

NETHERLANDS**1. Executive Summary**

1. The processing of applications for exemption for agreements that restrain competition developed as planned in 2001. This involves challenging barriers to entry in various sectors and removing other restraints on competition. There is now more room for actually investigating and instituting proceedings against hardcore cartels. The investigation into price formation on the petrol market in the Netherlands was the overture to this new stage in the life of NMa (the Dutch Competition Authority).

2. DTe (Energy Regulator, Chamber of NMa) has implemented the Gas Act programme, a comprehensive package of tasks which sets out the rules of play on the gas market and has further clarified the rules for access to the electricity market.

3. With regard to concentration control, companies increasingly make their own estimate of the likelihood that they will receive approval before notifying NMa of their intentions.

4. With the publication of the Guidelines for setting fines, NMa's sanctions policy has been clarified. A start has been made with the development of a leniency programme.

2. Changes to competition laws and policies, proposed or adopted**2.1 *Summary of new legal provisions of competition law and related*****2.1.1 *Increasing turnover thresholds***

4. Previously NMa had to be notified of concentrations if the joint global turnover of the companies involved amounted to more than NLG 250 million and if at least two of them had an annual turnover in the Netherlands of the least NLG 30 million. As of 17 October 2001, the last mentioned turnover threshold was increased from NLD 30 to EUR 30 million. The condition that the undertakings should have a joint annual turnover in excess of NLG 250 million (EUR 113.45 million) has not changed. The thresholds applicable to credit and financial institutions and insures have remained unchanged.

2.1.2 *Transport regulations*

5. As of 1 September 2001, the project to set up the Netherlands Transport Regulatory Authority was initiated. The aim of this project is to set up a new organisational unit within NMa, namely the Netherlands Transport Regulatory Authority. This chamber will be responsible for sector-specific regulation assigned to NMa by Parliament within the framework of the Passenger Transport Act of 2000, which took effect on 1 January 2001. The Bill introducing the Aviation Act and the Railways Act are also expected to assign sector-specific tasks to NMa.

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2.1.3 *Evaluation of the Competition Act, Electricity Act of 1998 and the Gas Act*

6. In 2002, The Competition Act, the Electricity Act of 1998 and the Gas Act will be evaluated. The evaluation studies carried out by the Minister of Economic Affairs will relate to the economic, legal and efficiency aspects of the Act. Amendments are expected to be made on the basis of the resulting recommendations, which will affect the activities of NMa and DTe.

2.2 *Other relevant measures, including new guidelines*

2.2.1 *Guidelines for Co-operation between Companies*

7. One of NMa's important activities in the year 2001 was the development of Guidelines for Co-operation between Companies. These guidelines are intended for companies and their branch associations. On the basis of these guidelines they can make a close estimate of the various frequently occurring types of co-operation between small and medium-sized enterprises and their branch associations.

2.2.2 *Price Squeeze Guidelines*

8. In 2001, NMa and the Independent Telecommunications and Postal Authority (OPTA) jointly issued guidelines to enable (efficient) new entrants which provided telecommunications services to offer services in competition with KPN Telecom. The guidelines deal with the issue of when a dominant position is abused as a consequence of unfairly low end-user tariffs.

9. If the margin between the consumer tariffs charged by KPN Telecom and the procurement costs (interconnection tariff), which other providers have to pay KPN Telecom, is too great, the new entrants cannot offer their services profitably. This is referred to as a price squeeze.

10. In the Guidelines, price squeeze tests have been defined for the various Telecom services (within the KPN local tariff area, trunk calls, Internet access calls, calls from fixed to mobile telephones). This allows KPN's minimum end-user tariffs for the services to be determined. The tariffs may not be lower than the costs an (efficient) entrant incurs for providing these services. In the case of fixed telephony, these costs consist, for instance, of the average interconnection tariff paid for obtaining access to KPN's network, multiplied by a margin to cover the costs, for instance, of marketing and invoicing. If KPN's tariffs are lower, KPN is abusing its dominant position.

2.2.3 *Guidelines for the Setting of Fines*

11. The Guidelines for the Setting of Fines are based on the principle that the level of fines should be such that they restrain offenders from offending again (specific prevention), as well as deterring potential offenders (general prevention). In determining the fine, NMa in any event is required to take into account the seriousness and duration of the infringement. The seriousness of the infringement, according to the guidelines, depends firstly on the type of infringement.

12. The guidelines refer to three types of infringements: very grave (e.g. horizontal restraints), grave (e.g. vertical price maintenance) and less grave infringements. The seriousness of the infringement is then determined on the basis of the type of infringement and the economic context in which the infringement occurred. In principle, the fine is based on a fine base of 10 percent of over involved of the undertaking in question. The turnover involved is equal to the value of all the transactions realised by the undertaking for

the entire duration of the infringement through the sale of goods and/or services to which the infringement relates. The level of the fine is determined by multiplying the fine basis by a certain factor. This factor increases in proportion to the severity of the infringement, taking into account the economic context. It is only possible to deviate from the guidelines if the application of the guidelines would produce inequitable results.

2.2.4 *Co-operation UMTS*

13. In September 2001, NMA, OPTA and the Ministry of Transport, Public Works and Water Management published a joint memorandum in which they gave an extensive explanation of the opportunities for UMTS licence holders to co-operate in constructing UMTS networks. The memorandum makes clear which organisations regulate which areas. NMa, for instance, will assess the joint ventures which restrain competition and will monitor compliance with the conditions of the licences.

2.3 *Government proposals for new legislation*

2.3.1 *Independent public authority*

14. In 2001 a draft act by which the NMa would become an independent governmental agency was sent to Parliament. The Act granting increased autonomy to the NMa has been approved by the Lower House in January 2002 and is now before the Upper House of the Parliament. The Upper House has however on request of the new Minister of economic affairs decided to stay the pending procedure. The House would like to have more insight into the position that the new Government is going to take towards the NMa having decided on the results of the evaluation of the Competition Act of 1998.

15. When the new Bill enters into force, the Minister of Economic Affairs may no longer issue instructions in individual cases. A further important change is that the head of NMa will no longer be a Director-General, but a Board of Directors with a chairman and two members.

3. **Enforcement of competition laws and policies**

Number of cases NMa/Dte:

- 2000 896;
- 2001 1 323;
- Increase in the number of cases + 427
- Increase as a percentage + 48%

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

3.1.1 summary of activities of:

- competition authorities;

Exemptions under the transitional regime:

- Remaining in 2000 170;
- Settled in 2001 133;
- Remaining in 2001 37.

Regular applications for exemption:

- Remaining in 2000 40;
- Received in 2001 24;
- Settled in 2001 32;
- Remaining in 2001 34.

Complaints:

- Remaining in 2000 124;
- Received in 2001 135;
- Settled in 2001 145;
- Remaining in 2001 112;

Orientations: Orientations are cases which are not classified as applications for exemption or as complaints. These are usually requests for an opinion on an issue relating to competition law or requests for advice:

- Remaining in 2000 122;
- Received in 2001 219;
- Settled in 2001 236;
- Remaining in 2001 104.

Decisions in relation to sanctions:

- Decisions in relation to sanctions 6;
- Failure to give notice 2;
- Submission of incorrect data 1;
- Fines for non-co-operation 1;
- Decisions not to impose a fine 2.

Ex officio investigations:

- Remaining in 2000 8;
- Started in 2001 11;
- Completed in 2001 6;
- Remaining in 2001 13.

Subsequent verifications: Subsequent verifications are official investigations into compliance with earlier decisions taken by NMa. In general, these verifications showed that the parties involved had complied properly with these decisions:

- Remaining in 2000 2;
- Started in 2001 8;
- Settled in 2001 5;
- Remaining in 2001 5.

Administrative appeals:

- It is possible to file an administrative appeal with NMa/DTe against decisions imposing sanctions and decisions in relation to applications for exemption, as well as decisions taken by the Director of DTe pursuant to the Electricity Act of 1998 or the Gas Act. These Administrative appeals are dealt with by the Legal Department.
- In total, 41 administrative appeals were completed relating to decisions taken pursuant to the Competition Act. In 5 cases relating to sanctions, the Director-General of NMa requested the advice of the Administrative Appeals Advisory Committee before taking a decision on the administrative appeal. At the end of 2001, 48 administrative appeals were still being processed by NMa under the Competition Act.

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Courts:

- Judicial appeals settled 12

3.1.2 *description of significant cases, including those with international implications.*

3.1.2.1 Cases 496 and 597 /Topherstel and Schadegarant

16. These decisions relate to co-operation between insurance companies involving the selection and contracting of car repair companies in relation to their motor-vehicle insurance. The policyholders are encouraged to make use of one of the selected car repair companies for insured repair work.

17. The parties in these cases are Topherstel and Schadegarant. Topherstel consists of 9 insurers. Schadegarant consists of 19 insurers. The joint operating agreements between the insurance companies are regarded as co-operation in procurement. The relevant product markets in these cases are the market for the procurement of car repair services and the market for motor-vehicle insurance policies.

18. Since the market share of Topherstel is small on both the relevant markets, it was concluded that the possible restraint on competition is not appreciable. In the case of Schadegarant, the same applies on the procurement market for car repair services. The restraint in competition on the market for motor vehicle insurance is appreciable due to Schadegarant's large market share. Schadegarant, however, meets the criteria for exemption and an exemption was therefore granted.

3.1.2.2 Case 757/Chilly and Basilicum versus G-Star/Secon Group

19. *Contested decision:* In a decision of 12 January 2000, a fine of NLG 500,000 was imposed on Secon Group B.V. The Director-General of NMa ruled that provisions relating to (minimum) recommended prices and an absolute prohibition on supplying third parties in Secon Group's general terms and conditions contravened section 6 of the Competition Act. An order subject to a penalty was imposed which required Secon Group to remove the provisions constituting the infringement from its general terms and conditions. Secon Group filed an administrative appeal against this ruling.

20. The administrative appeal was presented to the Advisory Committee for Administrative Appeals under the Competition Act. In its recommendations, the Advisory Committee was of the opinion that the agreements which Secon Groep had entered into with its customers up until 1 April 1998 did not contravene the prohibition on cartels because the transitional right contained in section 100(1) of the Competition Act applied. The provisions in relation to the (minimum) recommended prices are in conflict with section 6(1) of the Competition Act from 1 April 1998 onwards. In the opinion of the Advisory Committee, the provisions of these agreements with regard to the absolute prohibition on supplying third parties, in contrast to the provisions in relation to minimum recommended prices, do not contravene section 6(1) of the Competition Act because they do not have the intention of restraining competition and the Director General of NMa failed to investigate the possible restraining effects on competition of the provisions. The Committee therefore recommended reducing the fine by NLG 362.500.

21. *Considerations:* In the decision on the administrative appeal it was decided that the absolute prohibition on supplies to third parties and the provisions with regard to minimum recommended prices should be regarded as 'hardcore' restraints and therefore, by their very nature, as restraints on competition.

In addition, it was decided that the practices of Secon Group during the first three months of 1998 cannot, in general, be said to be unaffected by the prohibition contained in section 6 of the Competition Act due to the application of the transitional right contained in section 100(1) of the Competition Act. Finally, a reduction in the amount of the fine originally imposed was deemed inappropriate. Secon Group has filed a judicial appeal against this decision on the administrative appeal.

3.1.2.3 Case 2421 (952)/Agreements between notaries in Breda

22. *Contested decision:* In an earlier decision, the Director-General of NMa ruled that the scheme agreed to between 16 notaries in Breda to allocate assignments, involving the execution of deeds to which the municipality of Breda was a party, in accordance with a roster had resulted in a system of market allocation which by nature restrained competition and was prohibited even under the Economic Competition Act [*Wet economische mededinging*]. The Director-General of NMa imposed a fine varying from NLG 15.000 to NLG 20.000, on each of the notaries. Since there were no mitigating circumstances that gave cause to reduce the fine, apart from the fact that the notaries had already terminated the scheme, the Director-General of NMa deemed the amount of the fine as stated above to be appropriate.

23. *Administrative appeal:* Administrative appeals were filed against this decision. The administrative appeals are directed, in particular, against the investigation which was allegedly conducted unlawfully, the legal assessment of the practices and the level of the fines, which are alleged to be disproportionate. The administrative appeal was presented to the Advisory Committee for Administrative Appeals under the Competition Act for advice. The Advisory Committee's advice was that the investigation had been conducted in a lawful manner and that section 6 of the Competition Act had been contravened. In addition, the Advisory Committee recommended reviewing the level of the fines in the light of the effects that the infringement had had on the market. The Director-General of NMa subsequently carried out an investigation into the scope of the scheme in question. This investigation showed that the scheme indeed related to a very small part of the total activities of the notaries, with a total value which was smaller than the sum of the fines imposed. In the light of this, the Director-General of NMa was of the opinion that it has acted fairly in ruling on the administrative appeal to reduce the fines originally imposed to fines of between NLG 5,000 and NLG 8,000 per notary. A judicial appeal has been filed against this decision on the administrative appeal.

3.1.2.4 Case 1861/Nederlands Instituut van Psychologen [Netherlands Institute of Psychologists]

24. *Contested decision:* Until 2 September 1999, Nederlands Instituut van Psychologen (NIP) applied a policy with regard to the setting up of new practices. According to NMa, NIP exercises direct influence on the number of members, namely the psychologists in primary healthcare, through its policy with regard to the setting up of new practices. This policy restrains competition. Since the policy in relation to the setting up of practices had already been withdrawn, a report as not drawn up.

25. *Administrative appeal:* NIP filed an administrative appeal against this decision. The administrative appeal was directed against the decision that section 6 of the Competition Act had been infringed. Since possible future claims for damages may be brought before the Civil Court, due to its policy with regard to the setting up of practices, NIP was of the opinion that it had an interest in having the decision reviewed in an administrative appeal.

26. *Considerations:* The Director-General of NMa declared the administrative appeal to be inadmissible. For NIP, the decision was favourable so that (in this respect) a better legal position cannot be obtained by instituting an administrative appeal. The withdrawal of the contested decision cannot

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indemnify NIP from proceedings to obtain damages on the grounds of liability arising from an unlawful deed due to the Institute's policy with regard to setting up practices. According to NMa, NIP therefore has no interest in the proceedings. The aim which NIP hopes to achieve by submitting an administrative appeal cannot be achieved. A judicial appeal was not filed against this decision.

3.1.2.5 Case 2414/VBBS

27. *Contested decision:* On 31 March 1998, NMa received an application for exemption for six schemes from Vereniging Belangen Behartiging Schildersbedrijven, Stichting Meldadres Belangen Behartiging Schildersbedrijven, and Bureau Meldadres Belangen Behartiging Schildersbedrijven B.V. (jointly known as VBBS). On 19 February 2001, the Director-General of NMa dismissed the applications for exemption.

28. *Administrative appeal:* On 28 March 2001, VBBS filed an administrative appeal against the contested decision. VBBS is of the opinion that the schemes do not have the intention of restraining competition. Even if this were the case, the schemes result in sufficient advantages that justify exemption in accordance with section 17 of the Competition Act.

29. *Considerations:* In the decision on the administrative appeal, the Director-General of NMa concluded that the schemes have the purpose of restraining competition. The schemes apply to all work (above a price of NLG 5,000) in the painting and finishing branch in the Netherlands. The main elements of the scheme are set out in the Anti-Peddling Regulations (1998) [*Anti-Leur Reglement*], which specify a prior subscription procedure in relation to tenders for work in the painting and finishing branch. The participants in the scheme are obliged to notify Bureau Meldadres Belangenbehartiging Schildersbedrijven [Notification Bureau for the Promotion of the Interests of Painting Companies] if they wish to make an offer of work or to enter into negotiations. The Bureau appoints a mediator who is responsible for the prior subscription procedure. This mediator is responsible for determining the level of the subscription fee (the sum of the calculated fee and the organisational fee) and the beneficiary (the candidate with the lowest offer for a particular assignment). The beneficiary has the exclusive rights to negotiate with the party issuing the tender for a period of two months. The other participants may not contact the party issuing the tender during this period, unless they are given permission to do so by the mediator. The mediator may intervene in the tender procedure at all times if he is of the opinion that peddling is taking place. In the decision on the administrative appeal, the Director-General of NMa ruled that the general competition rules apply to the notified schemes. In addition, the Director-General of NMa came to the conclusion that the schemes in their entirety, in particular the aim of "combating peddling", are in conflict with section 6(1) of the Competition Act. The parts of the schemes restraining competition between the participants with regard to price and freedom of action limit the freedom of action and freedom of choice of parties issuing tenders in this branch. The Director-General of NMa ruled that the schemes may not be granted an exemption because they do not satisfy the first two conditions of section 17 of the Competition Act. As a result of the schemes, customers/consumers cannot benefit fully from competition between the various suppliers. VBBS has not presented plausible arguments that its schemes will result in economic advantages from which customers/consumers will benefit. VBBS filed a judicial appeal against this decision.

3.2 *Mergers and acquisitions*

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

• Concentration notifications	135
• Withdrawn	8
• Decisions in the notification stage*	138
– of which, decisions relating to mergers (section 27(a) of the Competition Act)	13
– of which, decisions relating to acquiring control (section 27(b) of the Competition Act)	106
– of which, decisions relating to the creation of a joint undertaking (section 27(c) of the Competition Act)	12
– of which, a decision is not applicable due to a turnover threshold	7
• Licence required	2
• Decisions in the licensing stage	1
• Decisions pursuant to section 40 of the Competition Act	1
• Decisions pursuant to section 35(3) of the Competition Act	0
• Summary decisions	45
• Deferred cases (pursuant to section 35(2) of the Competition Act)	67 (49%)
• Settled within four weeks**	77 (56%)
• Number of prenotification interviews	18
• Number of informal opinions	35

* *of which, notification was received in 11 cases in 2000*

** *this relates partly to cases which have been deferred*

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Concentrations with multiple notifications:

• Notification in two Member States	13
• The Netherlands and Belgium	2
• The Netherlands and Denmark	3
• The Netherlands and Germany	7
• The Netherlands and Italy	1
• Notification in three Member States	4
• The Netherlands, Belgium and Germany	1
• The Netherlands, Denmark and Ireland	1
• The Netherlands, Germany and Finland	1
• The Netherlands, Germany and United Kingdom	1
• Notification in more than three Member States	6
• The Netherlands, Australia, Belgium, Finland, Denmark and Ireland	1
• The Netherlands, Belgium, Denmark and Italy	1
• The Netherlands, Germany, Finland and United Kingdom	1
• The Netherlands, United Kingdom, Germany and Italy	1
• The Netherlands, Ireland, Sweden and Germany	1

3.2.2 *Summary of significant cases*

3.2.2.1 Case 2184/Air Products – AGA Transfer

30. *Parties and market(s)*: In 2001, the Director-General of NMa granted a licence to Air Products Holdings B.V for the acquisition of AGA Transfer. The acquisition related to the largest part of the cylinder gas activities and part of the bulk gas activities of AGA Gas B.V. The acquisition was the result of the ruling of the European Commission with regard to the take-over of AGA by Linde. The sale of part of AGA's activities in the Netherlands was one of the conditions which the European Commission linked to the approval of this acquisition. The investigation in the licensing stage focused particularly on the question of whether a joint dominant position would arise or be strengthened in the Netherlands on the markets for oxygen, argon and acetylene cylinder gases and the markets for the (liquid) bulk gases, oxygen and argon.

31. *Considerations (cylinder gases):* The structure of the national markets for cylinder and bulk gases has characteristics which may promote the emergence or strengthening of a joint dominant position. These are concentrated markets with two large players with regard to cylinder gases and three players with large market shares in the area of bulk gases. In addition, the market structure is characterised by symmetry in the market positions of the large players on the market and high barriers to entry. Industrial gases are also relatively homogenous products. The large players also encounter each other on the various markets.

32. The figures provided by the parties gave the impression initially that certain customers, who are supplied with cylinder gas through depot operators, were confronted with large price increases in the period from 1995 to 1999, while the average prices of cylinder gases supplied to other customers fell in this period. NMa concluded from this that there was reason to assume that a (collective) dominant position could arise or be strengthened by the concentration. Further investigation in the licensing stage showed that various factors could be identified as a result of which a joint dominant position would not arise. For instance, the transparency of the market is limited. It is consequently not possible for large players to monitor the behaviour of their competitors adequately and it would be difficult for them to co-ordinate their behaviour. In addition, the relationship between the two large players appeared to be limited. Smaller players on the market ensure that there is sufficient competitive pressure. In the past, competition has existed between the two large players on the market. The markets are not stable and consequently the companies have an incentive to acquire market share. Co-ordinated behaviour is therefore more difficult to maintain. New information also showed that the price increases assumed earlier in the case of small customers had to be viewed critically. Particularly in the case of bulk gases, customers that purchase large quantities exercise buyer power. In the light of these factors, the Director-General of NMa concluded that a joint dominant position would not arise or be strengthened by the acquisition and therefore granted a licence to realise the acquisition.

3.2.2.2 Case 2198/Schuitema – Sperwer

33. *Parties and market(s):* The Director-General of NMa indicated during the past year that a licence was required for the acquisition of B.V. Sperwer Holding by Schuitema N.V. Schuitema and Sperwer are both active in the supermarket sector and supply goods and services to 443 (Schuitema) and 265 (Sperwer) independent supermarket companies. The supermarket companies, supplied by Schuitema and Sperwer, operate their own stores, largely based on the C1000 formula and the Plusmarkt, Garantmarkt and Gastrovino (delicatessens) formulas.

34. *Considerations:* Ahold owns 73 percent of the shares in Schuitema. Due to this interest, Ahold controls Schuitema, in NMa's opinion, and NMa therefore regards Ahold and Schuitema as a single entity for the assessment of this concentration. The market shares of the parties on the market for the sale of daily consumer goods through supermarkets amount to approximately 40 to 50 percent. For the purpose of the assessment, the following aspects were taken into account: the structure of the markets for the sale of daily consumer goods through supermarkets, the recently announced reorganisation of Laurus, the position that the parties have in the area of full-service supermarkets, the parties' strong position on the markets for franchise services in relation to supermarkets, the strong position on the procurement market, the advantages which Ahold may achieve as a result of the fact that it is a financially strong company and finally the barriers to entry to this market. These circumstances, together with Ahold's large market share, lead to the conclusion that there is reason to assume that a dominant position may arise or be strengthened as a result of the proposed concentration. As result, de facto competition on the Dutch market or a part of it made the significantly obstructed. The parties did not continue their concentration plans and did not apply for a licence.

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

35. The NMa has an advisory role concerning new legislation, especially legislation in which the NMa will be given new competencies or which regards competition matters, for instance laws concerning liberalisation of sectors.

5. Resources of competition authorities¹

5.1 Resources overall in 2001:

- a) Annual budget (in your currency and USD): Euro 26,24 million
- b) Number of employees (person-years): 204 people

⇒ all staff combined.

¹ If there is more than one authority, please give details for each. However, only Central Government competition authorities should be included, not State or provincial bodies. Local offices should be included where these are part of the central authority.