of approximately 60 percent. In addition, the new company will control the entire transmission in the Randstad, the coastal region of the Netherlands, as a result of the concentration.

82. There is reason to assume, both with regard to the *upstream* and the *downstream* sides of the market, that a dominant position may arise or be strengthened. With regard to the *upstream* markets, this provisional conclusion is based on the suspicion that after the concentration Liberty will become an obligatory partner for a significant number of programme suppliers. In addition, the strengthening of its power with regard to the procurement of *content* will give Liberty the possibility of determining both transmission prices and conditions. Liberty will also acquire the possibility of exercising considerable influence on the development of digital television in the Netherlands. As a consequence of these factors, Liberty may give preferential treatment to its own supplier of programmes. With regard to the downstream markets, this provisional conclusion is based on the suspicion that Liberty will be able to determine which channels consumers are fed after the concentration, that Liberty will be able to determine the development and provision of digital services after the concentration and the fact that Casema will disappear as a benchmark.

83. *Consequences of the concentration with regard to the Internet:* At present, through their subscribers, the parties have a market share of 40 to 50 percent on the market for broadband Internet access (subscribers to cable and xDSL). Due to the emergence of xDSL, this market share will fall in the coming years. On the basis of various calculations, it is likely that the parties will still have a market share of 30 to 40 percent in two years' time. Since KPN's market share will be of the same order of magnitude and since Wanadoo and its present broadband subscribers will not switch to Liberty, there is no reason to assume that the concentration will result in the emergence or strengthening of the dominant position of a single company. Following the concentration, two large market players will emerge on the market for Internet access, namely Liberty-Casema and KPN. Due to the market dynamics, in particular, of this market, which is still young, there is no reason to assume that the concentration will result in the emergence or strengthening of a joint dominant position.

84. On the market for network access, the parties have approximately 30 to 40 percent of the connections suitable for broadband in the Netherlands. In this area, KPN also has a market share which is at least as large, so that there is no reason to assume that the concentration will result in the emergence or strengthening of the dominant position of a single company.

85. On the basis, for instance, of the above considerations in relation to radio and television, NMa concluded that a licence was required for the proposed acquisition of Casema. After this, the parties decided not to go ahead with the concentration. Casema has since been sold to two investment companies. NMa approved this acquisition in Case 3255/Carlyle and Providence - Casema.

Case 3074 / BAM – HBG

86. *Parties and market definition*: The notified transaction relates to the acquisition of Hollandsche Beton Groep N.V. (HBG) by Koninklijke BAM NBM N.V. (BAM). Initially, the European Commission was notified of the transaction, after which the case was referred to NMa at the request of the Dutch Minister of Economic Affairs. The markets affected by this concentration are the market for project development, the market or markets for civil and utility construction and the market or markets for earthworks, hydraulic engineering and road construction, with regard to which a further distinction may possibly be made according to the size of the projects. In addition, the markets for asphalt are affected.

87. In general, a link between the size of the project and the size of the companies, which are suitable to carry out the projects, is assumed. Partly due to the size of construction projects, in particular in the area of earthworks, hydraulic engineering and road construction, it occurs frequently that companies do not subscribe independently, but as consortiums with one or more other companies. Even in such cases, the companies involved in the consortium must have a certain size in order to be eligible to carry out large construction projects. In order to investigate the extent to which construction projects of various sizes should be deemed to belong to the same market or to separate markets, an analysis of projects from € 10 million or more was made in this case. As part of this, the data in relation to bids for construction projects in various size categories were examined.4 It appeared from the start that considerably more companies subscribed to projects in the areas of civil and utility construction and in the area of earthworks, hydraulic engineering and road construction in the category of € 10 to € 20 million than for projects of € 20 million or more.

88. *Consequences of the concentration*: For the assessment of the position of BAM/HBG and their competitors, it is not only important for NMa to investigate how many and which companies made an offer in each size category, but also how often companies subscribed and which company was ultimately

4 From € 10 million to € 20 million, from € 20 to 30 million, from € 30 to € 40 million, from € 40 to € 50 million and € 50 and above.

awarded the contract. In this regard, NMa examined the data relating to the realisation of construction projects. In the case of civil and utility construction projects of € 20 million or more, there were sufficient competitors who subscribed with the same frequency as BAM and HBG. If the realisation of civil and utility construction projects in the various size categories is considered, it is notable that the larger the assignment, the more often BAM/HBG carried out one or more of the assignments. Of all the civil and utility construction projects above € 20 million, however, BAM/HBG did not carry out more than its competitors. In addition, its competitors, such as Heijmans, Hillen & Roossen en TBI, were in any event (also) invited to make an offer. With regard to earthworks, hydraulic engineering and road construction, it was also concluded that sufficient companies subscribed with a comparable frequency to that of BAM/HBG to large earthworks, hydraulic engineering and road construction projects in the various size categories. The information with regard to the number of earthworks, hydraulic engineering and road construction projects awarded to BAM/HBG also shows that many of these projects were carried out in combination with other companies and cannot therefore be attributed to BAM/HBG in their entirety. Neither in the area of civil and utility construction, nor in the area of earthworks, hydraulic engineering and road construction, is it possible to conclude that a dominant position threatened to emerge as a result of the concentration.

89. In the area of earthworks, hydraulic engineering and road construction, NMa examined the railway construction market for the first time. Two competitors which are larger than BAM are active on this market and HBG adds hardly anything to BAM's existing position. In addition, customers in this market have a strong position. An increasing number of foreign companies are also active on the railway construction market in the Netherlands, as a result of which the emergence of a joint dominant position on this market is not likely. The investigation in this case also showed that the concentration would result in too strong a position on certain regional markets for asphalt. BAM would acquire control of asphalt plants in seven different areas with market shares varying from 40 to 60 percent. Since BAM/HBG would become larger in these markets than its largest competitor and this relates to an established market, its position would be too strong. The amended notification submitted by the parties, in which they undertake to withdraw from two plants within a certain period, to close two plants and to relinquish their interests in a number of plants ensures that BAM/HBG will not be able to acquire a dominant position in the area of asphalt.

Case 2786 / DSM - Brokking's Beheer

90. *Parties and market definition*: The notified transaction related to the combination of the activities of NPK van Eck B.V., Vulcaan Meststoffenhandel B.V. and Moreels N.V. within a company which would be jointly controlled by DSM Agro B.V. and Brokking's Beheer B.V. The markets affected by this concentration are the market for the production of artificial fertilisers, the market for trading in artificial fertilisers without holding stocks and the market for wholesalers in artificial fertilisers which keep stocks, with a possible distinction between animal fertilisers and artificial fertilisers.

91. *Consequences of the concentration*: The joint market share of the parties on the markets for the production of artificial fertilisers and the market for trading in artificial fertilisers without keeping stocks, which may possibly be distinguished, does not amount to more than 15 percent, irrespective of the geographical definition. Given these market shares, it is not plausible, in NMa's opinion, that a dominant position on these markets will arise or be strengthened. On a national market for the wholesale trade in artificial fertilisers, the joint market share of the parties is between 30 and 40 percent. The parties will therefore acquire a strong position on this market. NMa also concludes that a number of factors may put this strong position into perspective. Firstly, the total volume that Cebeco (which distributes artificial fertilisers through a joint venture with 23 agricultural cooperatives) trades almost as much as the parties. In addition, the parties are not able to behave independently of their buyers, the private retailers, because they are entirely dependent on them to realise their turnover. The parties need the retailers to sell their products

to end-users. The parties have no means of doing this themselves. Finally, various market players have indicated that the parties could not substantially increase their prices due to various alternatives which end-users have. For instance, the competitive pressure exerted by the wholesale trade in animal fertilisers and foreign competition, in particular in the border areas with Belgium and Germany, must be taken into account. In addition, a limited degree of direct supply by producers also occurs at present.

92. Finally, NMa investigated whether a joint dominant position could arise as a result of the concentration, since the parties in this case and Cebeco will become the two large players on the market. It appears that the differences between the organisations, their objectives and the marketing of their products could result in the emergence of different business strategies and cost structures. In addition, the market is not transparent, as a result of which the emergence of a joint position of power is not likely. In the light of these considerations, the possibilities for entering the market, market developments and the responses of market players, NMa has concluded that there is no reason to assume that this concentration will result in the emergence or strengthening of a dominant position on the market for the wholesale trade in (artificial) fertilisers.

4. The role of competition authorities in the formulation and implementation of other policies, e.g. regulatory reform, trade and industrial policies

93. The NMa made suggestions for improving the Competition Law following the evaluation of the Competition Act. The NMa made several suggestions under which strengthening of the available instruments c.q. investigation tools such as the possibility of searches in private premises and increasing the possibility of fining companies when they do not co-operate with an investigation. The NMa also suggested to bring the merger regulation in line with the European rules. These measures were also discussed in the evaluation of the Competition Act.

5. Resources of competition authorities

Staff

94. At the end of 2002, NMa had a total staff capacity of 303 employees on a full-time basis. At that moment, NMa employed 291 people. At the end of 2001, this figure was 204. NMa's employees come from a variety of backgrounds and, of course, include many lawyers and economists, but also, for instance, mathematicians and physicists. The average age of NMa's staff, as in 2001, was 36. In 2002, NMa employed seven women in management positions, as compared to six in 2001.

Table 4. Staff and Budget

Staff	**2002**	**2001**
Number of employees on 31 December (on a full-time basis)	303	187
Average age of staff	36	36

Table 5. Staff: break down

Competition control (cartels and abuse of dominance)	100
Merger Regulation	20
Office for Energy Regulation (*Dte*)	55
Office of Transport Regulation (*Vervoerkamer*)	8

Budget

95. The budget of the NMa increased from € 27 million in 2001 to € 32 million in 2002.

Table 5. Budget and realisation: expenditure

	Personnel	Property and Equipment	Realised 2002	Budget 2002	Realised 2001
NMa (excl. DTe)	13,131,552	9,808,939	22,940,491	21,848,000	20,664,000
Dte	3,042,981	3,944,423	6,987,405	8,749,000	5,579,000
Office of Transport Regulation	642,384	211,232	853,615	1,532,000	
Total	16,816,917	13,964,594	30,781,511	32,129,000	26,243,000
Revenues NMa			104,875	0	6,000
Revenues DTe			4,478,556	3,698,000	1,081,000

6. Summaries of or references to new reports and studies on competition policy issues

-- Not applicable --

ANNEX

Table A: Key figures NMa 2002

Reports and fines	**2002**	**2001**
Number of reports based on a reasonable suspicion that the Competition Act had been contravened	9	3
Number of cases in which fines were imposed	6	4
Number of fines	21	9
Total fines in €	99,600.000	158,823

Exemptions and complaints		
Processed applications for exemptions from the prohibition on cartels (*see table 2*)	45	165
Processed complaints with regard to contraventions of the Competition Act (*see table 3*)	187	145

Concentrations		
Notifications of mergers, acquisitions and joint ventures (concentrations)	77	135
Decisions on notifications of concentrations	66	138
Licence required for concentration	1	2

Office of Transport Regulation [*Vervoerkamer*]		
Cases under consideration relating to municipal transport companies	8	-
Number of cases settled by means of a court ruling	3	-

Office of Energy Regulation [*DTe*]		
Method decisions	17	13
Implementation decisions	329	368
Enforcement decisions	29	28
Advice to the Minister of Economic Affairs	20	41
Total	*395*	*450*

Administrative appeals		
Processed administrative appeals in competition cases	62	41
Processed administrative appeals in DTe cases	125	107

Reports and fines	**2002**	**2001**
Staff		
Number of employees at 31 December (on a full-time basis)	303	187
Average age of staff	36	36

Budget in €O	32 million	27 million

In the above-mentioned table a general figure is given regarding exemptions and complaints. In table B and C this is described more in detail.

Table B: Applications for exemption from the prohibition on cartels 2002

Processed applications for exemption from the prohibition on cartels	45
of which, regular applications	32
Concluded with a decision	22
Exemption granted	2
Exemption partly granted, partly refused	2
Application for exemption refused	5
No exemption required – does not restrict competition	13

Table C: Complaints settled in 2002 in relation to infringements of the Competition Act

Complaints settled in relation to infringements of the Competition Act	187
Settled by means of a decision	114
of which, in relation to cartel prohibition (section 6)	29
of which, in relation to prohibition abuse of dominance (section 24)	84
of which, in relation to Sections 6 and 24	1