Executive summary

1. The last annual report on Competition Law and Policy in the Netherlands was presented in the CLP in October '97. The most significant development in competition policy that was reported, was the approval of the new Dutch Competition Act by Dutch Parliament.

2. This Act entered into force on 1 January 1998 and simultaneously the new Dutch Competition Authority, the Nederlandse Mededingingsautoriteit (NMa), started its operations. The NMa dealt successfully with a substantial workload in its first year.

3. These developments were evaluated in the OECD Review of Regulatory Reform in the Netherlands. This report can be considered an update to both documents.

I Changes to competition laws and policies, proposed or adopted

1. Summary of new legal provisions of competition law and related legislation

4. The strengthening of the Dutch competition policy culminated in the new Competition Act coming into force on 1 January. This Act was adopted by the Dutch parliament in '97 (published on 22 May 1997; Stb. 1997, 242) and provided a completely new legislative basis for competition policy. It is described extensively in DAFFE/CLP(97)11/15 and DAFFE/CLP(99)23. The Dutch Competition Act is based on and closely linked to European law.

5. Also on 1 January 1999 a new enforcement agency, the NMa, became operational. As the OECD concluded in the Review of Regulatory Reform in the Netherlands: ‘the new law and new virtually independent enforcer embody the Dutch determination to make a clean break with the past and a clear announcement of the high priority now placed on competition policy’ (SG/RR(99)2; p. 36).

6. The old Economic Competition Act (WEM) was based on a so called abuse system. In the new law, like that of the EU, this system is replaced by a prohibition system very similar to that of Articles 81 and 82 of the EC Treaty. Under this law, a company has the burden of proof and must demonstrate that agreements or behaviour which correspond to the law’s prohibitions nonetheless do not conflict with the applicable standard. According to Article 6 of the Dutch Competition Act, agreements, decisions and concerted practices are prohibited if they have as their objective or effect the prevention, restriction or distortion of competition. Unlike its predecessor (the WEM) the Dutch Competition Act also includes a system of preventive concentration control.

7. The general prohibition of anti-competitive agreements, whether horizontal or vertical, is subject to conditions and procedures for exemptions which also parallel the EU system. Under this system, formal
criteria will usually determine legality, while case-by-case economic analysis will be applied in considering applications for exemption.

8. The NMa was set up to ensure an effective implementation of the Dutch Competition Act. It made a good start, as is shown in chapter II of this paper. The Dutch Minister of Economic Affairs wrote to parliament (on 30 June 1999): "I am satisfied with the functioning of the NMa and about the decisions that the NMa took in 1998. Notwithstanding the enormous working load, the NMa has fulfilled my expectations." Although the possibility formally exists under the Dutch Competition Act, the Minister has not given any instruction to the Director-General of the NMa.

9. The NMa dealt with a large number of requests for exemptions, notified before 1 April 1998 under a transition regime, as well as a large number of appeals and complaints about (assumed) agreements and abuse of power. The NMa also received and dealt with a large number of mergers and concentrations within the context of the preventive concentration control.

10. The Minister noted in her letter that the NMa had to set priorities, due to the large workload. When the exceptionally high amount of requests for exemptions will have been dealt with, the Minister expects the NMa to shift her attention to investigations based on complaints, including complaints by parties without a direct interest. This is in the interest of consumers.

2. **Other relevant measures, including new guidelines, exemptions and dispensations**

11. As in European Law, the Dutch Competition Act provides for exemptions. The de minimis provision of Article 7 exempts competition agreements which are of minor significance. Individual exemptions may also be granted (Article 17). The criteria of Article 81, Clause 3, apply.

12. Furthermore the EC block exemptions and the EC's individual exemptions based on article 81, clause 3 of the EC Treaty, are incorporated in the Dutch Competition Act (art. 12, 13, 14).

13. In the Dutch Competition Act a careful balance is sought between competition law and other policy concerns (see also par. 96, chapter three, OECD review of regulatory reform in the Netherlands). Article 11 of the Dutch Competition Act involves that Article 6 is not applicable to agreements, decisions and practices involving at least one undertaking or association of undertakings that is entrusted with the operation of services of general economic interest, by law or by an administrative agency, in so far as the application of that article would prevent the execution of the special task entrusted to such an undertaking or association.

14. Article 16 implies that Article 6 shall not apply to agreements, decisions or concerted practices, which are subject to the approval of, or can be declared invalid, prohibited or nullified by an administrative agency pursuant to the provisions of any other act, or which have arisen pursuant to any statutory requirement. This article will apply until 1 January 2003. In the meantime a final demarcation will be prepared.

15. Under Article 15 of the Dutch Competition Act Dutch block exemptions may be granted by general administrative orders (algemene maatregelen van bestuur). Four such orders were adopted (between October and December 1997) and concern the following exemptions:

- Decision exemption combination agreements (Stb. 1997, 592);
- Decision exemption agreements protection of branches (Stb. 1997, 596);
- Decision exemption co-operation agreements retail trade (Stb. 1997, 704);

16. The first of these orders provides exemption for joint bidding agreements for single tenders or contracts.

17. The second order exempts agreements between the owner of a shopping centre and a company located in that centre, limiting access to that centre for companies not selling like goods or services (for the first six years after location of the company involved).

18. The third order covers co-operation agreements between a franchiser and his franchisees, between a wholesaler and his retailers and between a buying corporation in the retail branch and its members. The aim of this exemption is to create more possibilities for useful forms of co-operation between independent retailers by which they can strengthen their position towards multiple shop organisations (if they agreed to do business under a common formula). The exemption applies to two types of agreements between chains of independent small retailers and their members: vertical price-fixing agreements during short-term advertisement campaigns and minimum purchase requirements.

19. The fourth order is a block exemption for resale price maintenance for Dutch newspapers. This exemption applies to agreements between two parties, a supplier and a buyer of a certain newspaper, which determining the retail-prices of the newspaper fixed by the publisher (expires 1 January 2003). This price has to be equal for all customers. The exemption also applies to agreements between publishers and to decisions by associations of publishers, which oblige the publishers concerned to raise the prices of subscriptions with the same amount and at the same time (expired 1 July 1999).

20. A fifth general administrative order has been taken and regards the provision of information within the Dutch Competition Act (Stb. 1997, 485), in case of notifications, complaints and requests.

21. Finally, the DG NMA took a formal Decision in which he determined the forms to be used in the case of notifications, complaints or requests, covered by the Dutch Competition Act.

3. Government proposals for new legislation

22. In the regulatory reform country review on the Netherlands (’98) the OECD states that the NMa’s independence is qualified, because the Minister has the power to issue instructions to the Director General to preserve the Minister’s responsibility and accountability to Parliament. The Minister does not intend to use the power to issue instructions in individual cases and has announced to give NMa maximum independent status as soon as possible, meaning that the Minister would formally lose this power. At the moment this report is written, the Dutch Council of Ministers discusses a proposal of the Minister of Economic Affairs to change the status of the NMa into a so called autonomous administrative organisation.

23. European developments are especially significant in the Dutch case. Not only is European Law applicable in the Netherlands as in other member states. EC-exemptions are also directly incorporated in the Netherlands through the Articles 12, 13 and 14. Two important initiatives have recently been taken by the European Commission. The first is the renewal of the regulation for block exemptions in vertical agreements. The second is the White Paper on Modernisation of the rules implementing articles 85 and 86 (now 81 and 82) of the EC treaty. Both initiatives will have consequences for the enforcement of the Dutch competition policy.

24. Under the new rules for vertical agreements different practices (and more, because of the new market share thresholds) will automatically be exempted in the Dutch legislation than now is the case.
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25. Furthermore, if the European enforcement system will be modernised as announced in the White Paper, the competence of the NMa will change substantially. It would directly apply Article 81, Clause 3.

26. Its working methods may also have to change. Interesting proposals in the European Commission’s White Paper are the proposal to abolish the current notification and authorisation system and the proposal to make Article 81, Clause 3 directly applicable (system of legal exception). Perhaps the Dutch enforcement system, which is now very much like the EU-system, should change accordingly.

II Enforcement of competition law and policies

a) Action against anti-competitive practices: including agreements and abuses of dominant positions, and

Mergers and acquisitions: statistics on number, size and type of mergers notified and/or controlled under competition laws

27. The NMa in 1998 received 1040 requests for exemption from the prohibition as laid down in article 6 of the Act (comparable to article 81 of the Treaty). 486 request were dealt with in 1998. Furthermore, the NMa received 266 complaints regarding a suspected infringement of article 6, and/or 24 of the Act (comparable to article 82 of the Treaty, abuse of dominant position). 139 complaints were dealt with in 1998.

28. The Dutch Competition Act further introduced a new element for the Netherlands: prior merger control. In 1998 the NMa received 154 notifications, which was three times as much as expected. In six cases the director general of the NMa (dg NMA) decided that a licence was required for the concentration. In one case (RAI/Jaarbeurs) the licence was refused, in two cases a licence was issued and in the two other cases the notifying parties withdraw their notification before the dg NMa took the decision. In the case of RAI/Jaarbeurs the Minister has also refused to overrule the decision of the dg NMa as was requested by the parties.

29. 19 of these cases were also notified to a foreign competition authority. In ten cases they were notified to two competition authorities (eight times Germany, once Belgium, once United Kingdom) and in six cases they were notified to three competition authorities (involving in five cases Germany and also (each once) Belgium, Italy, UK, Ireland and Portugal) and in three cases more than three countries.

30. Finally, thirty six administrative appeals were lodged and ten appeals were lodged at the Rotterdam District Court. The president of this court took two judgements. Five were taken by the Industrial Appeals Court. Twenty four judgements were taken by Dutch Courts in general.

b) Description of significant cases

1. Anti-competitive practices

- In the case of Stibat (case 51) it was decided that a collective plan of producers and importers of batteries to collect and remove used batteries was effective and efficient. The plan is meant to implement EU-directive 91/157. It is financed through contributions paid by the companies involved to Stibat. This approach is necessary to realise the advantages of collective removal and does not as such limit competition. Therefore this part of the above plan is exempted. The plan, however, also implied that the contribution would be obligatorily charged to the next
chain in the distribution process and would have to be specified on the invoice. This was considered unnecessary and certainly not to the benefit of the consumer. An exemption was therefore denied for these two measures. The parties involved have appealed.

- In case 21, two insurance companies Interpolis and Cobac asked an exemption for the set up of a joint venture offering credit insurance. The companies involved were no competitors on this market (it is a new market segment for Interpolis). Furthermore, this market is traditionally dominated by the Dutch Credit Insurance Company, NCM. The new joint venture would create a new serious supplier in this market and would contribute to more effective competition in the Dutch market for credit insurance. For these reasons, the dg NMa decided that an exemption was not required and that Article 6 was not applicable.

- In response to a complaint by Edipress (in case 803) Audax was accused of abuse of dominance. Edipress had been forced by Audax to deliver foreign newspapers and magazines to AKO - a daughter company of Audax - through the Audax holding Van Gelderen and to pay unusually high fees. Audax was obliged to offer Edipress direct access to AKO and for the usual fee, subject to a penalty of fifteen thousand guilders per day. Without an interim measure by the dg NMa, this abuse of dominance would have had irreversible effects and would have pushed Edipress out of the market.

2. **Mergers and acquisitions**

- In “RAI - Jaarbeurs”, case 47, the director general decided for the first time to prohibit a proposed merger. Both companies are active in the exhibition and fairs market and are major players in the Dutch market. In particular the RAI, an exhibition building in Amsterdam, and the Jaarbeurs, an exhibition building in Utrecht, are well known in the Netherlands. These two exhibition buildings are regarded as the only two serious possibilities for organising a national fair in the Netherlands. The dg NMa decided that the relevant geographic market was the Netherlands and that the combination would result in a dominant position that would significantly hinder effective competition on the Dutch market.

- In “Internatio-Muller N.V. – Brocacef Drogisten B.V.”, case 126, both parties decided to “throw in the towel” after a decision that a licence was required.

- In “Vendex Food Groep B.V. - De Boer Unigro N.V.”, after the parties were informed of the preliminary view of the dg NMa they decided to make certain amendments to their original merger plan. In a preliminary stage it became clear that the dg NMa would only grant clearance if the Boer Unigro ended its membership of Superunie, a major buyers’ co-operative of food products in the Netherlands. Thus, in this case the companies involved were given the opportunity to prevent a decision of the dg NMa that a licence would be required. This bargaining process is reflected in the decision of the dg NMa that cleared this merger.

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

31. Advocating competition is a responsibility of the Ministry of Economic Affairs, which has a.o. led to the launch of the Market Operation, Deregulation and Legislative Quality (MDW) Operation (see the OECD Review of Regulatory Reform in the Netherlands). In this context, the Ministry investigates the
bottlenecks (incl. regulations) encountered by consumers and industry in the pursuit of free and fair
competition and addresses them.

32. The NMA too is involved in advocacy. Several requests have been made to the NMa to report on
the effects on competition of intended or existing legislation, by parliament as well as individual ministers.
This advocacy role of the NMa is considered important. The most recent example is an advice given to the
Dutch Minister of Transport, Public Works and Water Management regarding competition in the telecom
sector.

33. Finally, the NMa is engaged in a number of information activities aimed at explaining the Dutch
Competition Act and the role of the NMa, such as lectures and seminars.

34. The Competition Policy Unit of the Dutch Ministry of Economic Affairs has been involved in
discussions about the liberalisation and (re)regulation of a number of sectors, during the last year and a
half. New legislation or new guidelines have been developed and/or discussed for among others the
sectors electricity, gas, telecommunication, personal transport, rail transport, postal services, waste and the
notary. In some cases the legislation was designed to implement new EG-regulations (electricity, gas,
postal services).

35. In such cases a balance needs to be sought between specific rules - customised to the need of the
sector, especially in the case of public utilities - and the need to avoid discrepancies with the Dutch
Competition Act. The Council of Ministers recently adopted the policy to limit the number of specific rules
and supervisory bodies as much as possible. Furthermore, adequate guidelines should be developed
regarding the co-operation between different supervisory bodies.

36. Meanwhile, different solutions have been found in respect of creating supervisory bodies or
regulators. In some sectors, such as personal and rail transport, the NMa itself is the supervisory body or
"toezichthouder". In the electricity sector, the supervisory body DTE (Dienst Uitvoering en Toezicht
Electriciteitswet) is a chamber of the NMa. In the case of telecom the regulator OPTA (Onafhankelijke
Post- en Telecommunicatie Autoriteit) is independent. The NMa of course also has its own responsibility
of enforcing competition policy, also in the electricity and telecom sectors. Between NMa and OPTA a
protocol has been signed that organises their co-operation in the field of telecom.

IV Resources of the NMa (1998)

I. Resources overall

a) Annual budget

- personnel: 11.572.30 Dutch guilders
- material: 8.111.000 Dutch guilders

b) Number of employees (person-years):

- Support staff: 24
- Economists: 21
- Lawyers: 51
- Other professionals: 18
- All staff combined: 114
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Literature:

The OECD Review of Regulatory Reform in the Netherlands
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Het Europese mededingingsbeleid 1998; XXVIIe verslag over het mededingingsbeleid