

NMa-Agenda

2010 | 2011

Netherlands Competition Authority

NMa

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Netherlands Competition Authority
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Editorial NMa | Design and Realization **Total Identity Den Haag**

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Competition helps
recovering the economy

1 Introduction

Crisis and recovery

‘Making markets work’ is the Netherlands Competition Authority’s mission. In times of crises, competition helps recovering the economy. After all, it makes undertakings solid and innovative, capable of weathering tough economic times, as well as facing global competition. Healthy competition leads to dynamic markets, which in recent decades have contributed to economic growth and to increased consumer welfare. Sound oversight and regulation thus stimulate future welfare and economic well-being of consumers.

Crisis is no excuse

Whenever economic prospects are uncertain, governments are often asked to (temporarily) restrict competition, to offer state aid, or to make interventions that would offset the effects of the crisis in the short run. All these actions have the potential to impede competition in the long run. In addition, in times of crises,

undertakings may become tempted to enter into price-fixing agreements in order to reduce that uncertainty. Yet the current economic crisis cannot be an excuse to create a situation that could harm the Dutch economy in any way in the long run. If history has taught us anything, it is that competition-restrictive measures may actually result in slower economic recoveries and in permanent market disruptions. However, that does not take away the fact that the NMa does indeed take into account the extraordinary circumstances and problems resulting from the current crisis. Competition authorities not only have the instruments to help achieve their countries' competition policy's objectives, but they also have the opportunity to advise governments on what measures should be taken to better stimulate economic recovery. Furthermore, regulators should offer undertakings guidance in their search of legitimate options to keep afloat. In the future, the NMa aims to provide more information in an earlier stage in cases such as these.

Public interests

Calls for stricter oversight are growing louder. And at the same time, society is asking the government to safeguard a number of interests on the market, such as

quality and sustainability. These calls will continue to grow even louder in the next few years. The NMa is well aware of the fact that public interests play a vital role in certain markets, and is able to take these into consideration in such cases. The NMa always analyzes what interests are involved and will then take such a decision that the market functions optimally. For example in the Dutch energy industry, it is essential to strike the right balance between affordability, reliability and sustainability. Another example are the decisions taken in health care cases, where public interests are taken into account as well. Interests such as sustainability may also be decisive in agreements that possibly restrict competition, provided that the agreement in question benefits consumers, leaves ample room for competition, and has no effects beyond what is necessary.

The NMa firmly believes that competition stimulates economic recovery, and will therefore continue to vigorously carry out its oversight duties. The NMa is hoping and is confident that together with politicians, businesses and consumers it will continue to make markets work over the next two years.

Developments in industries affect
choices of NMa's priorities



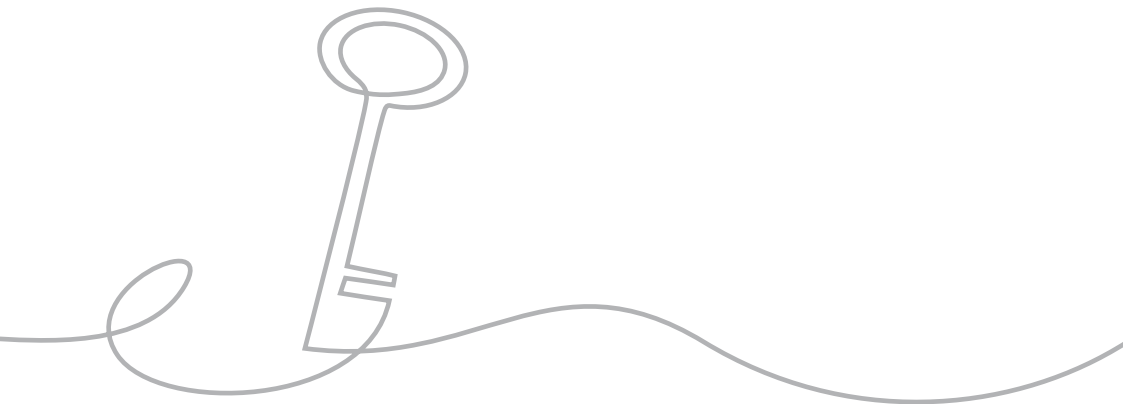
2 Focus industries

Correcting, and setting conditions

The NMa has a wide range of instruments at its disposal with which it can act in markets in both a stimulating way as well as in a corrective way. In the next couple of years, it is expected that regulatory action relating to cartels, dominant positions and concentrations is needed in **the processing industry, the financial and business services industry, and the health care industry**. Not all industries or subindustries in which regulatory action is expected to take place are being mentioned. It cannot be ruled out that other industries too will attract increased attention from the NMa – after all, the element of surprise is a vital one in enforcement strategy. Regarding the energy and transport industries, four priorities in the NMa's regulatory tasks have been identified: **the investment climate regarding energy networks, information provision to consumers, integration of wholesale markets, and development of transport-markets oversight**.

Processing industry: a classic case of competition-restrictive risks

The processing industry is a highly diverse segment of the Dutch economy. However, red flags are raised over some of its subindustries, according to economic analyses. Various markets are characterized by high levels of concentration and by homogenous products – two indicators of an increased risk of competition-restrictive violations. Such markets often have ‘classic cartels’, according to studies in the Netherlands and abroad. The NMa has found several violations in this industry in the past already, including cartels in the concrete and swimming pool chemicals industries. In addition, the European Commission has found cartels in the chemicals, textile, and bitumen industries. The importance of the processing industry is considerable, because a cartel at this level will directly affect how prices of other consumer products are formed. Furthermore, processing industries in other countries are attracting much attention as well. The NMa has launched several investigations already (sometimes as a result of economic analyses or of leniency requests), some of which are in their final stages already (e.g. an investigation into undertakings in the food-processing industry).



Financial and business services: a key industry of the economy

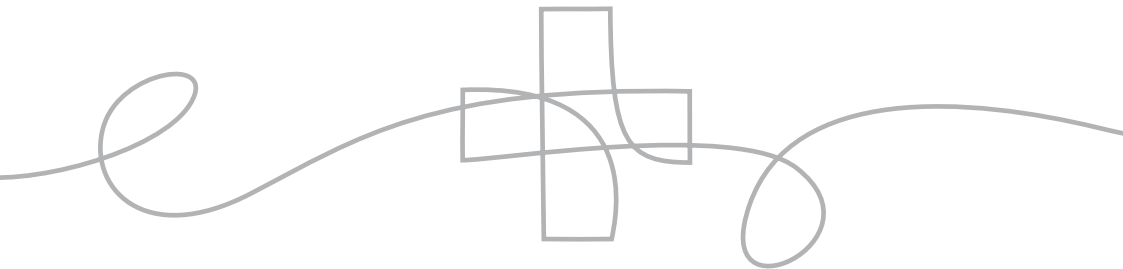
The financial and business services industry continues to be a focus industry. Extra attention will be given to collaborations in both the banking industry and in the insurance industry. The NMa will examine to what extent such collaborations go beyond what is legally permitted, and to what extent they are harmful to small

businesses and consumers in particular. Investigations are also launched into tying with regard to services for small and medium-sized businesses. Furthermore, as in previous years, the NMa will be keeping a close eye on the tariffs and developments regarding money transfers. The NMa closely works together with sector-specific (financial) regulators, such as the Netherlands Authority for the Financial Markets (AFM) and the Dutch central bank (DNB).

Undertakings that predominantly provide services to businesses fall in the financial and business services industry, a key industry of the Dutch economy, both in size as well as in dynamism. Financial and business services play a significant role in productivity improvement processes at other businesses. The increased attention is the result of the fact that, in recent years, this industry exhibited relatively little innovative efforts, and its labor productivity increased only slightly. In addition, the level of market concentration is on the rise. Having received tip-offs and indications, the NMa has reasons to believe that competition-restrictive agreements are being concluded in this industry. Some subindustries still have little knowledge of antitrust rules and regulations. By informing businesses in these subindustries

about what kinds of collaborative agreements and agreements are allowed, the NMa can guide the entire industry towards improved competition. At the same time, the NMa will warn businesses of the risks they take if they do not comply with antitrust regulations.

The NMa is receiving numerous tip-offs and indications concerning the real estate industry and it will therefore carry out oversight on this industry on a more structural basis, as well as closely watching market developments. Because of its size, increased complexity, and lack of transparency, the real estate industry is prone to violations, both to antitrust law violations, as well as to violations under the Dutch Criminal Code. The NMa is thus backing government initiatives calling for a tougher crackdown on violations in the real estate industry, and is therefore actively seeking cooperation with other criminal-investigation services and regulators to combat violations effectively.



Enforcing compliance in the health care industry

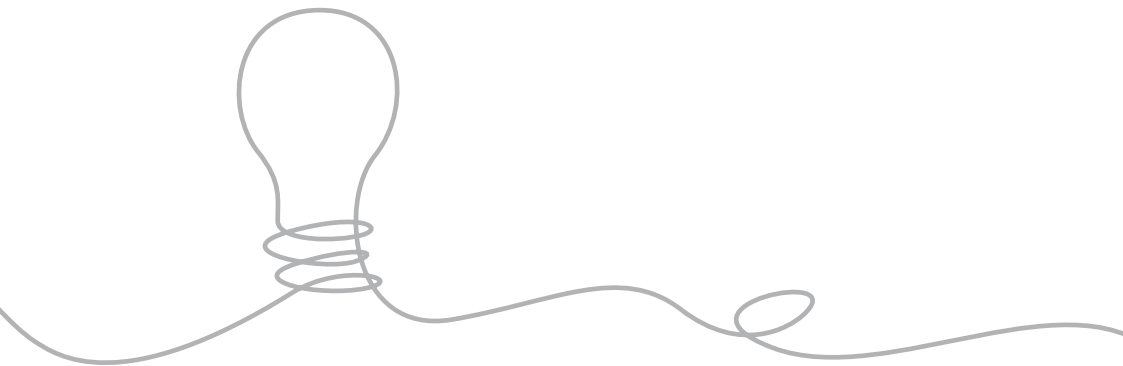
Market reforms in several segments of the Dutch health care industry have resulted in more and more segments opening up to (regulated) competition. The government's objective is to achieve higher quality, increased freedom of choice, and improved cost controllability. The NMa therefore needs to have an open mind with regard to issues concerning competition and quality, accessibility and affordability of health care.

Having been informed by the NMa, many subindustries have already become aware of antitrust regulations. With guidelines, such as the Guidelines for the health care industry, the NMa wants to provide as much information as possible on what is legally allowed, for example, with regard to multidisciplinary chain care for individuals with chronic medical conditions. In many subindustries, health care providers are working together to improve the quality of the health care they provide. It goes without saying that the NMa acknowledges the importance thereof and will see to it that consumers' options for more quality are not threatened by competition restrictions.

In 2010–2011, attention will be focused on various health care subindustries, such as home care, hospitals, pharmaceuticals, and health care insurances. The NMa is expecting the home care industry to make significant steps towards full compliance with competition rules. It will support this process wherever necessary, but it will also monitor its progress and step in if necessary. The number of hospital collaborations is increasing, and the NMa will be keeping a very close eye on whether or not these collaborations unwantedly restrict competition.

The NMa will also pay more attention to the pharmaceutical industry, drawing on the recently published European Commission study thereon.

Another subindustry that will be closely watched is the health care insurance industry. In recent years, for example through round-table discussions in the industry, the NMa has given much attention to the relationship between health care insurers and individual health care providers during contract negotiations. A vital assumption therein is that purchasing power does not, in principle, constitute an antitrust problem, as long as there is enough competition among health care insurers that would benefit insured individuals. The NMa will see to it that the health care insurance market is not impeded by collective competition-restrictive behavior of health care insurance companies.



Setting priorities in the energy and transport markets

The current state of affairs in the energy and transport markets largely determines what regulatory priorities need to be set in them. For the energy market, this means that important developments in technology, renewable energy and increased globalization affect what kind of oversight the market would need. Developments in the transport market are equally diverse, and they differ per segment as well. On top of that, transport legislation is still in flux.

Investment climate regarding energy networks

Monopolists on the energy markets must work efficiently in order for energy consumption to remain affordable for consumers. That is why the NMa is giving these monopolists incentives to increase efficiency and why it is setting caps on the tariffs that network operators are allowed to charge their customers. And in that context, it is essential that there is room for investments in order to have an affordable, reliable and sustainable energy supply. Investments are needed in, for example, cross-border transmission capacity, distributed generation, and the installation of so-called smart meters. Network operators need to be financially healthy for them to be able to invest. In its oversight over the next few years, the NMa will therefore focus on striking the right balance between the producers' interests and the customers' interests.

Clear and useful information for energy consumers

For the energy market to function well, it is vital that consumers have access to clear information that enables them to make well-founded choices. In 2010–2011, the NMa will ensure that the provision of information will improve, and, more

specifically, that the information becomes clearer and that it better satisfies the needs of the average consumer, for example, by checking whether companies comply with the Guideline provision of information, and also by providing consumer information portal ConsuWijzer with information. In relation thereto, the NMa closely cooperates with the Dutch Consumer Authority (CA), which, among other things, ensures customer recruitment is taking place in a fair and reliable manner. Customer treatment remains a point of particular interest as it is the basis on which faith in the energy market is built upon, for consumers and politicians alike.

Integration of wholesale markets

For the energy market to function well, it is largely dependent on the wholesale market. After all, the greater the benefits that energy suppliers are able to reap from increased competition on the wholesale market, the larger the benefits they are able to pass on to their customers. In 2010–2011, the NMa will be stimulating competition by maintaining oversight on energy exchanges, by providing financial incentives, by analyzing market impediments, and by enforcing existing and new

legislation aimed at further developing the market. Another reason for this industry to be considered a focus industry is the idea that corrective actions in accordance with the Competition Act may be necessary.

Another condition in order for the energy market to function well, is that the Dutch market needs to be coupled to those of its neighboring countries, which would offer consumers more options in choosing more affordable or more sustainable energy. Furthermore, it will increase security of supply. That is why the NMa continues to be a staunch proponent of creating a northwestern European energy market, for example, by stimulating international trading platforms, and by exploring possibilities of making unutilized capacity available to the market.



Oversight of transport markets

Oversight and regulation of transport markets is still new and is constantly developing. Over the next few years, the NMa will be primarily focusing on helping legislators draw up more detailed and effective legislation and oversight. The evaluations of the Dutch Aviation Act and the Railway Act are coming up as well. The NMa will also devote special attention to national and international

railway markets. For example, the creation of so-called corridors (international train routes) that are solely dedicated to cargo transport is of vital importance to the Dutch economy. This cannot be achieved without close collaboration between the regulators in each of the affected countries. Oversight of the pilotage services is new as well and is also still in development, with much effort going into setting up a pilotage tariff regulatory system, ready for the future.

Consultations

The multitude of reactions to the consultation round relating to the NMa Agenda have yielded considerable insight as to whether the NMa is setting the right priorities. Having so much diversity, the reactions support the NMa's vision with regard to several important issues, such as the priorities in the energy and transport markets, as well as the value that is attached to the idea of exchanging information effectively. The reactions also address other topics that deserve the NMa's attention, as the following examples show:

- The construction industry. The NMa will continue to be actively involved in this industry in the next few years, given the various cases in recent years, and because of the steady flow of indications coming in. Despite the positive developments taking place, it is necessary for the NMa to stay in this industry.
- The textbooks market. The textbooks market's levels of concentration are very high. In 2011, the Dutch Ministry of Education, Culture and Science will be evaluating a recently passed law mandating free textbooks. In relation thereto, the NMa will carry out a new market scan in early 2011.
- The mail services industry. Given its recent liberalization as well as its market structure, it is imperative to keep a watchful eye on this industry.

All reactions and indications may be of great value to the NMa's oversight activities and have thus been forwarded to the right experts within the organization.

The NMa aims for direct effects for consumers



3 Why these focus industries

Positive effects for consumers

The choice of what priorities the NMa should set is predominantly determined by the question to what degree consumers are affected by what is happening on a market. After all, at the end of the day, it is about whether consumers would be better off if the NMa stepped in. Bringing about direct effects is what the NMa is aiming for with its actions, which sometimes will only in the long run result in changes in behavior, eventually making markets work better. Indeed, competition authorities do not fight symptoms, but aim to bring about structural changes in behavior on markets, which sometimes take place outside the consumer's view. A case in point is the constant focus on the construction industry.

Setting priorities

The NMa is charged with oversight on cartels, dominant positions, mergers and acquisitions, and because of that, it prevents prices from increasing unjustifiably,

and supply from decreasing. The NMa's enforcement strategy is mostly risk-oriented, meaning that it is more likely to launch antitrust investigations in the industries with the highest risk of antitrust violations. Next to these investigations launched based on risk analyses, the instrument of leniency is increasingly playing a bigger role in tracking down antitrust violations. Undertakings and certain individuals that are or have been involved in a cartel may qualify for a fine reduction or may even escape a fine completely, provided that they file a leniency request on time and that they provide full cooperation during the leniency application process. The sooner a party contacts the NMa's Leniency Office, the higher its chances of immunity are, or of a substantial fine reduction. Not only does the instrument of leniency act as a source of indications, it also acts as a destabilizer of cartels.

Keeping an eye on the players on the energy markets will ensure they continue to offer good service and to work efficiently. In the transport industry, the NMa sets conditions under which competitors can enter the market, or it gives existing monopolists incentives to operate efficiently as if they were in a competitive

environment. Regarding its oversight tasks in the energy and transport markets, the NMa needs to prioritize, taking into account the state of play in these markets.

In addition, the NMa also has a considerable number of official duties it is required to carry out in the energy and transport markets. This means that the NMa is not able to choose what it will do or what not, but that it can, at the most, set priorities as to how it will carry out some of these official mandatory duties, for example, with regard to tariff decisions, licenses and exemptions. These duties claim a substantial share of the organization's resources.

Exchanging knowledge and information
is vital for superior oversight



4 Exchanging knowledge and information

Expertise combined

The sector-specific regulatory bodies within the NMa have joined forces and have formed a single office regulating the energy and transport markets. This integration offers greater opportunities for drawing on each other's expertise – for example with regard to regulation techniques – and may result in shorter lead times because of a more flexible allocation of financial and human resources. This in turn makes its oversight more effective, more efficient, and, where necessary, also more predictable. In 2008, two former departments, the Merger Control Department and the Antitrust Department, similarly merged into the current Competition Department.

The objective for the next few years is, in cooperation with competition control, to pursue a comprehensive vision for regulation and competition in the relevant markets. Wherever possible, teams from various departments will look into

problems together, with emphasis on exchanging knowledge and expertise of markets and techniques. With the vision for the markets in mind, the synergy between the various instruments offers the opportunity to determine what course of action is expected to have the most effect on the behavior of market participants. Examples of instruments available are: issuing licenses, setting tariff structures and technical requirements in regulated markets, imposing binding orders, dispute settlement, imposing penalties, commitments, urging to change certain rules (*compliance*), giving advice to governments (*advocacy*) and informing undertakings and consumers (*guidance*).

Limits to information exchange

The NMa sees cooperation as an essential ingredient in order to work towards excellent oversight. As seen in the reactions to the NMa Agenda's consultation, the exchange of knowledge and information is becoming more and more important. It strengthens oversight and it reduces the regulatory burden on undertakings. When exchanging information, the NMa naturally complies with existing privacy and confidentiality regulations, which prohibit certain forms of information exchange.

There are numerous government and non-government organizations in the Netherlands and abroad that have extensive knowledge of specific markets and/or investigation and regulation techniques. The NMa is investing in expansion of its network, seeking to cooperate with different regulatory partners and to exchange information and to share knowledge with them. This will include an evaluation of existing cooperative agreements and protocols. The NMa also wishes to discuss current restrictions on exchanging information. In that context, Sections 90 and 91 of the Dutch Competition Act come into focus.

Cooperation takes place at various levels. On a national level, the so-called Consultation Forum of Regulatory Bodies (MTB) was established in 2009, bringing together the Dutch Independent Regulator of Post and Electronic Communications in the Netherlands (OPTA), the Dutch Healthcare Authority (NZa), the Dutch Consumer Authority, the Netherlands Authority for the Financial Markets (AFM), the Dutch central bank (DNB) and the NMa. This forum's objective is to gain new insights, and, wherever possible, to adopt a common approach to similar problems. The NMa plans to step up the cooperation between the different regulators, for

example, by creating expert groups. Next to the MTB, the NMa enjoys strong relationships with, among others, the Dutch Public Prosecution Office (OM), the Fiscal Intelligence and Investigation Service (FIOD), the Economic Investigation Service (ECD), the Dutch Tax Administration, and Statistics Netherlands (CBS). On an international level, the NMa is actively involved in European developments relating to antitrust law and to market integration, such as freight transport or the northwestern European energy market. And in antitrust cases that have cross-border elements, approaches are internationally harmonized as well.

Moreover, the NMa organizing the annual conference of the *International Competition Network* (ICN) in 2011 will be a high point of international cooperation. And, the ICN will be celebrating its 10-year anniversary in 2011.



Want to know more about the NMa?
Please visit www.nmanet.nl

5 Announcements

New composition of the Board of the NMA as of October 1st, 2009

Mr. Henk Don has been professor in Econometrics and Economic Policy at the Erasmus School of Economics (Erasmus University) in Rotterdam since 2006. Between 1994 and 2006, he was director of the Netherlands Bureau for Economic Policy Analysis (CPB) in The Hague. Mr. Don has obtained a PhD in econometrics from the University of Amsterdam (UvA). As Board member, he will be primarily responsible for general antitrust oversight.

Mr. Jaap de Keijzer was partner at Amsterdam-based law firm De Brauw Blackstone Westbroek since 1998, where he already had worked as a lawyer since 1989. Between 2001 and 2005, he was managing partner. He has obtained Master's degrees in Law and in Geology from the University of Utrecht (UU) and has also obtained an MBA from the Rotterdam School of Management (Erasmus University) in Rotterdam. As Board member, he will focus on sector-specific oversight of the energy and transport markets.

Evaluation of the NMa

In 2010, the Minister of Economic Affairs will be carrying out the statutory quinquennial evaluation of the NMa's efficiency and effectiveness. The evaluation will cover subjects such as administrative burden, prioritization, and selection of instruments. Letters from the Minister regarding the NMa's annual reports, as well as recent studies, including one that was carried out by the Dutch Court of Audit, appear to indicate that the NMa is already working efficiently and effectively in many areas. Suggestions have been adopted and implemented.

Towards a leaner and more effective government

The NMa needs to comply with the current administration's program towards a leaner and more effective government. Approximately 57 jobs will be cut at the NMa between 2008 and 2011 while the budget will be cut by approximately € 5 million. Considering the NMa's natural turnover, it is not expected that forced lay-offs are necessary. More than ever, the NMa needs to prioritize. However, any expansion of the NMa as a result of new statutory tasks is not affected by this program.

Policy rules

The revised Protocol on Working Arrangements between EZ and the NMa states that the Board will submit planned, new or amended implementation rules to the Minister first, who has the power of rejection. In addition, the Minister has drawn up policy rules of her own, regarding fines, leniency and combination agreements. The new fine-policy rules, based on the former NMa Fining Code, offer the opportunity to impose higher fines (in case of a repeat offense, the fine is doubled for example). Having this opportunity is an example of the current government's aim to have regulators adopt a high-trust approach.

Criminal law

The Minister of Economic Affairs and the Minister of Justice have agreed to work on introducing a system in which criminal enforcement of the Competition Act would be possible, next to the existing administrative enforcement. This means, for example, that managing a cartel may become punishable by prison sentence, disqualification order, or criminal fine. With criminal enforcement getting this much attention, it underlines the wide and growing sense that cartels or abuses

of a dominant position are considered theft. The NMa sees opportunities to strengthen the deterrent effect of antitrust law, provided that current effectiveness of competition oversight is not threatened, particularly with regard to leniency.

Governments and the free market

The bill 'Governments and the Free Market' has been brought before the Dutch Senate. The bill proposes to have the NMa oversee fair competitive relationships between private undertakings and governments that engage in commercial activities. Government undertakings may have competitive advantages, since they also carry out duties funded by taxpayers' money. They might use these advantages on the market, thereby potentially disrupting the market. The bill contains rules of conduct that would prevent such disruptions from happening, and they provide the NMa the opportunity to take measures if these rules of conduct were violated. However, the NMa is not authorized to step in if a government agency considered the economic activity in question to be an activity of general economic interest or if it believed that European rules on state aid apply thereto.

Heat Act

In early 2009, the Dutch Senate approved the Heat Act, which is expected to take effect in mid-2010. For the period of 2010–2011, the NMa aims to be able to guarantee reasonable prices and a reliable heat supply. One of the priorities in this regard is drawing up and fleshing out tariff regulations for heat supply. The goal is to protect consumers against abuse by companies that charge excessive tariffs for heat supply. This needs to happen in such a way that heat-supply-related initiatives can still be developed.

In conclusion

This NMa Agenda aimed to provide as much insight as possible into how the NMa is wishing to carry out its oversight and investigation activities. In case you would like to know more about the NMa and about its activities, and/or about the latest (unforeseen) developments, please visit our website: www.nmanet.nl.

The Hague, the Netherlands, January 2010

