NMa Annual Report

1998

Netherlands Competition Authority

NMa Annual Report

1998

Foreword

We are pleased to present the abridged version of the Annual Report for the year 1998 of NMa, the Netherlands Competition Authority, which since 1 January 1998 has been supervising compliance with the Dutch Competition Act, which came into force on that date.

NMa's first year of operation has seen us facing a host of issues - a great deal more, in fact, than we had originally anticipated when our organisation was incorporated. Many fascinating issues have crossed our path, and have been given plenty of attention in the media. The upshot of this has been that as the "cartel watchdog" we were approached by many different parties, with Dutch industry realising before too long that the coming into effect of the Competition Act had forever changed the culture of the Dutch economy.

As much of a challenge as the avalanche of issues with which NMa has found itself confronted has posed to our young organisation, the situation has prompted us at the same time to set clear priorities as to what we could deal with in-house as well as restricting our scope for carrying out investigations of our own. The strong commitment of our staff has enabled us to achieve a great deal notwithstanding the huge workload. This Annual Report reflects the various developments.

Competition monitoring is a textbook example of a people business. The Competition Act simply does not lend itself for "mechanical application", because each individual case is unique and conditions vary between cases. All of this needs to be taken into consideration when making assessments. This is precisely what makes our work so fascinating and varied. We have had the pleasure over the past year to have dealt with cases from a variety of sectors, thus gaining an insight into a variety of products and markets and exchanging ideas with representatives from all echelons of the Dutch business community. This has given the compilation and deepening of know-how within our organisation a tremendous boost. This know-how is a condition if we are to gain a proper insight into the various markets and their structures and make allowance for specific situations, as these could prompt us to come to a different judgement than one might have expected at first glance. Over the coming year NMa intends to pursue the path on which it has embarked in the first year of its existence: that of analysis doing justice to economic reality rather than a legal appraisal in the narrowest sense of the word. This reality also serves as the point of departure when demarcating markets and determining whether a market qualifies as national or international.

NMa has primarily defined 1999 as a year in which it will process the many requests for exemption having been submitted in the context of the transitional regime. Processing in accordance with the prescribed terms (which, incidentally, are not firm dates) is bringing a great deal of pressure to bear on our organisation. According to our schedule, the vast majority of applications should have been cleared by the end of 1999. There will also be greater scope for conducting investigations of our own in 1999; some of these will be carried out in collaboration with the sector in question while others will take place unannounced. Monitoring of concentrations will remain in full swing in 1999. Due to the strict deadlines imposed by law, the pressure of work is correspondingly high. The department which deals with administrative and judicial appeals is expected to shoulder a considerably heavier workload due to the surging numbers of rulings on applications for exemption. 1999 will also be the year in which the first sanctions are to be imposed. This will provide a clearer picture of NMa's policy in this respect and enable it to be established to what extent the possibilities to impose sanctions which the organisation has at its disposal enable the enforcement of fair competitive relationships.

Although NMa is an agency of the Ministry of Economic Affairs, it operates at a distance from the Ministry while making its decisions independently, in line with how the legislator originally envisaged its performance -

a situation which the first year of operation has shown to be adequately feasible. In order to position NMa even more clearly as an independent organisation, the newly appointed Minister for Economic Affairs has formulated her intention to bring forward the date of conversion of NMa's status into that of an Independent Administrative Body. The relevant Bill is currently being prepared.

A trend can be discerned towards ever-increasing internationalisation of supervision. As businesses increasingly operate on a cross-border basis, the supervisory bodies must be able to work, and work together, internationally. Then again there is a clear trend of devolvement, with Brussels delegating matters to national authorities because this is where specific national market know-how is at hand. Close consultation between the supervisory bodies on their modus operandi and the context within which they do their work will continue to be a sine qua non.

Though a relative newcomer, NMa has abandoned its status as the latest addition to the family of supervisory bodies since the 1998 launch of DTe, the Dutch Electricity Regulator. The debate on the overlapping powers of the various supervisory bodies and on how to supervise the supervisors is guaranteed to flare up again within the near foreseeable future. I am very much in favour of the supervisory bodies agreeing concrete arrangements between themselves on their mutual collaboration or unambiguous boundaries being defined as to their respective areas of operation, similarly to the agreements between NMa and OPTA (the independent Postal and Telecommunication Authority), which have been laid down in a protocol. In my view, it would do the efficacy and efficiency of supervision no good at all if the various supervisory bodies were to try and steal one another's thunder in taking the lead in specific areas.
As guardians of free competition, close mutual relations and unambiguous agreements are in our best interests.

A.W. Kist
Director-General

29 April 1999

Introduction

1998 was the first effective year of the new Dutch Competition Act as well as the first year in which NMa, the Netherlands Competition Authority, monitored compliance with the new legislation. For this reason a great deal of attention has been devoted in this Annual Report to the way in which NMa has worked out its interpretation of legislation in practice and to the individual matters having been completed during the first year of operation, because this reflects the organisation's policy.

Chapter 2 elaborates on NMa's organisational structure and on how it operates vis-à-vis other supervisory bodies in the Netherlands and elsewhere. As the Dutch Competition Act is a reflection of the EC rules on competition, attention is also devoted in this chapter to the relationship with Brussels and to international collaboration.

Chapter 3 devotes in-depth attention to NMa's views of the statutory parameters which underpin its operation, elaborating on several key concepts from the Competition Act and how these are applied by NMa in its decision-making. The Competition Act only applies to undertakings, and chapter 3 therefore elaborates on NMa's definition of "undertaking" as well as explaining certain other major elements from the Competition Act such as the definition of the market, the practical interpretation of "abuse of a dominant position" and the application of the instrument of "provisional measure subject to penalty". It also contains an overview of such matters as NMa has settled during the first year of its existence.

It can be established that NMa found itself facing significantly more issues during its first year of operation than had originally been anticipated. For example, a total of 1,040 applications for exemption in the context of the transitional regime were received in 1998 whereas only 350 had been counted on. The care, construction and retail sectors were absolute front runners in numbers of applications for exemption, 486 of which were settled in 1998 either in the form of a ruling or on an informal basis. As many of the applications turned out to have been handed in less than complete, NMa had to make a concerted effort to complete them.

NMa received 266 complaints in 1998 - considerably more than the 150 it had originally counted on. The establishment of NMa as a new complaints authority may have had something to do with this overwhelming attention. Most of the complaints were aimed at alleged abuse of a dominant position, something which closer examination frequently failed to establish or substantiate to a sufficient degree. A total of 139 complaints were settled during the year under review, either formally or informally.

With the concept of control on concentrations introduced in the context of the Dutch Competition Act, a brand-new element has been introduced into the Dutch industrial landscape. This advance assessment of mergers, acquisitions and joint ventures is aimed at preventing such forms of dominance from operating as an alternative method of cartel formation. The strikingly large number of 154 concentrations were reported to NMa whereas some 50 had been expected. Strict deadlines and firm dates apply to concentration supervision, with NMa essentially being given four weeks to assess whether a particular concentration would require a licence. Such licence is required whenever NMa has reason to assume that the concentration would give rise to a position of economic dominance or strengthen an already existing one. In 1998 NMa decided on six occasions that the parties would have to file an application for a licence. Once such application has been filed, NMa is given 13 weeks to decide whether the licence is to be issued, refused or granted subject to specific conditions. During the year under review one application to be granted a licence was turned down while two were approved. In two cases the applicants dropped their request before NMa had come to its final decision. The sixth application was not received until 1999.

Finally, chapter 3 discusses the administrative and judicial appeals , of which not that many were received in 1998.

A total of 36 administrative and judicial appeals were received while interested parties appealed to the Rotterdam District Court in ten cases.
The number of administrative and judicial appeals is expected to rise as the number of rulings issued by NMa increases.

II Organisation and Development

1 January 1998 was the effective date of the new Dutch Competition Act as the successor to the Dutch Act on Economic Competition. The new Competition Act is aimed at promoting the dynamics of the economy by imposing bans on competition-restricting arrangements and conduct, thus seeking to strengthen the Dutch economy. The new Act has moreover brought Dutch legislation into line with the competition rules of the EC Treaty. The Lower House of the Dutch Parliament passed the Dutch Competition Act on 20 March 1997, with the Upper House following suit on 20 May. The Act was published in issue 242 of the Dutch Staatscourant on 22 May 1997.

2.1 New Legislation Effective; Areas of Operation

The taking effect of the Dutch Competition Act with effect from 1 January 1998 coincided with the operational launch of NMa, the Netherlands Competition Authority. The new organisation, which is headed by A.W. Kist as Director-General, is in charge of the monitoring of compliance with the new Competition Act and the implementation of such tasks as ensue from the new legislation: the monitoring of "healthy" competition in the market by supervising concentrations (mergers and acquisitions), processing applications for exemption submitted by businesses, complaints handling and conducting investigations. NMa's public inauguration took place on 25 November 1997 at the Kurhaus in the seaside resort of Scheveningen, in the august company of many a celebrity including HRH the Prince of Orange, EU Competition Commissioner Karel van Miert, the then Minister of Economic Affairs Dr Hans Wijers and representatives from the public and private sector, judiciary and a variety of foreign competition authorities.

There are a number of fundamental differences between the new Dutch Competition Act and its predecessor, the Dutch Act on Economic Competition. One of these is that the new legislation entails in a prohibition system, banning as it does all competition-restricting arrangements and conduct unless the organisation in question has been granted an exemption or dispensation. The monitoring of concentrations constituted a new element in Dutch legislation.

The Dutch Competition Act has introduced bans on:

- cartel arrangements;
- abuse of a dominant position;
- concentrations (mergers, acquisitions and specific types of joint venture) without prior notification.

Cartel Arrangements

Cartels are arrangements (e.g. agreements or decisions) between undertakings or concerted practices having a restrictive effect on competition in (part of) the Dutch market. A general prohibition of cartels has been in force since 1 January 1998. In this respect the Competition Act differs from the old Act on Economic Competition, which was based on the abuse system and therefore condoned cartels unless they were explicitly prohibited, in addition to which general bans applied to "hard-core" cartel constructions. As explained before, the new Competition Act has turned things around in that all cartels are now banned unless explicit permission has been given in the form of an exemption.

Abuse of a Dominant Position

Any undertaking that is sufficiently powerful not to have to worry unduly about other market players (competitors, suppliers, customers or end users) represents a potential threat to the open and free market when it abuses its economic dominance, for example by charging inordinately high prices, applying unreasonable supply conditions, refusing to supply specific customers, charging varying prices for identical products or services, pushing competitors off the market or making it impossible for new businesses to enter the market through a policy of price-dumping. Having a dominant position as such is not a problem, and is therefore not banned; it is only

when a business resorts to abusing such position that it is in contravention of the Competition Act.

Concentration Control

Concentrations of undertakings can lead to powerful enterprises which are sufficiently dominant to exert a significant impact of competition in a specific market, to the point of cutting out competition altogether. In order to prevent this from happening, a system of preventive control of concentrations of undertakings beyond specific turnover thresholds has been provided for in the new Competition Act. What this boils down to is that proposed mergers and acquisitions are required to be notified to NMa, and may not be completed unless NMa has performed an assessment of the competitive consequences of the concentration proposals. The Dutch Competition Act only applies to undertakings whose operations are aimed at the Dutch market or whose activities include the Dutch market. However, business operations in the Dutch market may also be subject to EU concentration control. Reference is made to section 2.6 hereinafter for a summary of matters having required attention in 1998.

2.2 Organisational Set Up

On 1 January 1998 NMa kicked off with a 70-strong workforce, whose number increased to some 100 as the year progressed. NMa's organisational set-up comprises three operational sections and one staff section. (Inter-disciplinary) Teams of mainly lawyers and economists work closely together at operational section level.

The Investigation, Supervision and Exemptions Department (in Dutch: OTO) represents the largest NMa department. It is in charge of processing requests to be granted exemption from the cartel ban, tracing and investigating (prohibited) cartel arrangements and investigating abuse of a dominant position, either in response to complaints submitted to NMa or at its own initiative.

The Department on Concentration Control, or CoCo for short, is charged with assessing within stringent statutorily prescribed terms whether a concentration (merger, acquisition or joint venture) having been notified should be licensed. Such licensing obligation depends on the impact of proposed concentrations on competition in the Dutch market. A licence will be required as soon as a position of dominance would appear to form or be enhanced. In relation to concentrations which are subject to a licensing duty, the question of whether a licence is to be issued and if so, subject to what conditions, is addressed.

The Decisions and Appeals Department (in Dutch: BBB) is in charge of handling administrative appeals and preparing penalty rulings. The BBB Department also represents the Director-General in judicial appeals before the Court.

The duties of the General Management & Control Staff Department (ABC) relate to personnel matters, financial administration, IT and information management, the library, the archives, printed matter, mail and information.

NMa operates an eight-strong Advisory Committee for Administrative Appeals, which advises the Director-General on decisions pertaining to administrative appeals against rulings imposing fines or provisional measures subject to penalty citing infringement of the cartel ban or the ban on abuse of a dominant position. The Advisory Committee is chaired by A. Geurtsen. The other members are R.C. van Houten (Deputy Chair), R.E. Bakker, Ms M.C.M. van Dijk, B.J. Drijber, Prof. E.H. Hondius, Prof. J.H. Jans and Prof. L. Timmerman. B. Baardman, D.C. Buijs and prof. K.J.M. Mortelmans assist NMa in their capacity as adviser.

2.3 Collaboration with DTe

The first part of the Dutch Electricity Act 1998 came into effect on 1 August 1998. The new legislation implements the European directives governing the liberalisation of the power market. DTe, the Dutch Electricity Regulator, has been specifically set up for the purpose of implementing this Act and monitor its compliance. DTe comes under the responsibility of the Minister of Economic Affairs. As issues related with the Dutch Competition Act exist, it forms part of the NMa organisation so as to enhance the consistency of competition views. DTe has now become part of the NMa organisation in management terms.

DTe's Duties and Activities

DTe has been specifically charged with the following duties in the context of implementation of the Dutch Power Act:

- definition of the rates structures and conditions governing electricity transmission, with due observance of the significance of a reliable, lasting, effective and environmentally acceptable performance of the power supply system and of that of promoting developments in the electricity market (following the coming into effect of the relevant Sections as per the Dutch Power Act 1998);
- definition of the rates to be charged by the individual grid companies including the incentive discount (which encourages the grid companies' effective business operation);
- biennial assessment of whether the grid companies are sufficiently capable effectively to cater for the overall transmission capacity requirement on the basis of estimates of the transmission capacity requirement having been submitted by the grid companies;
- biennial assessment of whether the grid companies are sufficiently capable effectively to cater for the requirement on the basis of estimates of the overall power requirement in the captive customer market segment having been

submitted by licence holders in respect of the supply of electricity to such captive customers;
- provision of advice to the Minister of Economic Affairs on:
  - applications to be granted exemption from appointing a grid company;
  - rates charged for the supply of electricity to captive customers.

With respect to the duties and powers which the Dutch Power Act 1998 has conferred on DTe, the Director-General of the NMa may issue general and specific instructions in respect of concepts to be applied when implementing the Dutch Competition Act.

2.4 Collaboration with Other Supervisory Bodies

Collaboration with OPTA

NMa and the postal and telecommunication industry watchdog, OPTA (Independent Postal and Telecommunication Authority), drew up a protocol in 1998 in which they laid down agreements on their mutual collaboration in respect of matters coming under the area of responsibility of both supervisory bodies. The basic premises underpinning their mutual collaboration are effective and efficient law enforcement and decision-making and a consistent interpretation and application of general and sector-specific competition rules.

The agreements reached between the two organisations are aimed at ensuring clarity in the division of duties, whichever of the two is contacted first. The protocol spells out when and in what way NMa and OPTA are to work together, such as when both NMa and OPTA are authorised to act in a specific matter, for example in connection with abuse of a dominant position by an undertaking operating in the postal or telecommunication sector. Whenever a case comes under NMa's area of operation as well as that of OPTA, the two will discuss which of them would be best equipped to deal with the matter. The decision depends inter alia on the statutory possibilities, the available capacity and the expertise which is on hand. Agreements have also been made between NMa and OPTA on the uniform interpretation of specific concepts.

Collaboration with Other Supervisory Bodies

Contact was made at a range of levels with national supervisory bodies including the Dutch Central Bank, the Insurance Supervisory Board and the Social Security Supervisory Board in 1998, with which NMa now exchanges general information and collaborates where appropriate. The various organisations also keep one another up to date on any resolutions passed which have relevance for the supervisory body in question.
NMa and the Public Broadcasting Commission (whose remit includes the supervision of additional activities performed by public broadcasting organisations) have agreed that the latter will notify the former in cases of suspected concurrence of media legislation with the Dutch Competition Act.

NMa collaborates with the Dutch Central Bank and the Insurance Supervisory Board wherever their respective supervisory duties overlap. With effect from 1 January 2000 NMa will take over the control of concentrations in the financial industry. It is already authorised to intervene in cases of abuse of a dominant position or cartel arrangements.

2.5 Advice to Third Parties

NMa issued advice on competitive aspects in a number of sectors on several occasions in 1998.

Position Regarding Market Forces in Implementation of Social Security

The State Secretary for Social Affairs and Employment having sought the advice of the Director-General of NMa on the future organisation of the implementation of the social security system, NMa presented its response in June 1998. For obvious reasons the advice was written from the vantage point of the body in charge of supervision of compliance with the Competition Act, with a particular focus on the current market structure and the envisaged one of the future and the competitive relations within the market. The point of departure was that, although a market-led approach to the implementation of social security is most certainly feasible, certain factors could have a restrictive impact on the efficacy of free market forces. In order for competition to be effective, for example, the number of suppliers will need to increase while the respective market shares will need to be divided more evenly among the various players and access thresholds to new market entrants should not be prohibitive. As regards the demand side of the market, it would be appropriate if the number of players were stepped up (sectors and individual businesses as principal), principals could switch from one implementing institution to another more easily and a system of public tendering would be introduced. These and other keys to success were presented to the State Secretary in the Director-General's advice.

Position Regarding Licences in the Telecommunication Market

In June 1998 the Director-General of NMa was requested by the Director for Telecommunication and Postal Services of the Ministry of Transport, Public Works and Water Management to issue an advice on the consequences in terms of competition of the transfer of the licences for mobile communication from Orange and Tele Danmark to

Tulip. The advice concluded that the transfer of the licences as such would have no negative consequences for competition and that the Minister of Transport, Public Works and Water Management therefore had no reason to deny the request for transfer. In the light of the proposed change in Tulip's shareholder structure, the suggestion was put to the Minister to make permission conditional on the parties notifying the Minister in advance on any changes in shareholder structure, thus enabling a proposal for amendment to be vetted against the Competition Act and/or the Telecommunications Act.

Position Regarding Sectors in Transition

The Minister of Economic Affairs requested the Director-General of NMa in August 1998 to subject the draft Gas Bill to an implementation test. In the report on this test, which was presented in September 1998, the Director-General stated that the current constellation in the gas market had caused him to doubt whether the approach to negotiated access as set out in the Bill would be appropriate. A transitional period based on regulated access could enhance the efficacy of the policy intentions while providing for clearer parameters defining NMa's supervisory role. If it was nevertheless decided to follow the path of negotiated access, several supplementary conditions should ensure effective supervision, in the form of adjustments to the proposal aimed at strengthening NMa's supervisory position as well as providing for the (human) resource requirement to enable the implementation by the NMa of the additional tasks.

2.6 International Collaboration

The Dutch Competition Act is drafted in accordance with the EC rules on competition. At NMa level the contributions to European affairs are co-ordinated and prepared by the EU Affairs Working Group, whose principal duty is to help ensure that the Dutch as an EU Member State contribute to a balanced EU-wide legal practice. To this end DG-IV, the European Commission's Directorate-General charged with the implementation of EC competition rules, confers with NMa through a set of advisory committees.

Contribution to Concentration Monitoring Advisory Committees

In order to promote uniformity in the assessment of concentration matters in the various EU Member States, the European Commission performs these duties in close and continuous contact with the national competition authorities in the Member States, which can submit their comments on the procedures in question to this end. This concerns procedures governing mergers and acquisitions which in view of the turnover levels prescribed in the Regulation on Concentration Control require notification to Brussels. A concentration advisory committee comprising representatives from Member State competition authorities is required to be consulted before each decision is finalised. This committee issues its advice on the European Commission's draft decision; where possible the European Commission then takes the advice into consideration.

NMa contributed to advisory committees on the following concentrations in 1998:

- Case IV/M 920 - Samsung and AST.
- Case IV/M 950 - Hoffmann-La Roche and Boehringer Mannheim.
- Case IV/M 970 - KS/OTW Signode and Titan.
- Case IV/M 986 - Agfa-Gevaert and DuPont.
- Case IV/M 993 - Bertelsmann, Kirch and Premiere.
- Case IV/M 1016 - Price Waterhouse and Coopers & Lybrand.
- Case IV/M 1027 - Deutsche Telekom and Betaresearch.
- Case IV/M 1096 - WordCom and MCI.
- Case IV/M 1157 - Scanska and Scancem.
- Case IV/M 1225 - Enso and Stora.

Contribution to Advisory Committees and Hearings on Cartel Matters and Abuse of a Dominant Position

The advisory committees are where the Member States issue their advice on draft EC decisions pertaining to the cartel prohibition pursuant to Article 85 and the ban on abuse of a dominant position pursuant to Article 86. The Netherlands is represented by the Ministry of Economic Affairs and NMa and, depending on the subject matter, by a second Ministry as well. In cases where the European Commission proposes to impose a fine on a company, the advisory committee session on the draft decision is followed by a meeting on the (level of the) actual fine.

NMa attended seven hearings in 1998. These revolved around procedures in respect of individual cases pursuant to Articles 85 and 86 of the EC Treaty. The parties to the disputes and those having an interest were invited at the hearings to respond to the Statement of Objections as formulated by the European Commission. Advice is normally provided on the following:

In connection with rulings pursuant to Article 85:

- The question as to whether the Commission has rightly concluded that Article(s) 85 and/or 86 of the EC Treaty applies/apply (the notion of "undertaking", impact on trade between Member States, restriction of competition, relevant market, fine).
- The question as to whether the Commission has rightly concluded that exemption/no exemption should be granted (exemption conditions ex Article 85(3) of the EC Treaty).

In connection with rulings pursuant to Article 86:

- The question as to whether the Commission has rightly concluded that Article 86 applies (the notion of "undertaking", impact on trade between Member states,

relevant market(s), a dominant position, abuse, fine). NMa furthermore participated, inter alia, in the following EC advisory committees in connection with the application of Articles 85 and 86 of the EC Treaty:

- Case IV 35.733 - Volkswagen/Audi.
- case IV 35.380 - SICASOV.
- Case IV 35.134 - TACA.
- Case IV 33.708 - British Sugar.
- Case IV 35.691 - District Heating.
- Case IV 36.253 - P&O/Stena.
- Case IV 35.079 - Whitbread.
- Case IV 36.237 - TPS (television by satellite).
- Case IV 34.466 - Greek Ferries.

Contribution to General Advisory Committees

NMa moreover communicated the Dutch point of view at General Advisory Committee level on two occasions in 1998. The General Advisory Committee is the forum for discussing more general topics of a procedural and policy-related nature which are relevant to competition practice. The advice issued in 1998 related to the performance of the advisory committees (composition, contribution and course of affairs at hearings) and the revision of the Transport Regulation and Regulation 99 (approval of notification form and hearings).

DG Conferences

During the year under review, the Minister of Economic Affairs and NMa participated in the two conferences of the Directors-General of the competition authorities of the EU Member States. Two important topics discussed at these meetings were the stepping up of collaboration between competition authorities in the wake of the "Announcement on Collaboration between the European Commission and the National Competition Authorities" and the relationship between the competition authorities and the sector-specific supervisory bodies.

OECD

The Ministry of Economic Affairs and NMa participate in OECD meetings organised by the Competition Law and Policy Committee. Important topics discussed in 1998 were "The OECD review of Regulatory Reform in the Netherlands", in which a great deal of attention was devoted to the Dutch competition policy, and the relationship between (the) general competition supervisor(s) and their sector-specific counterparts in the Netherlands. The aforementioned report entitled "The OECD Review of Regulatory Reform in the Netherlands" was published by OECD in February 1999. It describes the policy changes having been made in order to achieve greater economic dynamics, one of the conclusions being that the policy of free market forces has contributed to earlier economic gains achieved on the back of reform in the area of security in the employment market and social security being not only preserved but, better yet, increased. The report makes mention of the coming into effect of the new Dutch Competition Act and the incorporation of NMa. OECD consulted with NMa when preparing its report, especially in respect of the question as to how Dutch competition policy is being shaped.

2.7 Changes in EC Competition Rules

The Dutch Competition Act is in line with the EU rules on competition and includes the occasional reference thereto. This makes any changes in these rules relevant in terms of implementation of the Dutch Competition Act. The main (impending) changes are summarised hereinafter.

Green Paper on Vertical Restraints

The European Commission is considering the introduction of a new exemption in respect of vertical restrictions to replace the existing three. Together with the Ministry of Economic Affairs, NMa represents the Netherlands at the debate at European Commission and European Council level. The new approach to vertical restraints places greater emphasis on economic analysis (market share threshold and market impact of arrangements) while focusing less on a strictly legal interpretation of the arrangements.

The European Commission requires authorisation through amendment of Regulations 17 and 19 of the European Council if it is to realise the new approach in the form of a new block exemption regulation. NMa and the Ministry of Economic Affairs are also represented at the debate on the amendment of these Regulations. Regulation 17 provides for the application of the European cartel ban (Article 85) and abuse of a dominant position (Article 86), while Regulation 19 deals with the authority to issue block exemptions. The existing block exemptions expire on 1 January 2000.

Amendment of the EC Merger Control Regulation

Several amendments to the EC Merger Control Regulation dated 21 December 1989 have been in force since 1 March 1998. These changes have relevance for Dutch concentration control for, inter alia, the following reasons as the one-stop-shop principle applies to the control of concentrations: notification of concentrations is required to either the NMa (or other national competition authorities) or the European Commission, but never at national as well as EU level. The amendment of the EC Merger Control Regulation will translate into a slight increase in the number of proposed concentrations requiring notification to the European Commission rather than NMa. The amendments to the EC Merger Control Regulation relate to the following aspects:

- introduction of a "second" series of turnover thresholds

with the aim of avoiding multiple notification nationally;
- a change in the treatment of joint ventures;
- more flexible rules for referring concentrations to Member States;
- a change in the regulations regarding the prescribed waiting period for the duration of which a concentration may not be effected;
- the possibility for the European Commission to accept undertakings at the end of a first-stage review;
- amended rules regarding the calculation of the turnover achieved by credit institutions and other financial institutions.

The existing series of turnover thresholds enabling the determination of whether it concerns a concentration having a community dimension has remained intact, and the European Commission's exclusive authority to subject a particular concentration to its assessment with it.

Concentrations not having a community dimension are often required to be reported to the competent competition authorities of more than one Member State. The scenario of a second series of turnover thresholds has been opted for with the aim of curbing the administrative burden this brings with it, in that its introduction has done away with the need for multiple notification in more cases, concentrations exceeding this second series of turnover thresholds as well also having come under the exclusive competence of the European Commission since 1 March.

Both the existing and the second set of turnover thresholds come under the so-called two-thirds rule, the gist of which is that there is no question of community dimension in so far as more than two-thirds of total EU turnover achieved by all businesses together is accounted for by a single Member State. Concentration is then assessed by the competent national competition authority or authorities. In 1998 NMa performed its assessment of a concentration in which the European Commission had no competence pursuant to the two-third rule on two occasions, the first one being the merger between Vendex Food and De Boer Unigro (case no. 811) and the second one, the merger between Compagnie Générale des Eaux and Havas (case no. 384).

Structural Joint Ventures

A further amendment has changed the definition of concentration in so far as it relates to joint ventures. The distinction between co-operative and converging joint ventures has been scrapped. The incorporation of all joint ventures achieving an independent economic entity on a lasting basis is now being regarded as concentration as defined by the EC Merger Control Regulation; where appropriate the co-ordination aspects of the competitive behaviour between the parent companies of the joint venture in the context of the concentration procedure are vetted against the criteria pursuant to Article 85, paragraphs 1 and 3 of the EC Treaty.

III NMa's First Year of Operation

The legislator has put NMa in charge of supervision of compliance with the Dutch Competition Act. The Act and the supervision for which it provides ensure that customers have a choice while companies remain at liberty to compete with each other. It is for this reason that NMa is often referred to as the watchdog of economic democracy. Freedom of choice and freedom to compete are crucial elements of today's market economy, as it is effective competition which encourages enterprises to deploy their resources and labour as efficiently as possible while continuously striving for technological innovation. Competition prompts enterprises to return an optimum performance in terms of price, quality and options, something which is of great importance for consumers.

For the enterprises themselves it is of equally great importance that effective competition should be safe-guarded, as adequate competition in the domestic market prepares them better for dealing with their international competitors by ensuring that competition domestically prompts protected sectors, which are not (yet) having to deal with international competitive pressure to step up their level of efficiency. Examples of such protected sectors include a variety of services and sectors in which the government plays a prominent part for one reason or another, such as public transport and health care. Adequate legislation on competition in conjunction with strict monitoring thereof reduces costs and lowers prices in these protected sectors in particular, and this in turn enables sectors which are subject to international competitive pressure to source their products and services on more attractive (financial) conditions from enterprises in the protected sectors. Adequate competition in the protected sectors makes it easier for internationally operating sectors to compete. The positive effect of this mechanism should by no means be underestimated in an open economy such as that in the Netherlands. Finally, monitoring of competition is aimed at keeping markets sufficiently accessible to new entrants, especially fledgling businesses. This in turn boosts the invention and rendering accessible of technological innovations and applications and enhances economic dynamics.

3.1 Competition Act Instruments

The nature of the parameters for assessment which the Competition Act provides for in the area of the prohibition on cartels and the option to be granted exemption from this prohibition (Sections 6 and 17 of the Dutch Competition Act), the prohibition on abuse of a dominant position (Section 24 of the Competition Act) and the control of concentration (Chapter 5 of the Competition Act) is general while they have been formulated through "open standards". The key element of such general parameters for assessment is that the specific market situation and competitive relations should be assessed for each case individually. The decisions of the European Commission and the jurisprudence of the Court of Justice of the European Communities in the area of competition law are an important help in performing such assessments, it should be added. The advantage of a set of general assessment parameters is that the instruments provided for by the Competition Act can be applied with a certain degree of flexibility, while NMa is in a position continually to make allowance for changing market and market conditions. Initial experiences with the instruments provided for by the Competition Act have shown to NMa that these instruments offer a practicable framework for the effective application of general supervision of competition in concrete, specific situations.

3.2 "Undertaking" as a Concept

The first thing that needs to be done in ascertaining whether the provisions as per the Competition Act apply to a specific case is that it should be determined whether there is a question of an undertaking in a specific case, as the Competition Act does not deal with entities that do not carry on entrepreneurial operations. The definition of the concept of undertaking under the Competition Act has

been based on the definition under EC law as follows: "(...) any entity (...) which carries on an economic activity irrespective of its legal status or its funding". Jurisprudence of the Court of Justice of the European Communities bears out that the mere fact that an activity of which public law organisations are usually in charge does not necessarily detract from the economic nature of that activity. The key criterion is therefore whether or not an entity is a participant in economic activities.

In many cases it is obvious that it concerns entities that carry on economic activities. However, it can be less obvious in other situations; here the question as to whether an entity carries on an economic activity warrants special attention. It is in situations in which government activities border on entrepreneurial operations in particular that the application of the concept of undertaking can be problematic. The solution in such cases is to ascertain whether the government acts either on the basis of a government task which accrues to it or with which it has been charged, or operates as an undertaking.

During the year under review rulings were issued in several cases concerning the applicability of the concept of undertaking. For example, NMa determined in several sectors where the government plays a decidedly organising and controlling role while imposing restrictions on competitive freedom that the concept of undertaking nevertheless applied because it concerned economic activities. It was decided in several rulings that hospitals, health insurance funds and employer insurance implementing organisations do indeed carry on economic activities, thus qualifying as undertaking as per the Competition Act. In other sectors where the government also plays an organising and controlling role, however, NMa decided that this intervening role coincides with the implementation of a public duty. In this context it was decided that in view of the duties in support of the general interest with which they had been charged, neither the Fire Service in Egmond nor the Dutch Driver and Vehicle Licensing Centre could be regarded as an undertaking in the matters to which they were a party.

3.3 Administrative Law Parameters

3.3.1 Interested Party

It was concluded in section 1 of this chapter that the Dutch Competition Act is directed towards the best interests of consumers, inter alia. Consumer complaints are therefore taken seriously, in addition to which allowance is made for the aspect of whether the outcome of the handling of the complain can benefit the consumer when prioritising the order in which complaints are to be dealt with. For this reason the Competition Act offers the option of entertaining such complaints as qualify on an accelerated ex officio basis. This can be the case, for example, when an initial assessment reveals that it could well concern a serious infringement. Such discretionary powers to launch an investigation or otherwise is of particular relevance when an interested party submits a complaint ("application") as defined by the General Administrative Law Act of the Netherlands; NMa can be ordered to issue its ruling in such cases.

It can therefore be a useful and valuable exercise to have someone who is not an interested party as defined by the General Administrative Law Act file a complaint.

The notion of "having an interest" is therefore relevant to the question as to whether a complaint qualifies for entertainment by NMa by way of an application in a legal sense. Pursuant to Section 2(1) of Book 1 of the General Administrative Law Act, an interested party is defined as he whose best interests are directly involved in a decision. Legal precedent stipulates that a person qualifies as an interested party provided he or it meets the following cumulative conditions: it must concern the party's "own interest", which is "objective", moreover it must concern an "actual" as well as "personal" interest which in addition should have a "direct link" to the requested ruling. Only in so far as the person filing an application or complaint meets these conditions will the application or complaint be dealt with. The notion of "having an interest" is also pivotal in preparing specific decisions as the documentation is available for inspection by those having such interest and only they are entitled to state their views or be heard. The upshot of all this is that the consumer does not always qualify as a party having an interest in terms of the General Administrative Law Act of the Netherlands.

During the year under review the Director-General of NMa passed several resolutions in the context of which deliberations were aimed at the concept of "interested party".

3.3.2 Public Nature

Availability for Inspection by Interested Parties

The basic NMa premise pursuant to which the implementation of the Dutch Competition Act should be transparent is countered by the assurance to persons and enterprises that confidential information they have provided will not be publicised. Interested parties are given the option of inspecting documents in specific cases while specific resolutions are made available for inspection. However, the Competition Act - and Section 11 of Book 3 of the General Administrative Law Act of the Netherlands - stipulates in several provisions that information with respect to which Section 10 of the Government information and public access Act of the Netherlands states that it does not qualify for disclosure will not be made available for inspection. In practice, the principal ground to make an exception is that provided for by Section 10(1) sub (c) of the Government information

and public access Act, where it is stipulated that business and manufacturing information having been disclosed to NMa in confidence shall not be publicised.

Persons who and businesses which provide information to NMa are therefore explicitly asked to indicate which information should be regarded as confidential as defined in Section 10 of the Government information and public access Act. In so far as NMa is of the opinion that information has been wrongly qualified as confidential, such information is nevertheless not publicised without further ado. The Competition Act stipulates in respect of specific cases that the information in question is not to be publicised until a one-week period of the date of publication of a ruling to that effect has expired, thus making it possible for the person or business in question to file a notice of objection with the Director-General of NMa as well as a petition to be granted provisional relief with the President of the Rotterdam Court, in order to prevent publication.

Availability for General Inspection

During the year under review NMa received several requests from interested parties as well as non-interested parties citing the Government information and public access Act to be granted permission to inspect documentation. All requests were turned down as the Director-General of NMa is of the opinion that the Dutch Competition Act contains a special publication regulation which moreover is exhaustive by nature, rendering the general publication regulation as provided for by the Government information and public access Act inapplicable to such information as has been made available to NMa in the context of the Competition Act.

The publication regulation provided for by the Competition Act entails the following, inter alia. In the context of preparation of a resolution in response to a request for exemption, report or notice of objection, such documentation as relates to the matter at hand is made available for inspection by those having an interest, in addition to which any application to be granted exemption, notification of concentration and application for a licence as well as specific rulings are required to be published in the Dutch Staatscourant. Such rulings are also made available for inspection at the NMa offices (with the exception of such confidential information as they may include).

Requests to be granted permission to inspect files relating to concentration procedures met with a denial on reference to the parliamentary history of the Competition Act, which shows that the public preparation procedure which was originally to apply to the licensing stage has been scrapped as the legislator considered the confidentiality of sensitive data as a topic of an extremely serious nature. It is for this reason that inspection pursuant to the Government information and public access Act has been excluded. However, this does not necessarily mean that specific information cannot be made available to third parties in order to enable them to present their views in so far as it is necessary to enlist the views of third parties in the context of the careful preparation of a decision.

3.4 Enforcement

NMa monitors compliance with the Dutch Competition Act. To this end NMa officers have been given general powers (under the General Administrative Law Act) as well as specific powers (under the Competition Act). For example, NMa is at liberty to request information in writing as well as orally, enter business premises and demand access to business documents. It carries out investigations in response to complaints received or at its own initiative.

The enforcement of the prohibition on cartels and of that on abuse of a dominant position was primarily reflected in complaints handling in 1998, in which year a total of 266 complaints were entertained of which 139 were settled. In some cases use was made of the opportunity to demand access to business information and documents belonging to the accused party.

Due to the large numbers of complaints and requests to be granted exemption which NMa received in 1998, the organisation was not in a position to devote much time and effort to conducting investigations at its own initiative. In addition to one investigation which was completed in 1998 and in the context of which a number of enterprises were requested to grant access to business information and documents, attention was predominantly focused on making preparations for own-initiative investigations to be launched in 1999. Letters were sent to enterprises which had recently reached agreement on concentration, on the basis of reports in the media, these concentrations not having been reported to NMa. The object of the exercise was to ascertain whether notification has rightly been omitted. A total of ten verification letters were sent to enterprises which appeared to meet the turnover criteria; in nine cases it was concluded that it did not concern a concentration subject to notification as the turnover levels fell short of the prescribed thresholds. One verification letter turned out to anticipate a concentration which had not yet been completed, and which was subsequently duly notified. NMa has since been sending verification letters at regular intervals.

Whenever it is established tat the Competition Act has been violated, a report is drawn up while a penalty can ultimately follow against the offending party, for example by imposing a fine and/or provisional measure subject to penalty (or not, as the case may be).

The Investigation, Supervision and Exemptions Department prepared reports on seven occasions during the year under review in which NMa established that the Competition Act had been infringed upon. None of these reports resulted in a definitive ruling being issued during the year under review. This is scheduled to take place this year. NMa has the power to impose a provisional measure subject to penalty pending the investigation into violation of the Competition Act. As such a measure has a far-reaching impact on the undertaking on which it is imposed, it should be prepared with the utmost consideration. It is only when there are pressing reasons that the outcome of careful decision-making may be anticipated, with due observance of the circumstances in question. Section 3.6.3 discusses the policy aspects of the mechanism of provisional measure subject to penalty.

3.5 Material Assessment

3.5.1 Definition of Market and Relevant Market

The definition of the relevant market usually serves as the point of departure for analysis in competition law practice. The key question asked in this context is that of what the "competitive landscape" in which the enterprises operate looks like, in other words: which are the other market players exerting competitive pressure on enterprises having notified NMa of a competitive arrangement or concentration, or enterprises which could be guilty of abusing their dominant position? In order to answer this question NMa individually determines in so far as appropriate in which relevant product and geographical markets the parties operate. This may be done in the context of assessing requests to be granted exemption pursuant to Section 17 of the Competition Act or ascertaining whether a party is guilty of abusing its dominant position Section 24 of the Competition Act, or in that of the concentration control under Chapter 5 of the Competition Act. We would point out that the question as to which is the relevant market is sometimes left unanswered, for example when a variety of market definition methods confirm in all cases that there are no competitive problems.

The relevant product market relates to products to which the entrepreneurial act or conduct to be assessed in terms of competition law relates. Generally speaking the product market comprises all products whose characteristics, prices and specified use qualify them as mutually exchangeable or substitutable. Generally speaking the geographical market is defined as the territory within which the enterprises in question feature in the demand and supply of goods and services and within which competitive relations are sufficiently homogeneous. Such a territory can be set apart from neighbouring regions in that clearly deviating competitive conditions apply to the latter.

To some extent market definition can be said to be based on the weighing of a variety of factors. In a market featuring homogeneous products in particular, it is not always possible to define the criteria governing market definition in unambiguous terms: sometimes the situation resembles a continuum, with one market segment blending into another. As the definition of the market is required at all times to be in sync with economic reality, an individual analysis of actual competitive relations is called for. The European Commission's Notice on the determination of the relevant markets in terms of common competition law"[1] serves as a point of departure in defining the relevant market (although it does not constitute a "hard and fast rule").

NMa is at liberty to depart from the general guideline set out in this Notice when defining a market (and sometimes has no choice but to depart from this informal standard). Moreover economic theory on the method of defining the relevant market is currently still in a state of flux. NMa seeks where possible to integrate this development in its analysis. An example is the introduction of the SSNIP test (which itself is a product of the US antitrust tradition) into European competition law. In this test minor hypothetical price fluctuations are used to analyse which products qualify as alternatives to one another, and should therefore be classified under the same product market heading.

As for geographical market definition, NMa looks at the degree to which the nature of a market brands it as local, regional, national or international. Allowance is also made for international competitive pressure in NMa's analysis in so far as this is a criterion for Dutch industry. It should be borne in mind, however, that there are certain industrial sectors in the Netherlands which are protected from international competitive pressure, such as the construction industry, the retail sector and forms of services supplied by professional practitioners. Here the nature of the relevant geographical market will tend to brand it as national or regional.

3.5.2 Scope for Entrepreneurial Conduct

Once the relevant market has been defined, the next step is to chart the actual competitive relations within that market. However, the Dutch economy comprises several sectors where applicable legislation and regulations strongly curtail the scope for competition, to the point of excluding it altogether. Where appropriate NMa makes allowance for this in its competition law analysis.

[1] *Commission notice on the definition of the relevant market for the purposes of community competition law, Official Journal of the European Communities OJ C 372, 9 December 1997.*

3.5.3 Dominant Position

"Economic dominance" is a crucial criterion to concentration control as well as application of Section 24 of the Dutch Competition Act.

- In the context of monitoring concentration, the question of whether concentration would result in the creation or enhancement of economic dominance on the part of the enterprises involved in the concentration is looked into.
- Section 24 of the Competition Act imposes a ban on abuse of a dominant position.

An undertaking or group of undertakings is deemed to be dominant in so far as it is in a position largely to act independently from its competitors, suppliers or end users. How does NMa determine in practice whether an undertaking or group of undertakings enjoys such power? The practice of concentration control is used to answer this question. A similar modus operandi is adhered to when it needs to be ascertained, in the context of Section 24 of the Competition Act, whether an undertaking can be said to enjoy a dominant position.

The question as to whether a concentration would result in a dominant position forming or being enhanced prompts an analysis of the position of the enterprises in question in the relevant market. To this end the market structure is charted. The market share serves as the point of departure for NMa's analysis. In so far as the enterprises in question only have a limited market share, a cursory analysis will usually suffice. However, things are different in the event of market shares hinting at the possibility that one or more enterprises could be set to obtain a significant position in the market in question. When this is the case, NMa looks closely into a range of other factors in order to determine what position the enterprises involved in the concentration occupy. These are some of the criteria which could be wielded (without purporting to be exhaustive or comprehensive):

- What is the ratio between the market shares of the undertaking involved compared with that of the nearest competitor? If the market shares of the enterprises involved are large compared with that of the competition, this could indicate that the former occupy a position of strength. The development of the market share over time is a further relevant criterion in this context: are there signs that the market share has recently expanded or shrunk? If the latter is the case, this could be an indication that the position of the companies involved is being eroded.
- Does the market qualify as a growth market, a stable market or a shrinking market? Provided there are no high legal, technical or economic entrance barriers, the parties will be more likely to be facing competition in a growth market than in a shrinking market.
- Do the parties have special technology and know-how at their disposal, and do they possess intellectual property rights which they could use to secure their market position?
- Do the parties have special access to sourcing and selling markets due to vertical arrangements or vertical integration?
- What is the financial striking power of the enterprises involved in the concentration?
- Do special entry barriers apply to the competition and would it be realistic to assume that there are potential competitors which are capable of entering the market?

3.5.4 Assessment of Abuse of a Dominant Position

A dominant position as such does not have to fly in the face of the provisions of the Competition Act, unless it or its enhancement is the result of a concentration while posing a significant impediment to actual competition.

However, Section 24 of the Dutch Competition Act prohibits the abuse of a dominant position. Although the Act itself does not provide examples of abuse, the accompanying Explanatory Memorandum does name a few, such as exploitation using extreme highly prices or a strategy of price-dumping aimed at pushing competitors off the market, unreasonable delivery conditions, the exclusion of customers from delivery, practising price discrimination, and tie-in selling.

When an undertaking which enjoys a dominant position in one market abuses this position of dominance to limit or prevent competition in another (derived or adjacent) market, this can also qualify as abuse of a dominant position, all the more so in so far as the undertaking itself also canvasses the derived or adjacent market in question. In network sectors such as telecommunication, cable television and energy supply in particular, market entry by competitors often hinges on gaining access to the network (or, in more general terms: the infrastructure).

3.5.5 Cartel Related Matters

Restriction of Competition in the Context of Section 6 of the Dutch Competition Act

The ban on cartels is reflected in Section 6 of the Competition Act. This Section may only be applied in the event that the undertaking is actually displaying the banned conduct. The question as to when an organisation qualifies as an undertaking has already been discussed in section 3.2 hereinbefore.

Section 6 of the Competition Act may furthermore only be invoked in the event of:

- an agreement,
- a resolution by an association of undertakings,
- concerted practice.

The interpretation of these terms as applied by NMa is identical to that under the EC competition rules. As soon as undertakings have reached agreement on making arrangements on their competitive conduct, this qualifies as an agreement. NMa also applies a broad interpretation to the notion of an association of undertakings, which therefore also extends to partnerships not having legal personality as well as to government-incorporated legal entities. "Concerted practice" is defined as a form of co-ordination between undertakings without culminating in an actual agreement. With this the interent risks of competition are consciously replaced by factual collaboration.

The next question which presents itself is that of whether an agreement is aimed at, or results in, competition in (part of) the Dutch market being prevented, restricted or distorted. What needs to be established first is whether an agreement serves the purpose of restricting competition. In so far as an agreement is aimed to restricting competition between parties or between them and their competitors as defined in Section 6(1) of the Competition Act, it must be deemed to be prohibited. In so far as it does not serve such competition restricting purpose, the next question is whether it results in restricting competition. Moreover any agreement which is aimed at or results in competition being restricted only comes under the ban imposed pursuant to Section 6 if it is shown to appreasiably restrict competitioin. The NMa has also stated on several occasions that a specific agreement did not come under the prohibition on cartels for other reasons.

Section 16 of the Dutch Competition Act: Dual Government Supervision

Section 16 of the Competition Act stipulates that the ban on cartels does not apply to agreements:

- which are statutorily subject to approval;
- which qualify for being declared non-binding, being banned or being nullified by an administrative authority;
- which have been achieved pursuant to any statutory obligation.

The underlying philosophy of Section 16 of the Competition Act is the prevention of conflicting rulings by different administrative authorities. As long as the mutual reconciliation between the Competition Act and other legislation has not been completed, section 16 of the Competition Act will continue to act as provisional relief preventing a collision between the powers of different administrative authorities.

When new legislation is created or existing legislation amended, this enables the legislator to make allowance for the prevailing regime as per the Competition Act so as to prevent future dual government supervision in this area. This is also the reason why this provision is of a temporary nature (it being scheduled to be scrapped with effect from 1 January 2003).

NMa applies a restrictive interpretation to Section 16 of the Dutch Competition Act in that it actually has to be a question of dual government supervision impeding the concrete application of the ban on cartels.

Section 17 of the Dutch Competition Act: Exemptions

Agreements coming under the ban on cartels may qualify for exemption. Such exemption is only granted in so far as specific positive effects are in evidence. The competition restricting arrangements are required to contribute improving the production or distribution or to promoting technical or economic progress. The enterprises are furthermore required to pass on a fair share of the resulting benefits to the consumers. Finally, the competition restrictions are required to meet the proportionality requirements while sufficient residual competition should be in evidence.

3.5.6 Policy in Relation to Control of Concentration

Definitions Governing Concentration Control: Introduction

In the context of the decisions passed and informal views presented in 1998, NMa has developed a policy vis-à-vis the question as to the way in which concepts and aspects as per the Competition Act relating to the application of NMa's monitoring of concentration should be interpreted and elaborated. This is all the more important given that it is the first time ever for many a Dutch undertaking to be confronted with concentration control, which could render it shrouded in uncertainty in places.

As the year under review progressed, a reasonably clear policy formed in respect of certain concepts and interpretations, as follows:

- the calculation of turnover in the context of the scope of concentration control (Section 29 of the Competition Act;
- agreements, decisions and conduct directly related to a concentration and necessary for the realisation thereof (Section 10 of the Competition Act);
- the acquisition of control by a venture capital company (Section 28(1) sub (c) of the Competition Act);
- requests for exemption to be granted pursuant to Section 40 of the Competition Act.

Calculation of Turnover

Geographical Allocation of Turnover (Section 29 of the Competition Act)

Over the past year a host of informal views have been solicited in respect of the issue of geographical allocation of turnover when applying the Competition Act. Generally speaking the point of departure is that an undertaking's turnover is to be allocated on the basis of the location of the customer of the goods or services. This approach is in line with the European Commission's Notice on the calculation of turnover[2].

Interim Transactions
The turnover achieved for the previous calendar year is taken into consideration when calculating the turnover of the undertakings in question. Allowance must also be made for any earlier concentrations of (one or more of) the undertakings involved during year (t) when calculating the turnover realised for the year (t-1). The following example illustrates this. Let us assume that undertaking A, having taken over undertaking B during year (t), proceeds with the acquisition of undertaking C one month later. This implies that the notification of the concentration between A and C must also include the turnover realised by undertaking B during year (t-1) as part of the turnover achieved by undertaking A during year (t-1).

Additional Restrictions Applying to Concentrations (Section 10 of the Competition Act)
Additional restrictions can be interpreted as conditions accompanying a specific concentration. The Competition Act stipulates that the prohibition of cartels as per section 6 does not apply to restrictions which are directly linked to a concentration and are necessary if the concentration in question is to be realised. The most frequently occurring additional restrictions which were subjected to assessment during the year under review related to competition clauses, whereby the seller has to undertake on the occasion of acquiring control to refrain from engaging in competition for a specific period of time. After all the acquiring party will need some protection if the full value of the assets being transferred is to accrue to it. This implies, inter alia, that it should be able to rely on the loyalty of its customers as well as utilise such know-how as it has acquired. However, the duration, geographical scope and scope of operations of this protection should remain confined to what is absolutely essential. The policy in this respect is that a maximum term of five years should be applied. As for the geographical scope, the rule of thumb is that this should be restricted to the territory in which the transferring party marketed its products or services prior to their transfer.

Venture Capital Companies (Section 28 of the Competition Act)
Several cases of acquisition of control by venture capital companies were reported to NMa in the course of the year under review. The question presented itself in this context as to how the statutory exception for such venture capital companies should be interpreted. The question as to whether such exception applies is relevant whenever a venture capital company acquired a controlling say in another undertaking. The Competition Act stipulates that the acquisition of control by a venture capital company is not to be regarded as concentration as per this Act provided the voting rights relating to participation are only exercised with the aim of securing the full value of the investment. It transpires from the Explanatory Memorandum that the legislator has envisaged capping the extent to which a venture capital can interfere in the commercial conduct of the undertaking which it controls if the exception is to apply. In view of the fact that this exception depends on the way in which a venture capital company actually exercised its controlling rights, NMa is not necessarily in a position to determine in advance whether the exception applies to a concrete case of acquisition of control. It is therefore primarily the responsibility of the enterprises in question to answer the question as to whether the exception applies or not. If this requirement was originally satisfied but has since ceased to, the exception ceases to apply from that moment onwards and notification is required to be made.

To date NMa has responded to questions put forward by venture capital companies by stating as its opinion that the exception applies in so far as the venture capital company refrains from interfering in the day-to-day management and commercial policy of the undertaking the control of which it is in the process of acquiring or has already acquired. In NMa's view the exception is not in conflict with the exercise by the venture capital company of shareholder rights which are logically vested in the shareholdership, such as being involved in decision-making on the appointment of company directors or the adoption of the financial statements.

Where there is doubt, enterprises are obviously at liberty to submit specific questions for the scrutiny of NMa for the latter's informal view. It furthermore transpired during the year under review that regular notification was often made in respect of proposed concentrations involving venture capital companies. Where this is the case, a standard competition assessment will be carried out.

Requests Pursuant to Section 40 of the Competition Act
Section 34 of the Competition Act prohibits the creation of concentrations unless and until notification has duly been made to the Director-General of NMa and a four-week period has expired. Section 40(1) of the Competition Act stipulates that the Director-General may grant exemption from the ban imposed pursuant to section 34 if there are pressing reasons to do so, pursuant to a request to that effect by the notifying party. This exemption makes it possible for enterprises to complete the concentration having been notified, for their own risk, before the said waiting period has expired; however, NMa will subsequently still carry out its concentration assessment. It follows from Section 40(3) that the concentration will need to be undone if permission is not granted. The Explanatory Memorandum to the Dutch Competition Act shows that a pressing reason would be the inflicting of irreparable damage to a proposed concentration as a result of having to comply with the waiting period. NMa ruled in response to this type of request on nine

[2] *Notice on calculation of turnover under Council Regulation (EEC) no. 4064/89 on the control of concentrations between undertakings, Official Journal of the European Communities OJ C 385, 31 December 1994.*

occasions in 1998, with three requests being granted while the other six were denied. Such requests have to date been granted in cases of moratorium of payment, acute financial problems and the threat of bankruptcy.

3.6 Settlement Mechanism

During the first year of being in operation as supervisory authority, NMa has encountered an unexpectedly large number of cases, far and away in excess of the original estimates of concentration notifications, complaints, objections and appeals and requests to be granted exemption. The graph below illustrates the numbers of requests for exemptions, complaints and provisional measure subject to penalty.

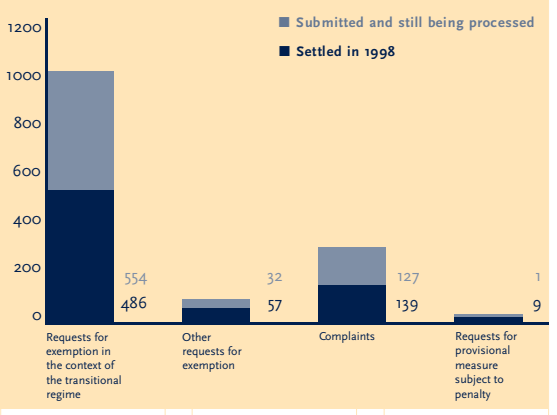

Figure 1: Summary of requests for exemption, complaints and provisional measures subject to penalty having been submitted to and settled by NMa.

3.6.1 Requests for Exemption

A total of 1,040 requests for exemption were submitted in 1998 in the context of the transitional regime, i.e. just under 700 more than the 350 which had been anticipated. The arrangements with respect to which exemption was applied for had already been in existence on the effective date of the Dutch Competition Act, the Dutch Act on Economic Competition not having prohibited them in the past. The lion's share of arrangements and schemes having been notified will continue to remain valid for the time being until such moment as NMa has issued its ruling on the request for exemption, which also implies that such arrangements will not come under the ban on cartel as per Section 6 of the Competition Act until such time as NMa has made its decision.
Most requests for exemption were received from the following industrial sectors:

- retail and wholesale;
- construction;
- the care sector;
- agriculture;
- transport;
- commercial services;
- culture, media and sport;
- the power sector.

Far and away the most requests to be granted exemption were received from the care, construction and retail sectors. The following examples of specific cases per sector serve to illustrate the type of competitive restriction for which the applicants have applied for exemption:

- retail and wholesale: franchise agreements and measures aimed at protecting the sector;
- construction: pooled agreements (entailing structural collaboration between contractors) and partnerships in the production of asphalt;
- care sector: a host of requests to be granted exemption in connection with agreements having been concluded between care insurers and suppliers of care services;
- agriculture: schemes and arrangements involving the cultivation of flowers and crops;
- transport: the joint provision of transport services;
- financial/commercial services: arrangements on the mortgage granting mechanism forming part of agreements having been concluded within this sector;
- culture and media: agreements on resale price maintenance in respect of magazines;
- power industry: agreements on the generation and distribution of power.

NMa made a concerted effort throughout the year under review to ensure that such requests for exemption as had been submitted should be completed. In many cases the information provided turned out to be insufficient to enable an adequate assessment to be made; NMa then has to ask additional questions and investigate the matter.

The majority of files which could not be completed in 1998 have now been supplemented to such extent as to enable a start to have been made on their substantive processing. When NMa has to ask for additional information, the terms are automatically extended as the data are insufficient to enable the careful assessment of the application.

In addition to having to complete such information as had been provided in the applications, NMa also worked hard on advising those having filed requests for exemption on alternative scenarios. For example, rather than turning down a request for an exemption, the applicant in question was asked to bring specific provisions of agreements into line with the Competition Act or ensure that prohibited arrangements would be scrapped. These actions were aimed at promoting compliance with the Competition Act. Issuing a provisional view is another example of an approach which is aimed at optimising the parties' own contribution to the process. This enables NMa to communicate its views without any legal consequences as such.

3.6.2 Complaints

As regards complaints handling, too, NMa has been applying a range of methods aimed at promoting compliance with the Competition Act. In addition to investigating complaints having been submitted followed by a ruling, NMa has in some cases - with the approval of the plaintiff - communicated such objections as it had established to the target company. In some cases this has prompted the latter to alter it conduct, thus eliminating the incompatibility with the Competition Act. All in all this has yielded the following picture. A total of 266 complaints were filed during the year under review (compared with the 150 or so which had originally been anticipated). Of the 139 complaints which were settled in 1998, six prompted the preparation of a report. A total of 46 complaints met with rejection while the other complaints which were settled during the year under review were either dropped by the plaintiff, with NMa's mediation often resulting in a solution being brought about which was acceptable to the plaintiff, or having to be declared inadmissible pursuant to Section 5 of Book 4 of the General Administrative Law Act of the Netherlands due to plaintiffs' repeated failure to produce adequate information. The majority of complaints were aimed against alleged abuse of a dominant position.

NMa also proceeded with the prioritisation of complaints handling, for example in terms of the sector concerned and the type and/or nature of the violation. The extremely large number of applications for exemption which were received during NMa's first year of operation has been an important factor in this. The Competition Act imposes strict terms on the processing of such applications (albeit it that it does not prescribe firm dates). In such a situation prioritisation is an absolute must if a proper capacity balance is to be maintained between the handling of complaints and the processing of exemption applications. Given NMa's limited capacity, it will be decided for each individual complaint whether the investigative effort would outstrip the expected result. NMa's limited resources and significant pressure of work has furthermore prompted it to assign realistic processing terms to complaints being handled.

3.6.3 Provisional Measure Subject to Penalty

The Competition Act offers the opportunity to impose a provisional measure subject to penalty. This has been done in view of the fact that the nature of infringements of the Competition Act can be such as to render it unacceptable for the alleged victim to have to await the NMa's penalty ruling or its imposition of an obligation on the guilty party. In a case of refusal to supply or selective price-dumping, for example, the victim in question could easily have been pushed off the market by the time the penalty ruling takes effect.

Stringent requirements apply to the granting of a request for imposition of a provisional measure subject to penalty. These can be summarised as follows:

- it has to be a matter of a prima facie violation;
- it has to be a matter of pressing urgency in that the measure must be necessary in preventing irreparable damage or loss which cannot be redressed in the form of loss compensation or through another suitable means.

The Explanatory Memorandum to the Dutch Competition Act notes that in view of the nature of the provisional measure and the stringent conditions to which this mechanism is subject, it may be expected to be applied on a conservative scale. NMa's implementation practice has corroborated this: of the seven requests for a provisional measure to be imposed, only one was granted.

3.6.4 Control of Concentration

Once a notification of a proposed concentration has been received by NMa, a decision is taken, essentially within the next four weeks, as to whether the concentration in question should be licensed - something which will be the case whenever NMa has reasons to assume that a dominant position would be created or enhanced as a result of the proposed concentration. A total of 154 notifications of proposed concentrations were submitted to NMa in 1998 (a great deal more than the 50 on which the organisation had counted), 139 of which had been resolved at year-end.

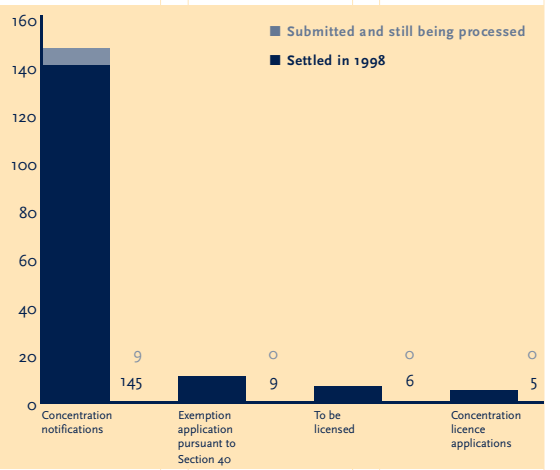

Figure 2: Concentration supervision summary.

The proposed concentrations of which NMa was notified covered a large number of sectors making up the Dutch economy, some of which were represented relatively frequently such as the construction and contracting industry, the power, gas and water production and distribution sector, Information Technology and the related services in the broadest sense, the (food) retail industry and the telecommunication sector.

During the year under review it was decided on six occasions that a licence would be needed. Once this has been decided, the parties between which the proposed concentration is to take place are required to submit an application for a licence to NMa. This happened in five instances in 1998.

In principle NMa is allotted a 13-week period for carrying out its investigation based on the application for a licence. We would point out that the General Administrative Law Act caters for suspension of the aforementioned terms of four and 13 weeks in the event that NMa requires additional information from the parties between which the proposed concentration is to take place if it is to perform its assessment.

NMa's Concentration Control Department communicates its provisional position to the parties and to any interested third parties in or around the eighth week after having received the application. This position is included in its deliberations, which contain an assessment based on such investigation as it has by the completed, and may end with a provisional conclusion vis-à-vis the question as to whether the proposed concentration would or would not cause a position of economic dominance to be created or enhanced. The deliberations constitute a confidential report, which is only communicated to the parties and others having a direct interest.

Depending in part on the requirements of the parties or of interested third parties, the next step consists in the organisation by NMa of a hearing, to be held no later than during the tenth week of the application for a licence having been received by NMa. This hearing has nothing as such to do with the obligation to hear the parties and any interested third parties pursuant to Sections 7 and 8 of Book 4 of the General Administrative Law Act. There are several reasons why it can be helpful to hold such a hearing. It enables the Concentration Control Department to take cognisance of the positions of the parties and of interested third parties. A hearing serves the purpose of gathering information and views in order to be able to make a balanced assessment of the case at hand.
A further advantage of a hearing is that it enables the participants immediately to respond to one another's points of view. This interaction makes it possible for NMa to gain an in-depth insight into the issue at stake. NMa prepares its final decision, making due allowance for such views as have been presented at the hearing, indicating whether the licence is to be granted, denied or granted subject to specific restrictions or conditions.

NMa takes the view that the parties concerned should be consulted as soon as possible following the hearing on any restrictions and/or obligations to be included in its final decision, experience having shown that the process of arriving at obligations can be a time-consuming and complex exercise.

Concentration Control Turnover Levels

Section 29 of the Dutch Competition Act stipulates that the provisions regarding concentration supervision apply to concentrations in whose context the combined turnover achieved for the previous calendar year by the undertakings involved exceeded the NLG 250m mark, with at least two of the parties involved in the proposed concentration having realised at least NLG 30m each in the Dutch market. The diagrams below show the distribution of the number of concentrations in terms of the combined turnover of the enterprises involved (Figure 3) and in that of Dutch sales realised by the smaller or smallest of the enterprises involved (Figure 4), based on the turnover data of a total of 143 concentrations having been notified (of which four were subsequently dropped).

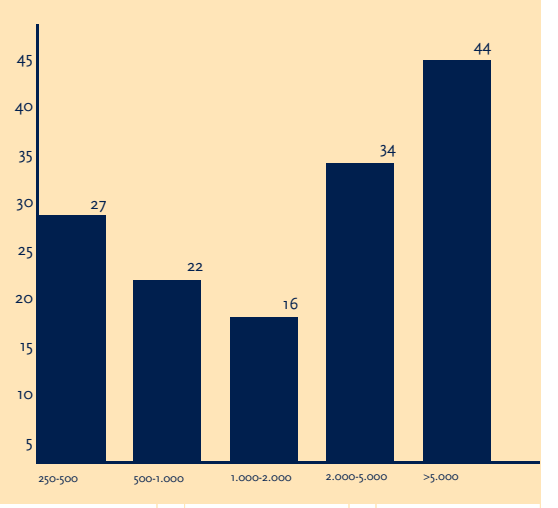

Figure 3: Distribution of number of concentrations in terms of combined turnover of enterprises involved (in millions of Dutch guilders).

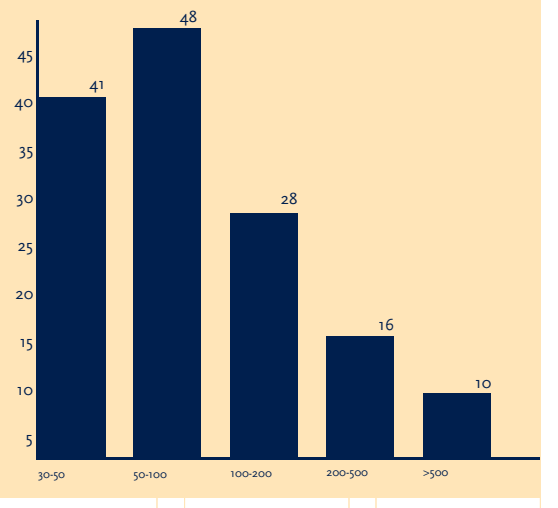

Figure 4: Distribution of number of concentrations in terms of Dutch sales of the smaller or smallest of the enterprises involved (in millions of Dutch guilders).

Concentration Control by Foreign Competition Authorities: "Multiple Notifications"

The Council of Ministers of the European Union agreed on 30 June 1997 that the Member States would maintain a record of the numbers of concentrations having been notified in their own Member States which were also up for notification in other EU Member States. For this reason a special question has been included in the "Concentration Notification Form".

Of the 154 concentration notifications which were filed with NMa in 1998, 19 had also been filed with foreign competition authorities, as follows:

Notifications		*Total*
Notification in two Member States		**10**
• Netherlands and Germany	8	
• Netherlands and Belgium	1	
• Netherlands and United Kingdom	1	
Notification in three Member States		**6**
• Netherlands, Germany and Belgium	2	
• Netherlands, Germany and Italy	2	
• Netherlands, Germany and United Kingdom	1	
• Netherlands, Italy and Portugal	1	
Notifications in more than three Member States		**3**
• Netherlands, United Kingdom, Ireland, Germany, Belgium, Greece and Spain	1	
• Netherlands, France, Greece, Italy, Ireland, Portugal and Sweden	1	
• Netherlands, United Kingdom, Germany, Belgium and France	1	

3.6.5 Administrative Appeal

As the Director-General of NMa is an administrative authority, the rulings (and their preparation) are subject to the General Administrative Law Act of the Netherlands. This implies among other things that prior to lodging an appeal with the courts, an administrative appeal has to be filed with the Director-General of NMa against a ruling. Rulings in response to notification of a concentration and to application for a licence have been excluded from this as per the Competition Act.
The administrative appeal is required to be filed within six weeks of publication of the decision against which it is aimed. Except where special circumstances apply, failure to comply with this requirement renders the administrative appeal inadmissible.

The file is made available for inspection by the relevant interested parties for the duration of the appeals procedure, with interested parties being invited to respond orally. As they are under no obligation to do so, a hearing is not always organised.

The Advisory Committee on Administrative Appeals advises on appeals aimed against decisions pursuant to which a fine or provisional measure subject to penalty is imposed citing infringement of the ban on cartels or the ban on abuse of a dominant position. Reference is made to chapter 2 of this Annual Report for the names of the members of this eight-strong Committee, of whom at least three members sit in on each individual case. Prior to issuing an advice the Advisory Committee invites the interested parties to be heard.

In principle the decision on the administrative appeal follows within six weeks of receipt of the appeal. A ten-week term applies in the event that the Advisory Committee is required to issue its advice. However, this term is suspended if the appeal turns out to be incomplete. The General Administrative Law Act furthermore offers the option of granting a one-off extension by four weeks. However, some cases are sufficiently complex as to take more time to be dealt with because they require meticulous preparation. In the event that the interested parties disagree with such extension of the term, they have the option of lodging an appeal with the Rotterdam Court (something which, it should be added, did not occur in 1998).

A total of 36 administrative appeals were filed against decisions of the Director-general of NMa in 1998, of which two were subsequently dropped while ten were completed during the year under review. One administrative appeal was ruled inadmissible as the parties were shown not to have an interest in the related ruling. Two appeals were declared to be invalid, with four being ruled partially valid and three completely valid.

Some of the (partial) validity statements related to appeals aimed against decisions concerning transitional law, in addition to which new facts and/or circumstances came to light during the review which resulted in the objection being validated. It is expected that the number of administrative appeal will show a considerable increase in 1999 in view of the large number of requests for exemption to be settled this year.

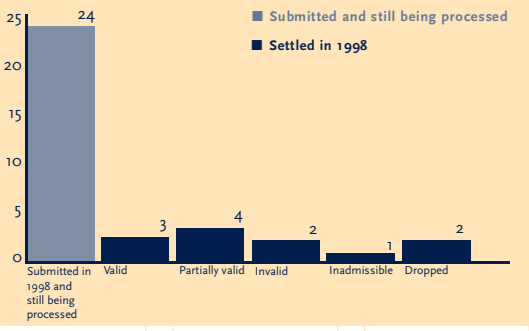

Figure 5: Rulings on administrative appeals.

3.6.6 Judicial Appeal and Request for Provisional Relief

A judicial appeal was lodged against a ruling by the Director-General of NMa and/or a petition for provisional relief was sought from the (President of) Rotterdam District court on ten occasions during the year under review. In three instances the appeal was dropped by the parties. On two occasions the President of the Court handed down a ruling on a petition to be granted provisional relief, denying the request in both instances. No Court ruling was issued on the other five cases during the year under review.

Johanna Westerdijkplein 107
2521 EN The Hague
P.O.BOX 16326
2500 BH The Hague
The Netherlands
Telephone +31 70 330 33 30
Fax +31 70 330 33 70
http://www.nma-org.nl