

Summary of the conclusions

Competition law offers the possibility of prohibiting the emergence or strengthening of dominant positions through mergers. Competition law prohibits the abuse of existing dominant positions and anti-competitive agreements, including both agreements between competitors and agreements between suppliers and buyers/procurers. These agreements, however, may be subject to a block exemption, they may have qualified for an exemption in the past, which still has effect, or they may meet the conditions for a statutory exception to the prohibition on cartels. The question is whether, and if so, how NMa can use these instruments in cases in which procurement power exists.

In any event, NMa takes the following elements with regard to a merger on the procurement side of the market into consideration when exercising merger control: the market position of the undertakings that are to merge, the position of these undertakings on their own downstream markets, the position of suppliers and the opportunities which a merger offers to exclude competitors and suppliers. Mergers on the procurement side of the market may restrict competition where the undertakings which intend to merge have large market shares and a powerful position on their own downstream markets and where there are many, small suppliers. After all, the undertakings which intend to merge will be in a position as a result of the merger to tie the suppliers to them or to restrict access to the market.

In the event of countervailing procurement power, a merger of suppliers which involves large market shares may be permitted in certain cases. In such cases, the conclusion may be drawn that a dominant position will not arise or will not be strengthened.

To prove the abuse of a dominant position on the procurement side of the market, it is necessary to establish that a dominant position exists on the relevant market and that it has been abused. An analysis of the procurement position is based on an analysis of the sales opportunities of suppliers, the market position of the procurer on the procurement side of the market and those factors which may affect whether a large market share also means that a dominant position exists. Important factors in this regard are the existence of countervailing power and the role and position which the undertaking has on its own downstream market. Abuse may exist if the undertaking with a dominant position on the procurement side compels suppliers to accept certain conditions, resulting in exploitation or exclusion. However, an undertaking with a dominant position enjoys contractual freedom: the refusal to negotiate, for instance, need not give rise to abuse.

Cooperation on the sales side, even if procurement power exists, is permissible where there is no appreciable restriction of competition or where a statutory exception applies. The assessment of cooperation on the sales side with a view to offering countervailing power against presumed procurement power, occurs in accordance with competition law within the framework of section 6 (1) and (3) of the Competition Act.

Addendum Concise overview of the assessment of procurement power

Introduction

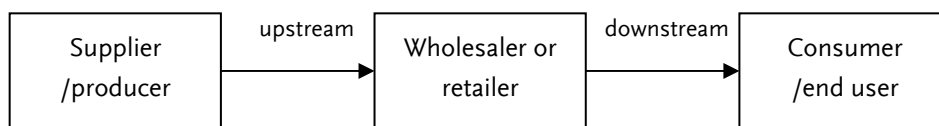
During the consultation, a number of parties asked for an overview of the criteria which NMa uses to assess whether procurement power has been abused. In the explanation below, NMa attempts to answer this question. Of course, each case will have to be assessed on its own merits. The decision-making practice of the European Commission and that of NMa, which is summarised in the White Paper, have contributed up until now to the policy of the European Commission and the competition authorities.

On the basis of a simple diagram of the production chain and a number of questions with an explanation, NMa has attempted to set out its assessment criteria below.

The production chain

NMa assumes the following simplified schematic representation of the production chain:

Schematic representation of the production chain



A production chain is often characterised by numerous related markets, for instance a market for raw materials, a market for intermediate products or semi-manufactures, a wholesale market and a market for the end product. The diagram above is a simplified representation of such a chain with a market for the end product (the downstream market) and an upstream market, with trade occupying a central position on both markets.¹ On the downstream market, traders and distributors operate as suppliers and consumers as buyers. The suppliers on the downstream market are themselves buyers on the upstream market, which trade with suppliers (or producers), which are the suppliers on this market. A buyer on an upstream market may therefore also be a supplier on a downstream market.

Market definition

Where procurement cooperation or a merger exists, the question which arises is whether a dominant procurement position could arise as a result. A dominant procurement position is acquired on a "relevant (procurement) market". This market must be determined, or the market must be defined. The most important objective in defining the market is determining the competitive pressure. With regard to the suppliers on a procurement market two factors, in particular, are important. Firstly, the extent to which suppliers have alternative distribution channels is important, in other words the number of buyers which they can supply. Secondly, the ease with which the procurement market can be entered on the procurement side is

¹ A more general representation of the production chain would include numerous upstream markets (and consequently also downstream markets). Procurement and sales power may exist on each of these markets.

important. The latter may bear a relation to the possibility of entering sales markets.²

The first questions which have to be answered in analysing (the abuse of) procurement power are:

- Which undertaking or procurement combination is assumed to have procurement power?
- On what upstream and downstream markets is this undertaking or procurement combination active?

Dominant position

Next it is important to determine whether a dominant position exists. A dominant position is defined as "*a position of one or more undertakings which enables them to prevent effective competition being maintained on the Dutch market or a part thereof, by giving them the power to behave to an appreciable extent independently of their competitors, their suppliers, their customers or end-users*".

Numerous factors are relevant in answering the question as to whether a dominant position exists, including:

- What is the market share on each of the relevant markets of the procurer which is assumed to have a dominant position?
- Who are the other players on each of the markets involved? What is their market share?
- Are there large, powerful suppliers on the supply side of an upstream market ('countervailing power')?
- What opportunities exist for entering the market? What possible barriers to entry exist? How long will it take to overcome these barriers and at what cost?
- How easily can the procurer, which is presumed to have a powerful position, switch from supplier or switch to producing a product itself?
- What contracts has the buyer, which is assumed to have a powerful position, entered into with its suppliers?

Example 1:

Data

Undertakings A and B purchase raw material X for the production of product Y. A and B both have a market share of 1% on the market for product Y.

The suppliers of raw material X can also supply C, D and E.

The contracts are short-term contracts and all procurers of raw material X are equally large: each of them has a market share of 20%.

A and B wish to merge. The markets involved are those for product Y and raw material X.

Due to the merger, a new undertaking A/B and undertakings C, D and E exist on the market for raw material X.

Due to the larger combination A/B, the suppliers of raw material X are now confronted with three players, which in all other respects are equally large.

There are many small suppliers of raw material X.

Analysis:

The market share of A/B on the market for product Y has increased from 1% to 2%. The market share on the procurement market has increased from 20% to 40%. There is no "countervailing power" on the supply side.

A and B had each entered into contracts with a specific group of suppliers. Due to the merger, the suppliers supply 80% of their production to A/B, but the contracts are short-term contracts and the suppliers can switch to C, D and E.

² See also chapters 2 and 3 of the document.

The suppliers will also be in a position to attract new buyers: the markets for this raw material can be entered easily (on the procurement side). The material is essential for many products or a good substitute for a number of other raw materials.

Conclusion:

It is not plausible that A/B occupies a dominant procurement position.

Example 2:

Data:

A "powerful procurer" O would arise after a merger of two equally large undertakings which operate exclusively on two markets involved: an upstream and a downstream market. O produces an intermediate product from products obtained from many small suppliers. O produces an end product from the intermediate product, which it sells on a consumer market.

O is confronted with few, small competitors on the consumer market. O has a market share of 80% on this consumer market. O procures the intermediate product from each of the suppliers in the same ratio on the basis of long-term contracts: each supplier therefore supplies 80% of its production to O. Entry to the consumer market is not possible within a period of a few years. O decreases its procurement on expiry of the contracts and therefore forces the suppliers to compete for the new (smaller) contracts by lowering their prices.

Analysis:

On the consumer market, supply decreases, resulting in an increase in prices. It would still take a considerable time for new entrants to enter the market. Due to the long-term contracts and a lack of alternative buyers, the small suppliers will be dependent on O for a considerable part of their turnover. Due to O's behaviour, the suppliers are forced to reduce their prices to retain market share. Both O and the other small buyers benefit from this, but this is to the disadvantage of suppliers and consumers.

Conclusion:

In all probability, O has a dominant position on both markets and abuses these dominant positions.

Procurement power and position on the downstream markets

Assume that the procurer indeed has a dominant procurement position (hereinafter "a powerful procurer"). Its position on the downstream market, however, is also important. If the procurer faces fierce competition on this market, it is likely that it will try to ensure that the advantages, which it has due to its dominant position, benefit consumers.

The question is therefore:

- What is the position of the powerful procurer on the downstream markets?

To reach an initial assessment, one could look at its market share on the downstream market. In the case of market shares of 50% or more, a dominant position will soon exist. However, other considerations may also play a role.³

In the first example above, a dominant position does not exist on the downstream market. In example 2, in all probability this is the case.

³ In this regard, see also chapters 2 and 3 of the White Paper.

*Abuse*Exploitation

It is of particular importance whether the powerful procurer is able to obtain lower prices, for instance through large-scale procurement (efficiency advantages). If this is the case, the powerful procurer will probably pass on the advantages obtained and the larger quantities purchased to the downstream markets. This is very likely if the powerful procurer does not have a dominant position on its downstream markets. The powerful procurer may also compel suppliers to offer lower prices, for instance by playing suppliers off against each other. As long as these advantages also benefit consumers, there is no cause for concern in relation to competition law. The situation would be different if the advantages were obtained by purchasing less. In this case, it is plausible that the powerful procurer is abusing its position to obtain lower prices, which do not benefit consumers. Since the powerful procurer purchases less, it will also be able to sell less on its own downstream markets. If it also has a dominant position on these markets, the effect of this practice will also be to drive up prices on the downstream markets. It is important to establish whether the incentive to purchase less does not originate from consumers themselves. After all, in that case the powerful procurer is responding to the development of demand. In the above-mentioned example 2, O obtains advantages which it does not pass on to consumers. There is no evidence that it is responding to the development of demand. After all, in this example it demands a higher price by selling fewer products.

Important questions in determining abuse:

- Does the powerful procurer obtain advantages from its suppliers?
- How are these advantages obtained?
- Are the advantages passed on to consumers?

Exclusion

In addition to possible financial advantages, it is important to establish whether the powerful procurer raises barriers to entry by (potential) competitors. The powerful procurer may, for instance, be the largest buyer for a significant number of suppliers and may tie these suppliers by means of (exclusive) contractual conditions and prevent the suppliers from supplying (potential) competitors of the powerful procurer. A consequence of this may be that the (potential) competitors of the powerful procurer are not (or no longer) in a position to compete and have to exit the market, which, on balance, may have the effect of driving up consumer prices. In addition, it is possible, for instance, that suppliers will not have any further incentive to invest or to innovate.

These two examples could have concrete exclusionary consequences, which obstruct the operation of market forces and reduce the range and quantity of goods supplied.

- What types of contracts does the powerful procurer enter into?
- What concrete consequences do these contracts have for suppliers and for consumers?

Forms of cooperation

A powerful procurer may also arise from a joint venture. In assessing such a joint venture it is important, for instance, whether the joint venture occupies a dominant procurement position and whether the participants in this joint venture compete with each other on the downstream markets. If the undertakings have a joint dominant procurement position and do not compete with each other on their

downstream markets, there is a risk that the joint venture will lead to coordination, not only with regard to procurement, but also with regard to sales.