Annual Report 2002 NMa and DTe

Nederlandse Mededingingsautoriteit

NMa

Key figures NMa 2002

Reports and fines	2002	2001
Number of reports based on a reasonable suspicion that the Competition Act had been contravened	9	3
Number of cases in which fines were imposed	6	4
Number of fines	21	9
Total fines in €	99,600,000	158,823 (NLG 350,000)
Exemptions and complaints		
· Processed applications for exemptions from the prohibition of cartels	45	165
· Processed complaints with regard to contraventions of the Competition Act	187	145
Concentrations		
· Notifications of mergers, acquisitions and joint ventures (concentrations)	77	135
· Decisions on notifications of concentrations	66	138
· Licence required for concentration	1	2
Office of Transport Regulation [Vervoerkamer]		
· Cases under consideration relating to municipal transport companies	8	-
· Number of cases settled by means of a ruling	3	-
DTe		
· Method decisions	17	13
· Implementation decisions	329	368
· Enforcement decisions	29	28
· Advice to the Minister of Economic Affairs	20	41
· Total	395	450
Administrative appeals		
· Processed administrative appeals in competition cases	62	41
· Processed administrative appeals in DTe cases	125	107
Staff		
· Number of employees at 31 December (on a full-time basis)	303	187
· Average age of staff	36	36
Budget in €	**32 million**	**27 million**

Annual Report 2002 NMa and DTe

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FOREWORD

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Foreword

This annual report presents the results of the paths taken by NMa, including DTe and the Office of Transport Regulation, to further consolidate enforcement of the Competition Act [*Mededingingswet*], the Electricity Act of 1998 [*Elektriciteitswet 1998*], the Gas Act [*Gaswet*] and the Passenger Transport Act of 2000 [*Wet personenvervoer 2000*] and to ensure the effective operation of market forces in the Netherlands. The paths taken were mapped out before 2002 by the first Directors of NMa and DTe, Mr A.W. Kist and Mr J.J. de Jong. Both accepted new positions at the beginning of 2003.

In this annual report NMa accounts for the way it has used the instruments at its disposal in 2002 to ensure the operation of markets. In addition, this annual report provides information on the development in the NMa's work. Finally, the annual report aims to be a reference work for entrepreneurs, professionals in competition law, academics, students and other interested parties.

In 2002, the results of a number of investigations which where recently started into infringements of the Competition Act, such as those in the construction industry, were not all publicised. Complex investigations which were started in 2000 and 2001 were also completed. Finally, new investigations were started, the results of which will be made public in 2003.

The investigation of infringements and the implementation and enforcement of competition rules and energy legislation is now well established. Experience and case law is developing. In the year under review, NMa also chose to invest in the organisation and technology that supports investigations. With regard to investigated practices and the sanctions imposed, the trend towards achieving better results will prove to be of a lasting nature. To ensure that this is the case, it is important that the extension of NMa's powers, which was requested and which was raised during the evaluation of the Competition Act and during the parliamentary inquiry into the construction industry, is realised. In DTe's area of operation, the extension of its powers, for instance to impose fines, has contributed to the effective implementation of its supervisory duties.

Strengthening NMa's ability to act is also important in relation to the new European directive on the implementation of the prohibition of cartels and the prohibition of the abuse of dominant positions contained in the EC Treaty. The new rules will take effect on 1 May 2004. The possibility of obtaining an exemption from the prohibition of cartels beforehand will no longer apply, while infringements can be investigated more intensively. It is not desirable that the Netherlands, as an EU Member State, adheres to a regime in the long-term which deviates from this. After all, it is essential for Dutch companies that the level playing field required for healthy and effective competition is realised at the level of the internal market and that they are not confronted with different regimes. The ultimate aim of action taken by NMa is not to impose penalties for infringements, but to ensure effective competition. It is for this reason that NMa wishes to utilise the right instruments in the area of both competition regulation in a visible manner to achieve optimal effects on the market. The accelerated integration of NMa and OPTA, which has been proposed, will increase the effectiveness of regulation of the postal services and telecommunications markets.

An increasing number of tasks, in particular sector-specific tasks, have been assigned to NMa. In this regard, it is important that NMa is sufficiently well-equipped with resources and, as was mentioned above, with legal instruments to ensure fair and effective competition or to bring this about by means of regulation. This applies generally and is all the more pressing where society has a considerable interest in regulation and therefore also has high expectations of NMa, for instance in the area of transport, but also in the area of energy. NMa is keen to realise these high expectations.

We wish to thank all members of NMa's staff for their contribution to ensuring that markets functioned well in 2002.

Mr R.J.P. Jansen
Acting Director-General of the Netherlands Competition Authority

Mr G.J.L. Zijl
Director of the Office of Energy Regulation

Summary

Part 1 • NMa in 2002: Central Issues

The first part of this annual report deals with the way NMa carried out its mission and describes the objectives and the strategy of NMa and its chambers in 2002.

With the aid of a management tool and the application of the Balanced Scorecard, performance and processes were analysed from four perspectives: the *Result* perspective, the *Customer/Environment* perspective, the *Owner's* perspective and the *Internal Organisation* perspective.

This analysis includes, for instance, with the effects of the Competition Act and NMa and the speed of NMa's processes. The input necessary for carrying out its duties, namely staff and funding, were also emphasised. In addition to recruitment and selection, training, and other characteristic elements of NMa's personnel policy, NMa's financial accountability is discussed.

The political and social framework within which NMa operates is subject to continuous change. For this reason, recent and future developments which affected NMa's tasks and relevant legislation are discussed briefly.

Part 2 • Objectives and Results per Task

The second part discusses the results of NMa/DTe/Office of Transport Regulation in relation to each of their tasks. Parts of these tasks, such as imposing sanctions for contraventions of the law and monitoring conditions applicable to concentrations (remedies) are discussed in detail.

The sectors that are given special priority by NMa are dealt with in separate paragraphs.

The intermezzo 'Competition Law and Prices' deals with the effects of the Competition Act and NMa's activities. Attention is given to both the economic effects of competition regulation and the social benefits of competition regulation.

Part 3 • Developments in Practice

The third part deals with developments in practice. The formal legal position of consumers in relation to competition cases dealt with by NMa is discussed. In addition, court rulings which are important to NMa's practice and a number of developments in practice, in particular in relation to concentration control, are discussed.

Part 4 • Decisions

The fourth part of this annual report provides a summary of NMa's decisions and an overview of the decisions taken by NMa and court rulings in competition cases in 2002. Before this the formal process from guidelines, to decisions and to appeals to the Netherlands Supreme Court is described.

PART I NMa in 2002: Central Issues

Mission, Objectives and Strategy

Mission

NMa's mission: Making markets work

Making markets work. This, in short, is the mission of the Netherlands Competition Authority. In practice, this mission is put into effect by monitoring markets and, where necessary and possible, by 'creating' markets through regulation.

NMa, including its chambers, the Office of Energy Regulation (DTe) and the Office of Transport Regulation (currently being set up), strives to bring about effective competition which benefits consumers and businesses. NMa throws itself into the breach for consumers' freedom of choice and opportunities for companies to compete.

A market system that functions well, in which supply and demand are matched effectively and fairly, contributes to lasting economic development. A competitive environment stimulates innovation and promotes the competitive strength of the private sector in the Netherlands. In addition, competition contributes to optimising the price/quality ratio of goods and services, from which consumers benefit.

Markets do not always function properly. The inadequate operation of market forces and distorted competitive relationships can have various causes. NMa gives attention to the behaviour and market position of companies: agreements between companies (cartels) and companies which abuse their dominant positions impede or eliminate competition. In addition, dominant positions which are the result of mergers or acquisitions may obstruct the proper operation of market forces. Sometimes natural monopolies exist, as in the case of the energy sector and other network sectors. By definition, the operation of market forces in these sectors is inadequate and consumers have insufficient freedom of choice. Effective regulation and effective regulation are necessary in such cases.

Where competition is possible, competition rules and regulation by NMa's apply. In certain sectors, the legislator may have good reasons for limiting or excluding competition through legislative frameworks. The reasons for this may be the public interest, such as protecting the environment or public health. Legislative frameworks may also be created because a sector is in a period of transition towards becoming a competitive market. In the case of the healthcare sector, for instance, the legislature has increased the opportunities for competition to bring about a market which takes more account of the wishes and preferences of patients. Not all parts of the healthcare sector are subject to competition at the moment.

Objectives

Ensuring that markets function well. NMa realises this mission by setting objectives for general competition regulation and for sector-specific regulation. NMa's objectives are based on the tasks assigned to it in the Act.

Objectives of general competition regulation

NMa was set up when the Competition Act took effect in 1998. The Competition Act assigns to NMa the task of taking action against cartels, against the abuse of dominant positions and against mergers and acquisitions (concentrations) which result in dominant positions that restrict competition.

Objectives of sector-specific regulation

The Office of Energy Regulation (DTe) regulates access to energy transmission and distribution networks, in accordance with the Electricity Act of 1998 and the Gas Act and, where possible, promotes competition on the energy markets. DTe's objective is to ensure efficiency *and* quality in the interests of consumers. The guiding principle is to stimulate the operation of market forces, where possible, and, where necessary, to simulate the effects of the operation of market forces.

The objective of the Office of Transport Regulation is to promote fair access by companies to certain transport markets and the facilities essential for this. The Office of Transport Regulation is currently in the process of being set up. Since 1 January 2000, the Office of Transport Regulation has supervised municipal transport companies in the Netherlands in accordance with the Passenger Transport Act of 2000 [*Wet personenvervoer 2000*]. This chamber of NMa will also carry out tasks assigned to NMa in the Aviation Act [*Wet luchtvaart]* and in the Railways Act, which are currently being prepared.

Strategy in 2002

NMa's strategy in 2002 was based on the key values of effectiveness, decisive action and authority.

NMa's work is tailor-made. NMa has various instruments for intervening in the market and stimulating compliance with the Competition Act. These include both severe and less severe instruments. The following is a selection from NMa's 'toolkit'. If NMa ascertains that competition rules have been infringed, sanctions may be imposed, but sometimes NMa chooses to issue a warning. NMa may refuse to grant an exemption for a competition agreement, but may also enter into consultation with the companies to amend the agreement in question. NMa may prohibit a merger, but in certain cases may take less far-reaching action by accepting changes to the transaction (remedies). DTe makes use of regulatory instruments and, by carrying out audits, ensures that energy companies have adhered to the rules. By means of guidelines, brochures and issuing information, NMa provides clarity with regard to what is and what is not permissible and how instruments for general competition regulation and sector-specific regulation will be applied.

Through its interventions, NMa aims to achieve optimal effects. The direct effects of its interventions are not (yet) measurable in all cases. This annual report will discuss the immediate effects of the regulation of concentrations and the effect of the Competition Act and NMa in general.

Part 2 page 52
Competition Act and Prices

NMa's staff and resources are deployed in such a way that the effect of action taken by NMa is maximised. The intended effect on competition is an important criterion in deciding which instrument or which combination of instruments NMa uses. In addition, each assessment is made within the context of the individual case: the existing regulations, the market structure and its development, and the market position of the companies in question. The required speed with which NMa must intervene also plays an important role.

Decisive action requires an alert response and anticipation of distortions of competition and of market developments, so that effects can be achieved as quickly as possible and unnecessary damage can be avoided. NMa is aware that the decisiveness of its action must correspond to a social need. In this regard, NMa is open to external warnings which enable it to track down infringements of competition rules.

At the same time, NMa must be a respected authority. This is important if it is to have influence and be effective in the long term. This requires firm, transparent and consistent implementation of competition regulation and regulatory policy.

Results in 2002

General competition regulation in 2002

In 2002 NMa focused on investigating cartels, in particular in the petrol, construction and banking sectors.

Part 2 page 37
Imposition of fines

NMa imposed fines for the discount campaign coordinated by Texaco against the arrival of a Tango filling station in Nijmegen. NMa has followed developments on the market for automobile fuels closely for some time. In mid-2000, NMa started an investigation into agreements and the practices of oil companies which possibly restricted competition. In 2002, NMa gave the market players the opportunity to present their opinions with regard to the intention announced at the end of 2001 to revoke the application of the European exemption for vertical support agreements between oil companies and filling station operators. In addition, NMa carried out further research into the effect of this proposed intervention. In March 2003, on the basis of this research, NMa concluded that there was insufficient evidence, in its opinion, that prohibiting the support system would result in lower retail prices. NMa is no longer convinced that this measure would have the intended effect, namely increased competition between the companies. For the time being, it has been decided not to intervene in the petrol sector, but to monitor the sector in the coming years.

At the end of 2001, considerable social and political unrest arose following indications that cartels had been formed in the construction industry, possibly on a very large scale. The parliamentary inquiry into the construction industry was an important consequence of this. At the beginning of 2002, NMa set up a special Construction Sector Taskforce to investigate infringements of the Competition Act in the construction industry. In 2002, a reasonable suspicion that the prohibition of cartels had been infringed was recorded on five occasions. The sanctions procedures which followed this were concluded in 2003. In 2003, the investigation was continued with full force.

Part 2 page 39
Investigation into cartel infringements in the construction industry

The financial sector, which plays a central role in the economy, is characterised by a very high degree of concentration and a high degree of opaqueness and cross holdings. For these reasons, the sector was the subject of a systematic investigation. The investigation into payment transactions in the Netherlands and the market position and practices of Interpay was intensified in 2002. Interpay was set up and is fully owned by eight banks in the Netherlands and is the sole provider in the Netherlands of support services, such as debit-card payments, smartcard payments, payments by credit card and giro transfers. The investigation resulted in a report in April 2003 which set out the reasonable suspicion that Interpay had charged excessive tariffs and, by doing so, had abused its dominant position and that competition between the banks is restricted by the fact that Interpay operates on behalf of the banks as the central procurement agency for network services for debit-card transactions.

Part 2 page 43
Research into the financial sector

In 2002, NMa also concluded its investigations into cartel agreements in the bicycle industry, the mobile telephony industry and the cleaning services industry. The report on five mobile telephone operators resulted in the imposition of fines totalling € 88 million in December 2002. In 2002, NMa also imposed fines for the use of an exclusionary system and for the refusal to deliver goods in the veterinary pharmaceuticals sector, which constituted an infringement of the prohibition of cartels. In total, fines amounting to € 99.6 million were imposed in 2002.

Part 2 page 37
Imposition of fines

At the beginning of 2002, NMa introduced a leniency scheme and set up a Leniency Office, with the aim of increasing the likelihood of exposing cartels. Through the publication of the Leniency Guidelines, NMa made it clear that companies which inform NMa of their cartels and cease participating in these cartels will be eligible for a reduction in their fines or for fine immunity under certain conditions.

Part 2 page 33
Granting leniency

In the area of concentration regulation, NMa is carrying out further work to make its method of assessment transparent. As a result, companies will be able to make a better assessment of mergers and acquisitions that NMa will permit and those that it will not

permit. In 2002, NMa published guidelines for a framework in relation to commitments (remedies) which NMa can attach as restrictions and instructions to its approval of a concentration. In addition, NMa has published a memorandum on the way it views the consequences of concentrations in the energy sector. In 2003, research into the energy sector will be continued.

Part 3 page 81
Guidelines for Remedies

Sector-specific regulation in 2002

In 2002, DTe started preparations for the second regulatory period, which will introduce, for instance, yardstick competition and regulation of the quality of distribution networks and grids. DTe is also preparing for its tasks in relation to the opening of the market for small consumers, which is expected to take place in 2004. As of that moment, these consumers will still be tied to a single energy supplier, with the exception of the supply of electricity generated by sustainable means. In addition, DTe has worked at developing a proactive and consistent supervisory policy.

On 1 January 2002, the first supervisory duties within the framework of the Passenger Transport Act of 2000 took effect. As of that moment the Office of Transport Regulation, although formally still in the process of being set up, became operational within NMa. The Office of Transport Regulation currently supervises municipal transport companies in the Netherlands.

Priorities

In the deployment of its available resources, NMa must set priorities. This applies particularly to the detection of infringements of the prohibition of cartels and the prohibition of the abuse of dominant positions.

In setting its priorities, NMa asks the following questions:

- What is the importance of the investigation to the Dutch economy?
- What is its social importance and its importance to consumers?
- What is the seriousness of the infringement?
- How likely is it that NMa will be able to establish that an infringement has been committed?
- Is action taken by NMa efficient?

In setting priorities for its activities, NMa therefore focuses on consumers and the advantages to consumers of its actions. Through its Information Line, NMa receives questions and reports from consumers, which may result in an investigation. In 2002, NMa set up a Consumer Desk on its website, which was updated at the beginning of 2003. The position of consumers in proceedings before NMa is dealt with elsewhere in this annual report.

Part 3 page 73
Position of the Consumer in Procedures

In 2002, considerable capacity was deployed for the investigation of possible infringements in the construction industry. In December 2002, NMa published its NMa Agenda 2003. With regard to concentration regulation, NMa announced in this document that it would focus this year primarily, although not exclusively, on concentration regulation in the construction industry, the healthcare sector, the energy sector and the financial sector. NMa's intentions in other areas are also included in the NMa Agenda 2003.

Overview of Performance

Balanced Scorecard

In order to manage its business processes and in the interests of accountability, NMa measures the 'pulse' of the organisation. The Balanced Scorecard was chosen as a means of providing insight into NMa's performance in relation to critical success factors. These are factors which are crucial to the operational success of NMa. NMa's Balanced Scorecard is being worked out in more detail and will make it possible to keep a more sensitive finger on the pulse of the organisation.

The NMa has defined its critical success factors from four perspectives: the *Result* perspective, the *Customer/Environment* perspective, the *Owner's* perspective and the *Internal Organisation* perspective.

Critical success factors for each perspective

Result perspective
- Proactive
- Outcomes
- Familiarity with NMa and competition law

Customer/Environment perspective
- Customer satisfaction
- Quality of decision-making
- Duration of proceedings

Owner's perspective
- Planning versus realisation
- Resource management

Internal Organisation perspective
- Attractiveness of NMa
- Innovative strength
- Good employer

For NMa to be able to measure its performance against the critical success factors, measurable performance indicators have been defined. A number of performance indicators are already measured and used as management and planning instruments. In this annual report, the performance measurement based on the Balanced Scorecard is stated under the respective topic.

Result perspective

From the *Result* perspective, attention is given to the action taken by NMa and society's expectations in this regard.

Proactive

NMa measures the increase in its 'proactive' activities, the activities which are not 'demand driven'. In 2002, NMa's aim was at least to achieve further growth in these activities compared to the previous year. The most important proactive activity, carrying out investigations into infringements of the Competition Act, increased sharply from six investigations in 2001 to 28 investigations in 2002.

Effects

NMa conducts research into the effects (outcomes) of the Competition Act, NMa and its activities. It appears from the evaluation of the Competition Act, commissioned by the Ministry of Economic Affairs, that the Act has already affected the behaviour of companies within a relatively short period.[1] The effects differ with regard to their size and timing and

1 *NEI. Eindrapport evaluatie mededingingswet [Final Report on the Evaluation of the Competition Act]. Rotterdam 2002.*

depend on the sector, the type of infringement and the intervention under competition law. Although the number of observations is insufficient to draw the conclusion that the effect of action taken under competition law is measurably favourable, it is important to note that nowhere has the short-term effect proved to be unfavourable. The parts of this annual report entitled 'Competition Law and Prices' discusses the effect of the application of the Competition Act and the effect of the existence of NMa and action taken by NMa.

Part 2 page 52
Competition Act and Prices

Familiarity with the rules

From the *Result* perspective, it is also important that companies and consumers are familiar with the competition rules and the regulation exercised by NMa. Public awareness of what is and what is not permitted and how NMa can be called upon to ascertain whether competition is impeded is an important means of promoting compliance with the Competition Act.

From the investigation carried out within the framework of the evaluation of the Competition Act, it appears that the public is generally aware of the Act and NMa in general and that companies take the Act into account. Amongst smaller companies and companies in sectors which have not (yet) been the subject of a decision by NMa, awareness is less widespread. The evaluation report therefore recommends providing information on the Act, focused particularly on smaller companies and sectors in which certain aspects of the Act have possibly not received sufficient attention. Research published in 2002 carried out by the Vrije Universiteit also shows that there is still scope for improvement with regard to the provision of information by NMa to companies.

External communication

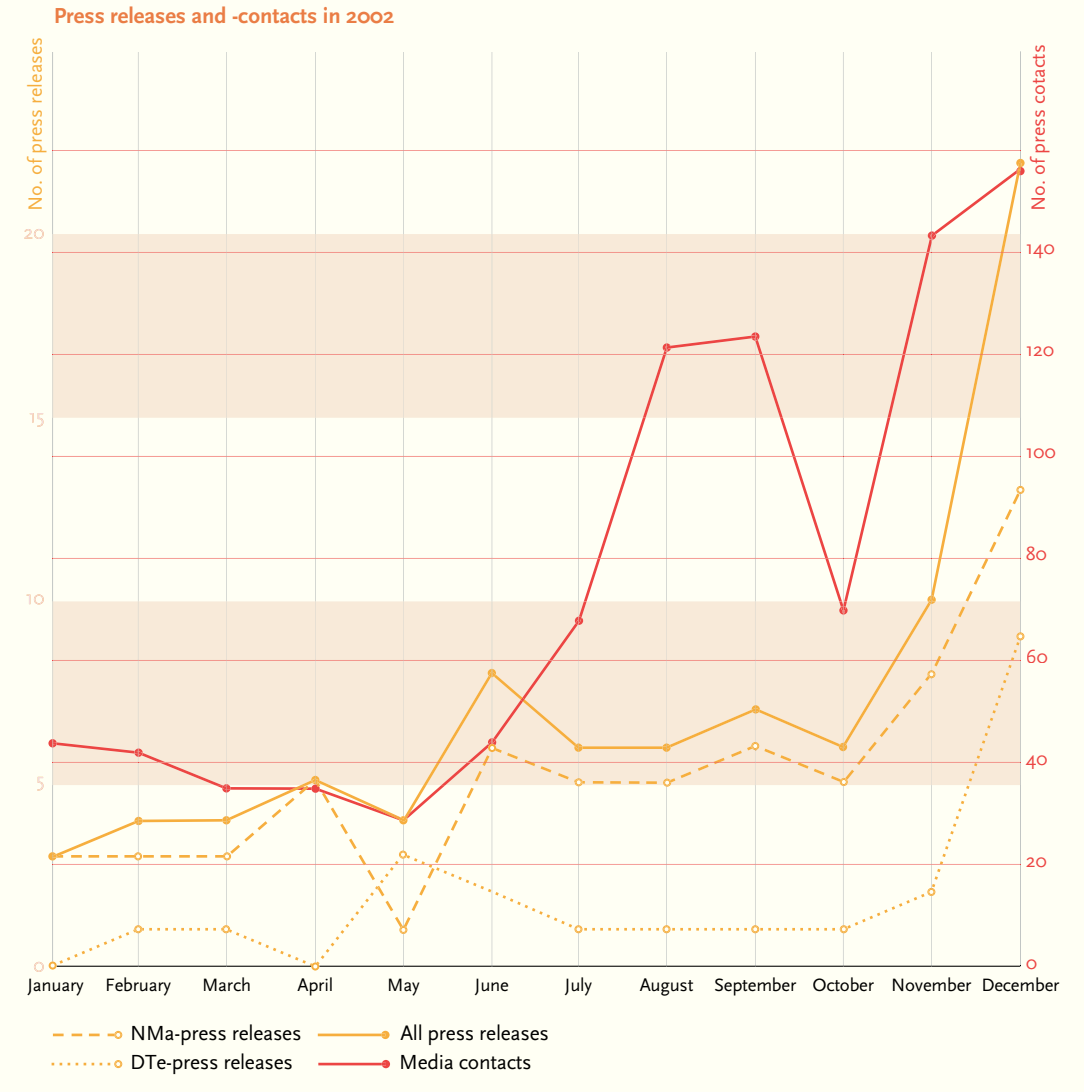
An important aim of NMa's external communication is promoting compliance by companies with competition rules and sector-specific rules. In addition, through its communication NMa accounts to society for its activities and receives information from society. NMa provides information on the applicable rules and the way it applies these in various ways.

In 2002 NMa modernised is own website and that of DTe, which were launched at the beginning of 2003. A special area has been set aside on the websites to provide consumers and companies in the small and medium-sized enterprise sector with information. In addition, NMa publishes brochures, which were revised in 2002, guidelines on the content and application of competition rules and its decisions. All this information is available from the websites.

DTe provided information on its policy, current developments and current proceedings in its magazine *EnergieFocus*. *EnergieFocus* appeared four times in 2002 and is currently being evaluated. At the end of 2002, NMa introduced its own quarterly magazine *'NMagazine'*. The magazine contains articles on matters in which NMa is or was involved and provides an insider's view of NMa.

Media contacts

For NMa, issuing press releases is a way of providing transparency and accounting for the decisions it takes and investigations it concludes. In 2002, NMa issued a total of 85 press releases, of which 63 related to NMa and 22 to DTe. Partly as a result of these press releases, NMa had 914 contacts with the press. The number of press contacts was greatest in August and September and in November and December. This can be explained by the fact that in these periods the public hearings of the parliamentary inquiry into the construction industry were held, the final report of this inquiry was published and NMa issued a large number of press releases.



Contacts NMa/DTe Information Line per Quarter

1st Quarter	Email	Telephone	
DTe	83	469	
NMa	226	610	
	309	1079	1388

2nd Quarter	Email	Telephone	
DTe	180	367	
NMa	307	503	
	487	870	1357

3rd Quarter	Email	Telephone	
DTe	219	259	
NMa	423	454	
	642	713	1355

4th Quarter	Email	Telephone	
DTe	285	262	
NMa	493	406	
	778	668	1446

Total 2002			5546

Information Line

An important instrument in communication and the provision of information is NMa and DTe's Information Line. Questions from companies and consumers are answered by telephone and email. The Information Line processed more than 5500 contacts in 2002. In addition to answering questions on competition and energy regulation, the Information Line also received information on alleged restrictions on competition.

The Information Line receives and answers many questions posed by private individuals and companies with regard to the liberalisation of the energy markets and complaints regarding electricity grid and gas network managers and energy suppliers. In 2002, considerable attention was given to answering these questions from the public. Approximately 60% of the total of 1940 questions regarding the energy markets were asked by private individuals and business customers and the remaining 40% were asked by consultants, government organisations and energy companies. Approximately 40% of the questions related to the (level of) energy bills.

Customer/Environment perspective

The *Customer/Environment* perspective highlights the expectations of 'customers' which NMa deals with and therefore focuses on aspects of service, such as the speed with which NMa produces its products.

Turnaround time

The turnaround time of NMa's processes and measuring these received attention during the evaluation of the Competition Act. The researchers recommended making improvements and annual reporting on turnaround times in NMa's annual report. In 2002, NMa made improvements. NMa measures the extent to which its procedures comply with statutory terms derived from the Competition Act and the General Administrative Law Act [*Algemene wet bestuursrecht*].

The generally applicable terms of the General Administrative Law Act apply to various procedures. The generally applicable terms of the General Administrative Law Act appeared to be of subordinate importance in relation to NMa's work. Decisions on administrative appeals, for instance, should be taken, in principle, within 10 weeks or within a reasonable term. In practice, it appears that a reasonable term for administrative appeals in complex competition law cases is four months. In the case of administrative appeals in energy cases, six months appears to be appropriate.

Although NMa does not meet the deadlines set out in the Act (which are not strict deadlines) in all cases, clear improvements were made in this regard in 2002. This applies to all procedures which were measured. NMa is working at making further improvements to this.

A strict deadline applies to the procedure for the assessment of notified mergers and acquisitions. Failure to meet this deadline is equated with granting approval. As in previous years, these deadlines were met in all cases.

Administrative burden on companies

The Competition Act and regulation by NMa imposes burdens on companies.[2] NMa cannot determine exactly what the extent of this burden is. Particularly in the case of procedures which companies are required to complete, NMa aims to keep this burden as low as possible.

In the case of applications for exemption from the prohibition of cartels, notifications of concentrations (mergers and takeovers) and applications for a licence for a concentration, the burdens imposed on companies relate primarily to the obligation to draw up and submit a reasoned petition or a reasoned notification or application. Forms have been approved for making submissions. Companies which make submissions are required to answer the questions posed on the forms. The forms have been drawn up in such a way that NMa immediately has the information it requires to start its assessment. This limits the burden on companies as far as possible.

Since it appears in many cases that specific, supplementary information is required for the assessment, it is often necessary for NMa to ask additional questions. These written questions have to be answered in writing by the companies. In asking additional questions, NMa limits itself as far as possible to data which are essential to the assessment.

In striving to reduce the time taken to process NMa's procedures, an attempt has been made to limit the burden on companies as far as possible. In addition, through the publication of guidelines, NMa wishes to provide as much transparency as possible. This enables companies to anticipate what practices and agreements are or are not permitted.

Processing complaints

In the course of 2002, five written complaints were received regarding action taken by NMa. In accordance with Section 9:14 of the General Administrative Law Act, a Complaints Officer is assigned responsibility for processing and advising NMa with regard to such complaints. One of the primary tasks of this person is to attempt to find a solution to their grievances in consultation with complainants. In four of the five cases, an amicable settlement was reached. In one case, it proved necessary to institute formal proceedings, which resulted in an acknowledgement that the complaint regarding the time taken to process a complaint in relation to competition was well founded.

2 *In accordance with the position taken by the Cabinet (Parliamentary Proceedings of the Lower House of the Dutch Parliament, 2001–2002, 24 036, No. 232, 12 October 2001) on the report of the Supervision of Companies Working Group of the Market Forces, Deregulation and Legislative Quality Project, NMa briefly discusses the burden which its supervision places on companies.*

In order of submission, the complaints submitted related to:

- action taken by NMa in relation to agreements between companies in the taxi industry;
- granting limited rights to interested parties to inspect a dossier in relation to a report which had been drawn up;
- the organisation of a hearing within a period which the person in question considered too short;
- failure to respond in time to a complaint with regard to the housing market in the municipality of The Hague; and
- the time taken to settle a complaint with regard to agreements between businesses in the car repair industry and the content of the decision taken in relation to the complaint.

Owner's perspective

The *Owner's* perspective focuses on the Ministry of Economic Affairs. The central issues in this regard relate to production figures and deployment of resources.

Realisation compared to planning

NMa measures the extent to which the realisation of its 'production' corresponds to its plans drawn up before the start of the year. Although it appears that the output in any one year cannot always be predicted accurately, NMa performs fairly well in this regard. Realisation, compared to planning, varies from 63% with regard to the number of administrative appeals in energy cases settled (37% less than expected) to 160% for the number of regular applications for exemption from the prohibition of cartels (60% more than expected). The number of procedures affected by market developments, in particular, such as the number of mergers and acquisitions in the Netherlands, cannot be predicted accurately. The number of notifications of concentrations was 23% less than expected. In this annual report, reference is made to this in relation to NMa's activities, where an analysis is made of realisation compared to planning.

Resource management

From the *Owner's* perspective, it is also important that resources are properly managed. NMa reports to the Ministry of Economic Affairs on this. In 2002 NMa remained within the budget of € 32,129,000 which it had been granted. Underspending amounted to 4.2%. Compared to 2001, total expenses increased by 17%. This increase in comparison to the previous year can be explained by structural factors, such as the growth in the number of employees.

On the basis of audits carried out in 2002, the Audit Service of the Ministry of Economic Affairs concluded that the NMa's regular administrative activities were under pressure from the strong growth of the organisation, the proposed merger with OPTA and the future conversion of NMa into an independent administrative authority. On the basis of the recommendations of the Audit Service, high priority will be given to strengthening financial and asset management at NMa in 2003 and future years.

Budget and realisation: expenditure

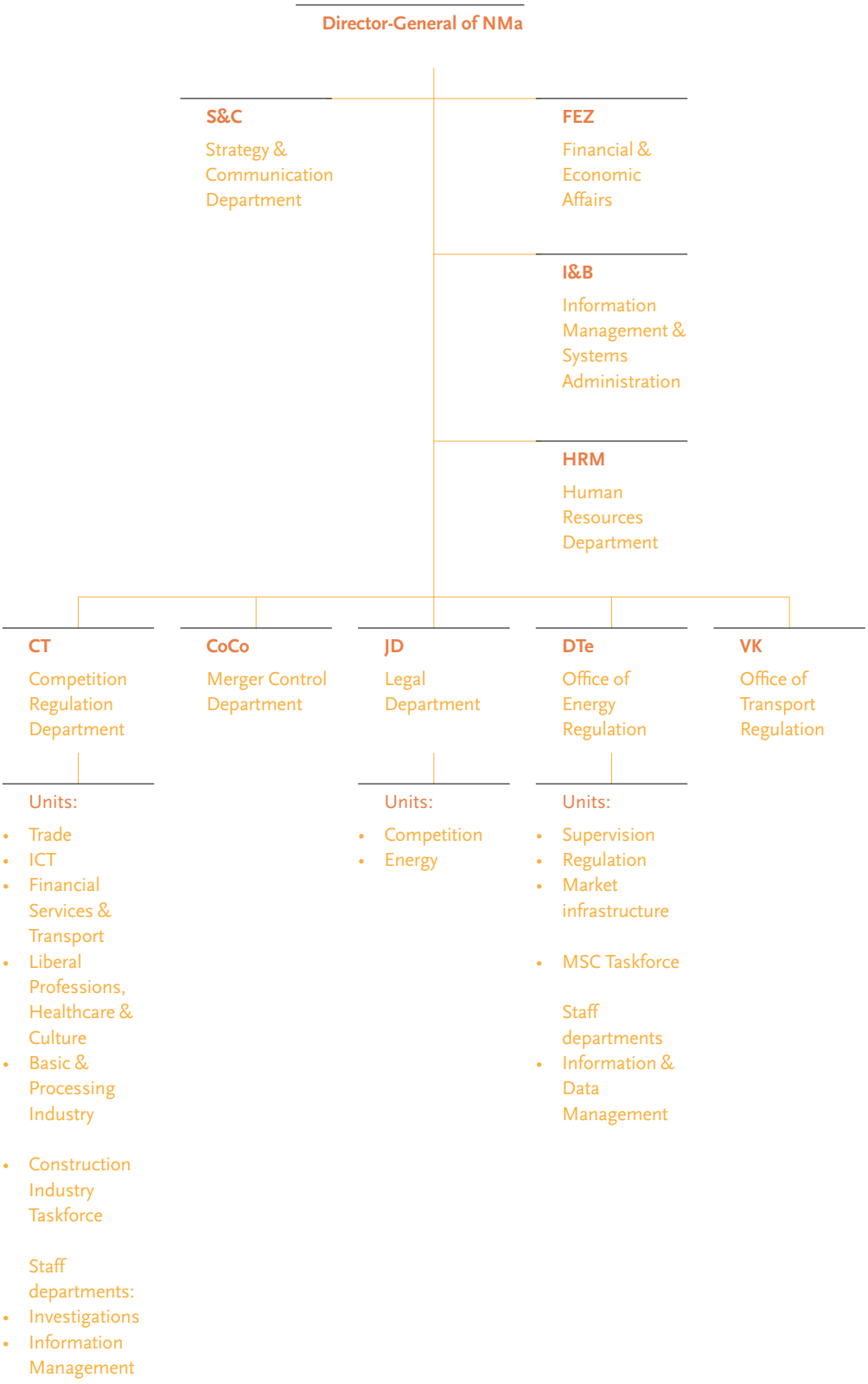
	Personnel	Property and Equipment	Realised 2002	Budget 2002	Realised 2001
NMa (excl DTe)	13,131,552	9,808,939	22,940,491	21,848,000	20,664,000
DTe	3,042,981	3,944,423	6,987,405	8,749,000	5,579,000
Office of Transport Regulation	642,384	211,232	853,615	1,532,000	
Total	**16,816,917**	**13,964,594**	**30,781,511**	**32,129,000**	**26,243,000**
Revenues NMa		104,875	0	6,000	
Revenues DTe		4,478,556	3,698,000	1,081,000	

Internal Organisation perspective

The *Internal Organisation* perspective focuses on the question of what the organisation requires of its business processes to fulfil its tasks. The quality and productivity of staff and their assessment of NMa as an employer are emphasised. From the *Internal Organisation* perspective, NMa gives attention, for instance, to being a 'good employer'.

NMa's Organisation

NMa's organisation is divided into four line management Directorates, the Office of Transport Regulation project and four staff departments



At the end of 2002, NMa had a total staff capacity of 303 employees on a full-time basis. At that moment, NMa employed 291 people. At the end of 2001, this figure was 204. NMa's employees come from a variety of backgrounds and, of course, include many lawyers and economists, but also, for instance, mathematicians and physicists. The average age of NMa's staff, as in 2001, was 36. In 2002, NMa employed seven women in management positions, as compared to six in 2001.

Recruitment and selection

NMa's growth required the recruitment of many new employees in 2002. NMa continued the recruitment policy it had developed in 2001. In its labour market communication, NMa focuses on the theme 'Work that is relevant and visible'. This theme appears to have attracted many people, given the large number of job applications received. From both a qualitative and quantitative point of view, there has been a healthy influx of new employees, also from the private sector. Recruiting more experienced employees requires more effort. Nevertheless, using a combination of recruitment methods, almost all vacancies have been filled.

Good employer

Recruitment activities are only successful in the long term if attention is also given to staff retention. NMa wishes to be an attractive employer which gives its employees responsibilities and opportunities for personal development. In July 2002, a staff satisfaction survey was carried out by NMa. This survey provided considerable insight into the appreciation that staff have of NMa as an employer, including its chambers. The improvement plans that were drawn up are being implemented throughout NMa or within particular organisational units. The priorities for 2003 are improving career policy, attention to the 'NMa culture' and the pressure of work. In order to monitor progress in this regard, another staff satisfaction survey will be held in mid-2003.

Investment in training in each area

Skills training	51%
Development of substantive knowledge	38%
Language	4%
Computerisation	3%
Other	4%

Training

NMa is a knowledge intensive organisation which makes high demands on the quality of its own work. Well-educated employees with knowledge of their area of work are essential to this. An adequate training policy is therefore of considerable importance. NMa invests a relatively large amount in training. Many of NMa's staff receive external training in various areas of expertise. NMa now also has a large number of internal training courses on offer. In particular, courses in the area of competition and energy regulation are offered for NMa's staff and for people outside NMa. Colleagues from, for instance, OPTA and the Ministry of Economic Affairs regularly participate in these courses.

In addition to courses offered internally, training capacity is purchased to support the professionalisation of specific functional groups (professionalisation of the secretariats and project-based work) and specific development of individual members of staff.

Job descriptions and career development

In the year under review, performance management and results, the management of processes and the management of people were developed further. For this purpose, for instance, 'yardsticks' were drawn up which indicated the level of knowledge and expertise that may be assumed for a number of positions and levels. This has clarified for staff what may be expected at a certain level. These yardsticks also provide clarity with regard to career opportunities within NMa.

Code of conduct

The visibility and relevance of NMa's work means that employees must be aware of the standards of integrity, confidentiality and moral rectitude. These values and codes of conduct were combined for the first time in 2002 into a single document which was brought to the attention of the organisation. The compliance programme means that members of staff are required annually to sign a statement stating that they are aware of and act in compliance with the code of conduct. All officials employed by NMa are required to take an oath on entering employment.

Internal communication

In a growing organisation, internal communication becomes increasingly important. In 2002, an intranet was developed within NMa, which serves as a platform for exchanging information, for instance with regard to decisions taken by NMa and staff matters, but also for communicating information of a more social nature. In addition, the intranet offers access to NMa's electronic library and knowledge systems.

Development of legislation, tasks and role

The political, social and international framework within which NMa works is undergoing constant development. Naturally NMa develops its own organisation in line with these developments to enable it to carry out new tasks as well as possible. The developments with regard to the position of NMa (including DTe) and its powers, new sector-specific tasks and NMa's international role are discussed below.

NMa: autonomous administrative authority status

In 2002 the Lower House of the Dutch Parliament approved the Bill 'amending the Competition Act in relation to the conversion of the Netherlands Competition Authority, as an administrative body, into an autonomous administrative authority'.[1] In September, the Bill was to be debated in the Upper House of the Dutch Parliament. Unfortunately the processing of this Bill was postponed. The formalisation of the autonomous position of NMa has therefore been deferred. The formalisation of NMa's status as an autonomous administrative authority will enable it to exercise competition regulation independently. In the present situation, NMa does in fact carry out its tasks independently.

The fact that the granting of the status of an autonomous administrative authority to NMa has been postponed also means that the organisational changes arising from the Bill, in particular the creation of an Executive Board to manage NMa, were not implemented in 2002.

1 *Proceedings of the Upper House of the Dutch Parliament, 2001-2002, 27639, no. 228*

Strengthening NMa's regulatory instruments

Both in the case of NMa and DTe, strengthening their statutory powers will contribute to the effectiveness of regulation.

Records of cartel agreements may be stored in private houses. With a view to strengthening regulation, it is therefore necessary that NMa has the authority to enter private homes to carry out investigations. The increase in its powers is also accompanied by guarantees for citizens. It is possible that a court order will have to be obtained for the use of these powers in order to test the proportionality of the action taken.

For investigations to be effective, it is also essential that everyone complies with the statutory obligation to cooperate. To enforce this, it is necessary that NMa should be able to impose a substantial sanction if cooperation is refused. At present, the maximum fine for this is € 4,500. In 2002, this amount proved to be too low to compel companies to participate. The imposition of an order subject to a penalty to obtain insight into certain data and documents is generally inadequate because it results in considerable delays in the investigation. In addition, an order subject a penalty cannot be used in the case of a refusal to cooperate in areas other than allowing inspections of certain data and documents. In its final report presented in December 2002, the Parliamentary Commission of Inquiry into the Construction Industry concluded that an extension of NMa's legal powers, such as the right to enter private homes and to impose higher fines for a refusal to cooperate, should be considered if the present options prove inadequate. Strengthening the available instruments was also discussed in the evaluation of the Competition Act. DTe called for a number of amendments to the Act, for instance in relation to the regulation of transmission grids and networks and an increase in the instruments available for law enforcement. Due to the political situation, the legislative process in this regard did not

progress. At the end of 2002, the debate in the Lower House of the Dutch Parliament on the amendments to the Electricity Production Sector (Transition) Act [*Overgangswet electriciteitsproductieserctor (OEPS)*][2] was concluded. For DTe, this is an important amendment to the Act, as it provides a legal basis for imposing individual price caps on grid managers.

2 *Proceedings of the Lower House of the Dutch Parliament, 2002-2003, 28 174*

Evaluation of the Competition Act and the Electricity and Gas Acts

In the first half of 2002, the Ministry of Economic Affairs concluded its evaluations of the Competition Act, the Electricity Act of 1998 and the Gas Act. The Cabinet has not yet adopted a position with regard to these evaluations. The new Cabinet will probably submit a proposal to amend the aforementioned Acts, for instance with regard to extending NMa's powers.

The main conclusion of the report on the evaluation of the Competition Act is that the Act has contributed to enforcing and improving effective competitive relationships and that the Act therefore functions well. It was also concluded that NMa has developed into an influential authority which has managed to apply the Competition Act effectively and efficiently. The quantity and quality of the work done by NMa with the number of people at its disposal is referred to in the evaluation report as impressive.

The evaluation of the Competition Act resulted in a number of recommendations, in addition to the recommendation to strengthen NMa's law-enforcement powers, aimed at improving the way the Act and NMa function. For instance, it was recommended that the Competition Act should provide for the possibility of taking a decision, subject to restrictions and instructions, that a notified concentration does not require a licence. In addition, the evaluation report recommends investigating whether the prohibition of the abuse of a dominant position should be strengthened by means of preventive regulation of dominant companies. The evaluation of the Electricity Act of 1998 and the Gas Act gave the general impression that the dynamism of the electricity and gas markets has increased considerably in recent years. The electricity market is in the lead in this regard because the process of liberalisation began earlier in this market. Non-discriminatory access to the electricity grids and gas networks in the Netherlands is one of the main aims of the legislation. According to the evaluation, it appears that this aim has been realised within a short period.

NMa has drawn conclusions for its work and management processes from the conclusions of the research carried out as part of the evaluations. The researchers concluded that these processes were under pressure from the considerable growth which NMa has experienced within a short period. All the investigations are now managed as projects. In addition, monitoring processes and time recording have been further improved.

Office of Transport Regulation

Part 2 page 69
Transport Regulation

Since 1 January 2002, the Office of Transport Regulation, which is being set up within NMa, was assigned the task of supervising municipal transport companies in the Netherlands. The intended formal date on which the Office of Transport Regulation will be launched has been postponed from 1 January 2003 to 1 January 2004.

OPTA

The Independent Post and Telecommunications Authority [*Onafhankelijke Post en Telecommunicatie Autoriteit (OPTA)*] and NMa proposed an accelerated merger in July 2002. In terms of the proposal, OPTA will become a chamber within NMa. Accelerated integration will increase the effectiveness of regulation of the postal services and telecommunications markets. The integration will also ensure consistent application of competition-related concepts. The tasks of NMa and OPTA are ultimately aimed at

achieving the same objective, namely ensuring that markets operate optimally in the interests of consumers and to provide opportunities for companies to compete. OPTA and NMa already cooperate intensively on various dossiers. A merger of OPTA and NMa will make it possible to deploy the general and sector-specific instruments they have in such a way that tailor-made solutions are provided for effective regulation with the right dosage: stricter, where necessary, and more restrained, where possible.

In the period leading up to the formal merger, OPTA and NMa will cooperate more intensively within the legal frameworks applicable at present, for instance by exchanging employees and knowledge of supervision and regulation.

The Minister of Economic Affairs has given his consent to the integration of OPTA and NMa. The Ministry is preparing the amendment bills which are necessary for the merger. In 2003, NMa cooperated with the Ministry and OPTA in preparing for the integration.

Office of Health Regulation [*Zorgkamer*]

In February 2003, the Minister for Health, Welfare and Sport issued instructions for the preparation and creation of a so-called 'market suprerintendant' for the healthcare sector, as a chamber within NMa. On 1 March 2003, the first stage of the project commenced. A project group has been formed which is preparing the substantive tasks of the Healthcare Supervisory Authority and its embedding within the organisation. The planned start date of the Healthcare Supervisory Authority is 1 January 2005. Since this will result in an extension of NMa's tasks, additional amendments to legislation will be necessary, in addition to the legislative amendments relating to NMa which have already been announced.

New European implementation regulation

Far-reaching changes in competition regulations and the way NMa carries out its tasks have emanated from Brussels. In particular, the new European regulation which governs the implementation of the provisions of the EC Treaty relating to competition will take effect and will bring about important changes. On 26 November 2002, the Council of Ministers of the European Union adopted this implementation regulation. Regulation 1/2003,[3] the successor of Regulation 17/62, will take effect as of 1 May 2004. A period of consultation between the Member States of the European Union and the European Commission, extending over four years, preceded the adoption of the regulation. The regulation will result in far-reaching changes (modernisation) in relation to the enforcement of European competition law.

3 *OJEC L 1, 04.01.2003, page 1-25*

The most important changes arising from the new Regulation are:

- The abolition of the possibility of obtaining an exemption from the prohibition of cartels contained in Article 81 (1) of the EC Treaty. Companies will have to make their own assessment of whether they meet the criterion for exemption in Article 81 (3).
- Strengthening of retrospective monitoring of compliance with competition rules. The focus will lie on detecting grave infringements of Articles 81 (cartels) and 82 (abuse of a dominant position) of the EC Treaty.
- Decentralised application of competition rules. In addition to the European Commission, national competition authorities and judicial bodies of the Member States may assess practices in their entirety against the prohibitions contained in Articles 81 and 82 of the EC Treaty and the exceptions to these.

In the period up until the regulation takes effect, NMa will make preparations for the application of all facets of Regulation 1/2003. In doing so, NMa will take initiatives both at the national and European levels. At the national level, as an adviser to the Ministry of Economic Affairs, NMa is involved in preparing the necessary amendments to legislation. In addition, NMa will make internal preparations for its new tasks. A project has been set up within NMa for this and a project leader has been appointed. NMa also sees it as its task

to provide companies and the public with information on the consequences of the modernisation of European competition law.

At the European level, these preparations mean that NMa will make a contribution to the activities of the European Competition Network (ECN) set up at the end of 2002. This network, in which NMa has a place alongside the other national competition authorities and the European Commission, is giving shape to the practical cooperation required between the participating institutions. For instance, an intranet has been set up for exchanging information and agreements have been made with regard to the work that is to be done. In addition, within the framework of ECN, NMa has contributed to the Notices and Announcements with regard to the new regulation, which the European Commission will publish in the first half of 2004.

Other developments in the area of European competition law are discussed elsewhere in this annual report.

NMa's contribution to the advisory committees on cartels and abuse of dominance

COMP/36.571	Austrian Banks
COMP/36.756	Sodium Gloconate
COMP/37.015	New Holland
COMP/37.985	Georg Verkehrs-organisation GmbH - Bahn
COMP/29.373	Visa II
COMP/35.587 - 35.706 - 36.321	Nintendo
COMP/37.519	Methionine
COMP/37.730	Austrian Airlines - Lufthansa
COMP/37.851	Carlsberg – Heineken
COMP/36.072	GFU – Gas Negotiating Committee
COMP/37.704	MCI Worldcom / KPN
COMP/36.700	Industrial and Medical Gasses
COMP/37.667	Speciality Graphite
COMP/37.396	Revised TCA
COMP/37.956	Reinforcing bars
COMP/37.671	Food Flavour Enhancers
COMP/37.978	Methylglucamine
COMP/37.152	Plasterboard
COMP/37.784	Fine Art Auction Houses

NMa's contribution to the advisory committees on concentration

COMP/M.2283	Schneider/Legrand
COMP/M.2416	Tetra Laval/Sidel
COMP/M.2495	Haniel/Fels
COMP/M.2568	Haniel/Ytong
COMP/M.2547	Bayer/Aventis Crop Science
COMP/M.2624	BP
COMP/M.2650	Haniel/Cementbouw
COMP/M.2698	Promotech/Sulze Textill
COMP/M.2706	Carnival/P&O

NMa's international role

NMa represents the Netherlands in advisory committees set up to advise the European Commission in its assessment of concentration, cartel and abuse cases. The European Commission must consult the Member States through the advisory committees before it takes decisions. The Commission is not obliged to follow the advice, but takes this into account as far as possible in its decisions. The advisory committee may recommend publishing the advice. In addition, in 2002 NMa contributed to a number of expert meetings organised by the European Commission. NMa regularly consults other authorities of other Member States with regard to individual cases and other topics which are raised at the European level.

The informal consultation forum of competition authorities in the European Economic Area, the European Competition Authorities (ECA), met on two occasions in 2002. In April a meeting was held in Athens to discuss the assessment of concentrations and competition in the airline industry. ECA's Mergers Procedures Group adopted a Procedures Guide as a first step towards reducing the burden of companies in the process of merging. The Procedures Guide sets out the practice of information exchange between ECA competition authorities in relation to merger notifications involving a number of companies. The procedures ensure that the Member States inform each other at an early stage, avoid inconsistent outcomes and may result in time savings.[3] During the second meeting in Stockholm at the end of 2002, a decision was taken to adopt guidelines for cooperation between national competition authorities with regard to the submission of joint applications to the European Commission to process concentrations of which notification is given in a number of Member States.

In September, the first annual meeting of the International Competition Network (ICN) was held. ICN's aim is to provide the competition authorities of all countries, including developing countries, with a network within which to discuss practical topics in relation to the enforcement of competition law. During the meeting, the following topics, amongst others, were discussed: the advisory powers of competition authorities, the analytical framework for concentration control and the principles applicable to the submission and assessment of concentrations of which notification is given in a number of Member States.[4]

Together with the Ministry of Economic Affairs, NMa participates in meetings of the Competition Committee of the Organisation for Economic Cooperation and Development (OECD). In 2002, for instance, NMa presented its Guidelines for the Setting of Fines and the Leniency Guidelines to the 'International Cooperation' working group. Within this working group, NMa made a contribution to a comparative study of 'merger procedures'. In addition, a contribution was made to the second report of the Competition Committee

3 *The Procedurals Guide is published on NMa's website.*

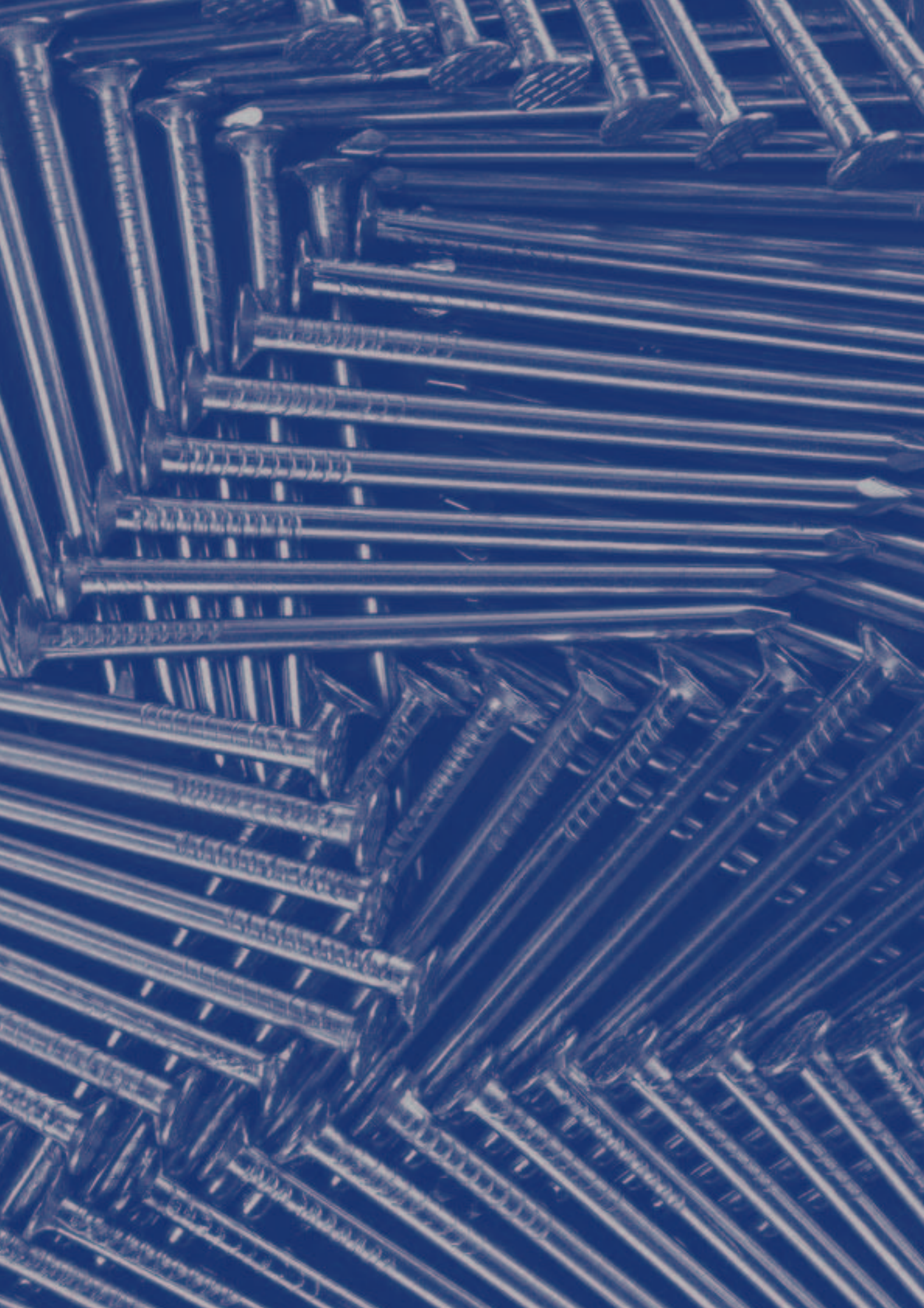
4 *For more information, see the website www.internationalcompetitionnet-work.org*

on 'effective action against hardcore cartels'. NMa also made a contribution to the 'Competition and Regulation' working group and the Global Competition Forum.

On 25 April 2002, NMa organised a symposium entitled 'Changes in Competition – A Change of Scene' [*Veranderingen in het mededingingsrecht - verschuivende panelen*] to mark the opening of its new premises in the Muzentoren. The then Minister of Economic Affairs, Annemarie Jorritsma-Lebbink, and the European Commissioner for Competition Policy, Mario Monti, spoke about changes in (European) competition policy and competition law. The Advocate-General of the European Court of Justice, Ad Geelhoed, spoke about institutional aspects of general and sector-specific market regulation and arrangements with regard to regulation.

Within the framework of cooperation and the exchange of knowledge between the various European competition authorities, the Merger Control Department of NMa organised a seminar entitled 'Recent Developments in EU Competition Law and Economics' and 10 June 2002 in The Hague. All the European competition authorities and the European Commission were invited to attend. The contributions of the speakers, for instance, dealt with the economic analysis of recent European concentration cases, assessment criteria in relation to concentrations and the consequences of possible future amendments to the European Merger Regulation. The speakers during the seminar were Eric van Damme (Tilburg University), Jules Theeuwes (Universiteit van Amsterdam), Michael Wise (OECD) and John Clark (OECD) as well as staff of the European Commission.

PART 2 Objectives and Results per Task



Prohibition of Cartels and of the Abuse of Dominant Positions

This chapter describes the instruments NMa used in relation to the regulation of cartels and the abuse of dominant positions. The figures give insight into the number and diversity of cases. The changes that will occur in 2004 at the international level are of considerable importance in relation to NMa's tasks.

Part 1 page 25
New European implementation regulation

This has already been explained in Part 1 of this annual report. Other amendments at the European level are described in this part. The imposition of fines is given special attention. NMa's activities in the construction industry, the healthcare sector and the financial sector are discussed separately. Summaries of a number of notable cases in the past year have been included in Part 4. Finally, a number of developments in practice, in particular court rulings, are explained in Part 3.

Objectives of competition regulation

Prohibition of cartels: Section 6 of the Competition Act

1 Agreements between undertakings, decisions by associations of undertakings and concerted practices by undertakings which have as their object or effect the prevention, restriction or distortion of competition within the Dutch market, or a part thereof, are prohibited.
2 Agreements and decisions prohibited pursuant to subsection (1) are legally null and void.

Dominant Position: Section 1 of the Competition Act

i dominant position: a position of one or more undertakings which enables them to prevent effective competition being maintained on the Dutch market or a part thereof, by giving them the power to behave to an appreciable extent independently of their competitors, their suppliers, their customers or end-users.

Prohibition of the abuse of dominant positions: Section 24 of the Competition Act

1 Undertakings are prohibited from abusing a dominant position.

Cartels are agreements between companies or concerted practices of companies which limit or even eliminate competition. In a normal market situation, companies compete with each other with regard to the price of their products, but also in relation to other factors, such as quality and service.

Entering into agreements, for instance with regard to charging the same prices (or applying the same price changes) or the division of markets, eliminates competition between the companies. Cartels remove the incentive to offer an attractive product in the most efficient way.

A dominant position is a position held by one or more companies, which enables them to obstruct the maintenance of actual competition on the Dutch market or a part of it. A dominant position gives companies the scope to behave in a way which, to a considerable extent, is independent of their competitors, suppliers, customers or end-users. In principle, holding a dominant position is not prohibited. On the basis of the Competition Act, NMa may prohibit companies from acquiring or strengthening a dominant position through a merger or acquisition. [See also 'Regulation of concentrations' in Part 2]. NMa does not take action against a company which achieves a dominant position of its own accord. Within the framework of the Competition Act, a company may grow and acquire market share. NMa does take action against abuses of dominant positions.

By abusing a dominant position, a company restricts competition, for instance by driving or excluding (potential) competitors from the market or by exploiting customers. Examples of abuse are excessive prices, unreasonable supply conditions, refusing to supply certain customers, price discrimination and tied sales. Charging prices that are too low in order to drive competitors from the market is an example of an abuse of a dominant position.

Since the beginning of 2002, the Competition Act has also made demands on the administration of public companies, implementing the European 'transparency directive'. Public companies are companies with a special or exclusive right granted by a public authority or companies responsible for the management of a service in the public interest and which receive some form of government support for this. If they are also involved in commercial activities (which may have an unfavourable effect on trade between

Member States), they are obliged, for instance, to maintain a separate administration for these activities. In 2002 no cases were processed by NMa in relation to the transparency directive.

Deployment of resources for competition regulation

NMa deploys 100 people for the Competition Department.

In 2002 NMa deployed more people than previously for the enforcement of the prohibition of cartels and the prohibition of the abuse of dominant positions – the Competition Department increased the number of people deployed from 70 at the beginning of 2002 to almost 100 at the end of the year. Of this capacity, 60% were deployed for investigations into infringements of the Competition Act in 2002, while 40% were deployed for other tasks which contribute to compliance with competition rules. These tasks include assessing applications for exemption from the prohibition of cartels, giving advice and drawing up guidelines.

In 2002, the Competition Department set up staff services for Investigations and Information Management. This further increased the professionalism of investigations.

Results: instruments deployed

In 2002, NMa made use of various instruments for the regulation of competition. NMa takes action against cartel agreements, by taking action against prohibited cartels and by assessing applications for exemption from the prohibition of cartels. NMa also takes action against the abuse of dominant positions by carrying out investigations into prohibited practices. In addition, various other instruments are used to combat and prevent distortions of competition. These instruments are discussed briefly below. Special attention is given below to the imposition of fines.

Investigations

In the past two years, emphasis has been placed on investigations into infringements of the Competition Act. NMa initiates investigations itself or starts an investigation following a complaint which is submitted or some other report which it receives. In 2002, NMa carried out investigations into possible infringements of the prohibition of cartels in a variety of sectors. Not all the investigations led to the conclusion or provided evidence that the Competition Act had been infringed. In nine cases, NMa drew up a formal report which concluded that there was a reasonable suspicion that competition rules had been contravened. A report has drawn up with a view to imposing a sanction. In 2002, reports were drawn up in nine cases in relation to infringements of the prohibition of cartels. Three sanctions procedures were concluded in cartel cases in 2002.

Part 2 page 44
Research into the financial sector

With regard to the prohibition of the abuse of a dominant position, an investigation was carried out into Interpay in 2002. In June, partly in relation to this, an information and consultation document on electronic payments was published. The investigation led to the conclusion in a report of April 2003 that there was a reasonable suspicion that the Competition Act had been contravened.

An investigation into the possible abuse of a dominant position by Endemol was concluded in 2002 because NMa found no evidence that the Competition Act had been infringed.

During investigations a very large number of documents usually have to be analysed. In many cases, an investigation requires that NMa orders companies to make documents available for inspection during unannounced visits to the companies. NMa makes copies of documents for its investigation. In 2002, NMa invested in a computerised information processing system. The documents which are investigated are scanned into the system, can be selected automatically and can be identified for inspection. The Information Management Department of the Competition Department is responsible for administering

Contraventions of the prohibition of cartels

- Mobile telephone operators
- Cleaning services branch
- Construction companies in relation to permanent cooperation
- Construction companies with regard to tenders for the municipality of Scheemda
- construction companies in relation to asphalt plants in the north of the Netherlands
- Construction companies in relation to asphalt plants
- Construction companies in relation to the construction of athletics tracks
- Bicycle manufacturers
- Bicycle branch organisations

the system. Considerable efficiency gains have been achieved through this advanced method of investigation.

In Europe, NMa is in the lead with regard to investigating the electronic data of companies. Evidence of cartel agreements may be found in the electronic archives of companies. The data and documents which NMa may order a company to make available for inspection may include, for instance, digital data at a particular location. In carrying out its investigations, NMa makes copies of original data media, such as floppy disks, hard drives or CD-ROMs. The main aim of this forensic recording and 'seizure' of electronic data is to spend no more time than is necessary at the company. The actual investigation of the electronic data takes place on NMa's premises. NMa carries out focused searches through the data for particular documents which are important for the investigation in question. Such an investigation of electronic data takes several weeks or months, depending on the amount and complexity of the data. It is not in proportion and efficient to carry out an investigation such as this at the company investigated.

Of course, this electronic investigation takes place on the basis of guarantees which ensure that the interests of the defence are not jeopardised. For instance, the so-called 'search terms' used to identify relevant documents in the company's administration are recorded in so-called protocols and data which NMa may not investigate, pursuant to the Act, is not included in the investigation.

Performance indicators

Complaints processed within the statutory term*

2002	2001
35%	33%

Realisation compared to planning

Realisation	Planning
187 (155%)	121

* *Assuming a term of eight weeks (Sections 4:13 and 4:14 of the General Administrative Law Act).*

See also 'Customer/Environment perspective' in Part 1.

Processing of complaints

Many of the complaints submitted to NMa related to possible abuses of dominant positions. Other complaints related to the prohibition of cartels. In 2002, a total of 187 complaints were processed. Of these, 114 complaints were settled by means of a decision based on substantive grounds. The remaining complaints were settled in other ways, for instance by the withdrawal of the complaint after mediation by or on the basis of advice given by NMa or after NMa had issued an informal opinion.

In 2002, a procedure was introduced whereby complaints would be subjected to an initial assessment within two weeks after receipt. As it is necessary to make effective use of capacity, it is not possible to investigate all complaints substantively. A complaint is dismissed if the initial assessment gives rise to a strong suspicion that the complaint is unfounded or if the complaint does not relate to the Competition Act. This method of operation enables NMa to utilise its capacity to carry out investigations and process complaints in sectors where the deployment of resources is needed most.

Complaints settled in 2000 in relation to infringements of the Competition Act	187
Settled by means of a decision	114
of which, in relation to Section 6	29
of which, in relation to Section 24	84
of which, in relation to Sections 6 and 24	1

Granting leniency

Through the publication of its Leniency Guidelines, NMa has introduced a leniency scheme to promote the detection of cartels. It is possible that a company, which is involved in a cartel, wishes to end its involvement in the cartel or has already ended its involvement and wishes to inform NMa of the cartel, but is restrained from doing so for fear of high fines. To encourage such companies to notify NMa of the existence and the activities of the cartel, NMa may promise the company that it will not impose a fine (fine immunity) or that it will reduce the fine which may be imposed under the Competition Act (fine reduction).
The possibility of granting leniency is regarded both nationally and internationally as an important instrument in detecting (international) cartels. The European Commission and many other competition authorities within and outside the European Union have similar leniency programmes. Both at the European level and in the United States success has been achieved through this.

In NMa's opinion, leniency in the treatment of a member of a cartel, who has notified NMa of a cartel and who makes it possible to investigate the cartel or makes a significant contribution to the investigation, is beneficial in detecting, sanctioning and bringing to an end infringements of the Competition Act. This promotes the efficient operation of markets and eliminates or reduces the disadvantages to buyers and consumers caused by cartels.

On 5 March 2002, NMa published a consultation document on its website containing a draft of the Leniency Guidelines. The consultation document was also sent to market players, organisations representing market players and other regulators. Due to the number of comments made during the consultation procedure, NMa amended the Guidelines. On 28 June 2002, NMa published the definitive Leniency Guidelines in the *Netherlands Government Gazette* and on its website.[1] The Guidelines relate, in particular, to agreements between and practices of companies that restrict competition and which may be considered to be very grave infringements of the prohibition of cartels.

1 *Netherlands Government Gazette, 122 of 1 July 2002.*

The order in which NMa is informed of cartels and the moment at which NMa is informed are decisive in determining the degree of leniency. The system is set out in the following table:

	NMa has not yet started an investigation	NMa has already started an investigation
First informant, not a leader of the cartel	*Right* to immunity	*Right* to immunity from 50% to possible full immunity
Second or subsequent informant or leader of the cartel	*Possibly* 10% to 50%	*Possibly* 10% to 50%

The Leniency Office can be contacted at telephone number + 31-(0)70-3301710, fax + 31-(0)70-3301700, and by email at NMa_clementie@minez.nl.

In order to qualify for leniency, companies have to meet a number of conditions. For instance, the company must provide all the information it has or acquires with regard to the cartel. This must be information which NMa does not already have in its possession. The information must make it possible to start an investigation or must have added value for a current investigation. To qualify for fine immunity or a reduction in the fine of more than 50%, a company may not have been the leader of the cartel and may not have encouraged any other company to participate in the cartel. The company must give its full cooperation to the investigation and must refrain from all practices which could obstruct NMa's investigation.

Together with the publication of the Leniency Guidelines, a Leniency Office was set up within NMa. Applications for leniency may be submitted to the Leniency Office. In the second half of 2002, the Leniency Office was developed further. In 2002, one request for leniency was granted. In addition, a number of requests are being processed and a number of exploratory investigations are taking place which may result in an application. In relation to the interests involved, these are not discussed further in this report.

Assessment of applications for exemption

Companies which enter into horizontal agreements (between competitors) or vertical agreements (between suppliers and their customers), which limit competition but which they believe make a positive contribution to economic development, may request exemption from the prohibition of cartel's from NMa. An exemption is not required if agreements do not appreciably restrict competition or if they fall under a block exemption.

NMa does not grant exemption for agreements which restrict competition which do not meet strict conditions. Such agreements are therefore prohibited. In order to be eligible for exemption from the prohibition of cartels, an agreement which restricts competition between companies must contribute to improving production or distribution, or to technological or economic progress. In addition, a reasonable part of the advantages

Performance indicators

Regular applications for exemption settled within the statutory term*

2002	2001
35%	31%

Realisation compared to planning

Realisation	Planning
32 (160%)	20

* *Assuming a term eight months (Section 19 of the Competition Act).*

See also 'Customer perspective' in Part 1.

Applications for exemption from the prohibition of cartels

Processed applications for exemption from the prohibition of cartels	45
of which, regular applications	32
Concluded with a decision	22
Exemption granted	2
Exemption partly granted, partly refused	2
Application for exemption refused	5
No exemption required – does not restrict competition	13

resulting from the agreements must be enjoyed by the users. Competition may not be restricted more than is strictly necessary and sufficient competition must remain on the market.

Often an agreement is amended after consultation with NMa in such a way that it either complies with the conditions for exemption or the agreement no longer restricts competition appreciably and is therefore not subject to the prohibition of cartels. In a number of cases, following an investigation, it was ascertained that an exemption from the prohibition of cartels was not necessary.

In 2002 the assessment of applications for exemption resulted in the termination of various cartel agreements contained in contracts between and schemes involving companies. In other cases, agreements were amended in such a way that competition was no longer restricted or an exemption could be granted.

Subsequent verification

NMa monitors compliance with its decisions by carrying out verifications. If an exemption from the prohibition of cartels has not been granted for an agreement, NMa carries out random checks to ascertain whether the companies in question have in fact terminated the prohibited agreement. In 2002 verifications took place with regard to decisions taken by NMa in relation to the healthcare sector and Taxi Schiphol, the Code of Conduct for Mortgage Loans [*Gedragscode hypothecaire geldleningen*] and the Code of Conduct for Minimum Prices for Waste Disposal Sites [*Gedragscode minimumprijzen afvalstortplaatsen*].

Monitoring

NMa carries out monitoring research to analyse the market situation in certain sectors. Such research may focus both on the structure of the market, so that the results can be used in supervising concentrations, and on practices of companies which restrict competition. If NMa reaches the conclusion in its research that competition within a market is restricted by a particular practice or some other cause, this may be a reason to start an investigation into infringements of the Competition Act.

In 2002 NMa started monitoring research into the CD sector in the form of a sector scan. NMa analysed the market structure and price formation. In addition, NMa ascertained the extent to which price formation in the Netherlands with regard to CDs deviated from that in other countries. In April 2003, NMa published the results of this monitoring research. It appeared from the research that a number of special characteristics of the CD sector in the Netherlands contribute to the fact that retail prices in the Netherlands are relatively high. The sector scan provided NMa with no concrete reason to suspect that record companies had entered into illegal price agreements with regard to the sale of CDs. The considerable spread of consumer prices also gave NMa no reason to assume that record companies dictate the sales prices retailers charge for their CDs or that retailers entered into price agreements at the national level. NMa therefore decided not to start a competition investigation into cartel agreements in the sector.

In August 2002 NMa published a report on an investigation started in 2001 into the level of rates for telephone calls from the fixed telephone network to a mobile number. The conclusion was that each of the five mobile operators in the Netherlands has a dominant position on their own mobile network with regard to the termination of calls. After all, a mobile operator experiences no serious competition in setting its tariffs for the termination of calls on its own mobile network. The operator which receives the call charges a rate for terminating calls. This rate is paid by the operator from whose network the call originates (the originating network). This relates to the system of settlement which has been chosen, based on the so-called 'calling party pays' principle, whereby the operator's own customer is generally not confronted with the cost of terminating the call. As a result, mobile operators have hardly any incentive at all to charge at competitive rates.

This report is important for a further investigation into whether the level of terminating tariffs is permissible. Initially the initiative for further action was left to OPTA, as a number of disputes were pending with regard to the level of termination tariffs. This method of operation was consistent with agreements set out in the cooperation protocol between NMa and OPTA. Due to legal proceedings which had been filed, however, it was not clear at the beginning of 2003 what legal possibilities were open to OPTA in this regard. Since several operators increased their termination tariffs in the spring of 2003, NMa took over the investigation in April 2003.

Advice

The advice given by NMa, generally at the request of other public authorities, involves aspects relating to competition in regulations and legislation other than the Competition Act, or the application of these. In 2002, for instance, within the framework of competition regulation NMa advised the Ministry of Finance on the auctioning of filling stations on the motorway network. NMa made suggestions aimed at preventing anticompetitive behaviour before or after the auctions.

Other interventions

In some cases, NMa may act decisively to terminate or prevent (impending) restrictions on competition after carrying out a brief investigation. If there is a suspicion that an infringement has been committed, the companies involved are informed of this suspicion. NMa asks the companies to provide clarification and they are given the opportunity to terminate the behaviour in question. If this is not done, NMa may still take the route of imposing a sanction. The use of such interventions is an efficient and effective way of removing restrictions on competition. In 2002, interventions of this type were made on a number of occasions. In such cases, NMa can also monitor compliance by carrying out a verification.

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An example of this is the action taken by NMa following a complaint by Koninklijke Nederlandse Slagersorganisatie (KNS) [Royal Dutch Association of Butchers] against Schuitema Vastgoed B.V. (Schuitema Vastgoed) relating to an exclusivity clause in a rental agreement in which Schuitema Vastgoed acts as the tenant of a shopping centre. After a company visit, NMa urged Schuitema Vastgoed to amend the rental agreement which included the exclusivity clause. Schuitema Vastgoed subsequently informed its contractual partners that the clause was null and void.

International developments

Part 1 page 25
New European implementation regulation

In 2002 a new European directive was introduced which put into effect new provisions in the EC Treaty with regard to the prohibition of cartels and the prohibition of abuse of dominant positions. The changes resulting from this directive (Directive 1/2003) were discussed in Part 1 of this annual report. In 2002 other developments also occurred in relation to European competition rules. On 1 October 2002, the new block exemption for motor vehicle distribution (No. 1400/2002)[2] took effect. The prohibition of the use of selective dealership arrangements will take effect on 1 October 2005. The new Directive is based on the present policy of the European Commission in relation to the assessment of vertical restrictions on competition. The Directive consequently takes as its point of departure a more economic approach and the provisions of the block exemption apply to restrictive agreements up to a certain market share threshold. The European Commission has published a brochure explaining this block exemption.[3]

No new developments have taken place with regard to the review of the block exemption for technology transfers. The Commission used 2002 to process answers to the questionnaire which it distributed to market players.

Block exemption 1617/93 with regard to certain agreements in the airline industry was extended to 30 June 2005.[4] The extension includes an obligation on the part of airline

2 *OJEC 2002, L 203, 01.08.2002, p. 30-41.*

3 *See the Commission's website www.europa.eu.int/comm/competition/car_sector/*

4 *OJEC. 2002, L 167, 26.06.2002, p. 6.*

companies, which participate in negotiations on tariffs for the transportation of passengers, to provide certain data.

On 9 July 2002, a proposal for a new block exemption for certain agreements in the insurance sector was published, on which comments may be submitted.[5]

5 *OJEC. 2002, C 163, 09-07-2002, p. 7.*

Imposition of fines

NMa can impose a fine as a sanction for infringing the Competition Act. In 2002 NMa imposed fines amounting to € 99.6 million. This related to six cases in which a total of 21 fines were imposed. A meticulous process precedes the imposition of fines.

Procedure

Decisions in relation to sanctions are prepared by NMa's Legal Department. The Competition Department, the department within NMa which carries out investigations into restrictions on competition, contributes the report which it has drawn up and the underlying dossier.

The parties that are the subject of the report are given the opportunity to inspect the report and the dossier and are subsequently given an opportunity to present their opinion on the report in writing or during a hearing. The officials of the Legal Department who participate in the appeals commission and who prepare the decision with regard to the sanction are not involved in the investigation of the case. This is in accordance with the separation of functions prescribed in Section 3 of the Competition Act.

Guidelines for the Setting of Fines

In December 2001, NMa adopted Guidelines for the Setting of Fines [*Richtsnoeren Boetetoemeting*] which are important with regard to the imposition of fines for infringements of the prohibition of cartels contained in Section 6 of the Competition Act.[6]

The contents of these Guidelines for the Setting of Fines were discussed extensively in the Annual Report for 2001. The Guidelines for the Setting of Fines provide for the fine which may be imposed if Section 6 or Section 24 of the Competition Act is infringed. The fine, pursuant to the Act, amounts to a maximum of € 450,000 or 10 percent of the total annual turnover of the company, if this is greater.[7] In determining the fine, in accordance with the Guidelines for the Setting of Fines, the turnover involved is an important element. The turnover involved may be understood to be the value of all transactions which the company realises through the sale of goods and/or the supply of services relating to the infringement for the entire duration of the infringement. NMa bases the fine on 10 percent of the turnover involved of the respective company (fine basis), which is then multiplied by a certain factor depending, for instance, on the seriousness of the infringement, that is, whether it is a *very grave*, *grave* or *less grave* infringement.

6 *Netherlands Government Gazette, 21 December 2001, No. 248, p. 90. The Guidelines for the Setting of Fines can also be obtained from NMa's website, http://www.nmanet.nl.*

7 *If the infringement is committed by an association of undertakings, the maximum fine is based on the joint turnover of the undertakings which participate in this association.*

Application of the Guidelines for the Setting of Fines in 2002

In the year under review, NMa applied the Guidelines of the Setting of Fines in three cartel cases. In these decisions on sanctions, further form was given to NMa's policy with regard to the implementation of fines in 2002. The level of the fine depends on the specific economic and actual circumstances of the case. Within the boundaries set by the Guidelines for the Setting of Fines, the fines are tailored to the case. This approach contributes to ensuring that the fines have both a specific and general preventive effect. A court ruling has not been made on a fine determined in accordance with the Guidelines for the Setting of Fines. In its ruling on the appeal filed by N.V. Samenwerkende elektriciteitsproductiebedrijven (SEP), the Court of Rotterdam did consider whether the sanction imposed in 1999, in other words prior to the introduction of the Guidelines for the Setting of Fines, was in accordance with the guidelines. The Court ruled that the fine was not disproportionately high.[8]

Part 3 page 76
Court Rulings

8 *Court of Rotterdam, 26 November 2002, Reg. No. 00/1002 MEDED (SEP).*

In 1999 NMa imposed a fine of NLG 14 million (€ 6.35 million) on SEP because SEP had abused its dominant position.

Petrol: pricing Tango out of the market

The investigation into the developments surrounding the Tango filling station in Nijmegen related to a joint campaign by the Nijmegen filling stations, Neerboscheweg, Vermeulen St Anna, Sparu and Texaco/BEM, to price Tango out of the market. In the period from 15 April 2000 until 17 July 2000, all three companies offered the same discount on the price of petrol, diesel and LPG.

Normally horizontal price agreements soon constitute a *very grave* infringement of the Competition Act. NMa qualified this horizontal price agreement as a *grave* infringement. NMa attached importance to the content of the price agreement, namely a *reduction* rather than an increase in the retail price, and the fact that this price agreement was entered into by companies which have an operating agreement with the same supplier.

The turnover involved of each of the filling stations which committed the infringement was determined, after deduction of VAT, duties and levies. The level of the fine was determined for each of the filling stations by multiplying 10 percent of the turnover involved by a factor of 1. In accordance with the Guidelines for the Setting of Fines, NMa sets this factor at a figure between 0 and 2. The relatively small size of the relevant geographical market (Nijmegen and surroundings) played a role in setting this factor. On the basis of this, NMa set the fine for Vermeulen Neerboscheweg at € 25,000, the fine for Sparu at € 46,500 and the fine for Vermeulen St Anna at € 48,500. The fine for Texaco/BEM was increased due to the fact that Texaco/BEM had initiated and coordinated the discount campaign. With a view to achieving the desired preventive effect, NMa was of the opinion that it was also necessary to adjust the fine imposed on Texaco/BEM, which resulted in a fine of € 1 million.

Veterinary pharmaceuticals: refusal to supply

In 2000 NMa started an investigation into the practices of Coöperatieve Nederlandse Veterinair-farmaceutische Groothandel UA (AUV) and Aesculaap B.V. These companies are active, for instance, in the market for veterinary pharmaceuticals. Of all veterinary surgeons in the Netherlands, 90 percent are affiliated to UAV for the procurement of veterinary pharmaceuticals. AUV offers a range of products which includes more than 90 percent of all the veterinary pharmaceutical products available in the Netherlands. Aesculaap, which also sells AUV products, is the only other wholesaler in the Netherlands with a full assortment of veterinary pharmaceuticals.

The investigation led to the conclusion that AUV had infringed the prohibition of cartels by systematically refusing to supply pharmaceuticals to veterinary surgeons. AUV refused to supply its products to veterinary surgeons who did not adhere to its internal rules, for instance with regard to the pricing of AUV's products and the policy with regard to the setting up of practices by members. AUV entered into an agreement with Aesculaap in relation to this exclusionary policy.

In 1998, AUV submitted an application for exemption from the prohibition of cartels for, amongst others, this exclusionary policy. Following a provisional assessment by NMa, AUV deleted parts of its constitution and withdrew the application for exemption in mid-2000. However, NMa reached the conclusion that AUV and Aesculaap had refused to supply goods and had applied its exclusionary policy after this date. Fines were imposed for this period.

The level of the fines was determined by multiplying 10 percent of the turnover involved for the period from mid-2000 up to and including the date of the report, 15 February 2001, by a factor of 2. Practices such as this are *very grave* infringements, for which NMa sets the factor at between 1.5 and 3 in accordance with the Guidelines for the Setting of Fines. In determining the factor, the horizontal nature and the interrelationship of the practices were taken into account. Since these practices relate to the entire Dutch market, they had a

considerable economic effect on the market. The (potential) loss incurred by competitors, buyers and consumers as a result of the infringement is considerable. The fine imposed on AUV was set at € 9,700,000 on these grounds. Since Aesculaap's involvement carried less weight, the amount of the fine imposed on Aesculaap was reduced by 50 percent. The fine was set at € 750,000.

Mobile telephony: joint reduction in payments to dealers

NMa established that Ben, Dutchtone, KPN Mobile, O2 and Vodafone had entered into cartel agreements with regard to the reduction of standard payments to dealers for mobile telephone subscriptions. The investigation arose from various reports around September 2001, for instance in the media. All the market players took part in the horizontal price agreement. As a result, the agreement had a considerable effect on the market. The (potential) damage was as great. The infringement took place in any event from 13 June 2001 up to and including 31 December 2001, with regard to Ben, Dutchtone and Vodafone, and up to 31 October 2001 with regard to KPN Mobile and O2. As this is a very grave infringement, a factor of between 1.5 and 3 applied. In this case, the factor determined was not publicised because this would have resulted in the disclosure of sensitive commercial information. NMa set the fines for Dutchtone, KPN Mobile and O2 at € 11.5 million, € 31.3 million and € 6 million respectively. The fine imposed on Ben was increased by 10 percent to € 15.2 million because Ben took the initiative to enter into a cartel agreement. The fine imposed on Vodafone was also increased by 10 percent to € 24 million because Vodafone had encouraged the others to participate in the infringement.

Investigation into cartel infringements in the construction industry

Construction Industry Taskforce: 30 people

At the beginning of 2000, NMa set up the Construction Industry Taskforce to carry out intensive investigations into possible infringements of the Competition Act in the construction industry. In the autumn of 2001, the possibility of large-scale irregularities in the construction industry emerged. Partly on the basis of evidence in the highly publicised 'parallel administration' of the company Koop Tjuchem, NMa started various investigations.

At the end of 2002, the Construction Industry Taskforce consisted of 30 people. In addition, a number of employees of the Legal Department were assigned to sanctions procedures in relation to suspicions that the Competition Act had been infringed.

In 2002 NMa focused its investigation on a number of priority areas, which were carefully selected on the basis of the criteria which NMa uses in setting its priorities. In practice, with regard to the investigation into the construction industry, this means that in making the selection attention is given to the extent of the suspected infringement, its damage to society, whether the behaviour is incidental or structural, the number of reports which NMa has and the concreteness of these. Single items of evidence, such as evidence in the parallel administration, do not provide an adequate basis for determining that an infringement of the prohibition of cartels has been committed.

Setting priorities also means that not all evidence is investigated, even in the case of the investigation into the construction industry. This also applies to evidence derived from the parallel administration, from which NMa has made a selection. For instance, NMa has investigated a tender issued by the municipality of Scheemda, which is recorded in the parallel administration, because NMa received numerous concrete reports, in addition to the evidence obtained from the parallel administration.

NMa is also investigating important structural cooperative ventures between construction companies which emerged from the parallel administration. The cooperative ventures relate to a large part of the infrastructural work commissioned by public authorities in the years from 1998 to the present.

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Competition Act and Prices

Reports of infringements in the construction industry received in 2002

- Through the Information Line
  - By telephone 47
  - By email 23
- In writing 36
- By means of the notification form for tendering services 20

Tips and notifications: evidence of cartels

Apart from evidence in the parallel accounts of Koop Tjuchem, NMa is also investigating a variety of other evidence of possible infringements of the prohibition of cartels in the construction industry. Evidence is brought to NMa's attention through complaints and other reports.

NMa has taken a number of measures to ensure that it receives as many reports as possible. At the end of 2001, NMa opened its Information Line explicitly for tips and reports. A large number of reports were received by telephone and by email. Not all the reports are intended for NMa—the reports do not always involve a situation to which the prohibition of cartels applies. In certain cases, NMa refers the matter to other institutions. Other reports have given cause to carry out a further investigation.

In June 2002, NMa introduced a notification form which public authorities that issue tenders, such as municipalities, provinces, water boards and central government departments and private contractors may use to give notification of infringements of competition rules. Using the form and the explanation accompanying it, a department that issues a tender can ascertain whether it is possibly encountering cartel agreements in the tender procedure. Notification using the form may also give rise to an investigation by NMa. NMa registers all data received in a database, so that observable patterns can be identified, which in turn may give cause for an investigation.

Part 2 page 33
Granting leniency

With the adoption of the Leniency Guidelines, NMa also introduced a measure aimed at exposing cartels.

Investigation of infringements

In 2002 five series of on-site company inspections and the number of small-scale company inspections were held. NMa investigated 17 companies at a total of approximately 30 locations. People were also interviewed who were given the opportunity to provide statements.

In a number of cases the companies investigated did not fulfil their statutory obligation to cooperate in the investigation. In 2002, NMa imposed a fine for this in two cases. Following the conclusion of five investigations, NMa had a reasonable suspicion that an infringement of the prohibition of cartels had been committed. NMa set this suspicion out in a formal report.

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The drawing up of a report is followed by a sanctions procedure. If it is finally ascertained that an infringement was committed, fines are imposed. In 2003 NMa continued its intensive investigation into the construction industry.

NMa has deployed considerable investigative capacity for the investigation into the construction industry and uses advanced computer-based methods for analysing the documents of companies.

Part 2 page 32
Investigations

Sector investigations

In support of the investigation into the construction industry, NMa commissioned research into 100 of the largest construction projects put out to tender by public authorities in the period from 1998 to 2001. Special attention was paid to syndication. The researchers concluded that syndication may be necessary for carrying out large projects, but a consequence of this is that construction companies are able to coordinate their market behaviour on a small scale. It also provides companies with a potential means of imposing sanctions by excluding competitors from future syndicates. The likelihood of syndication is greater, the larger the project. According to the researchers, this does not mean, however, that syndicates are necessary wherever they occur. In 2003 NMa will advise the Ministry of Economic Affairs on the operation of the present prohibition of cartels in relation to syndication agreements.

Infringements ascertained: investigations completed in 2002

Five investigations into the construction industry, which NMa completed in 2002, resulted in a reasonable suspicion that the prohibition of cartels had been infringed. Following notification by the municipality of Amsterdam, NMa investigated the developments surrounding the tender for the North-South underground railway in the capital.
On 1 November, NMa drew up a report on two companies. It appeared from the investigation that these construction companies had entered into a master agreement at the end of 2000, in which mutual competition and competition with their competitors was restricted. This cooperation took the form of an agreement with a permanent character between potential competitors in relation to their market behaviour. NMa therefore suspects the companies of an infringement of the Competition Act.

At the end of November, NMa drew up a report on four road construction companies. A reasonable suspicion arose from the investigation that these companies had had prior consultation and had entered into price agreements with regard to the tendering of maintenance work on asphalted roads in the municipality of Scheemda in the period from 1998 up to and including 2000. In this investigation, NMa made use of data from the parallel accounts of Koop Tjuchem and other evidence.

At the beginning of December, NMa concluded an investigation into possible cartel agreements in relation to asphalting works in the provinces of Groningen, Friesland and Drenthe. A report was drawn up on 13 road construction companies due to a reasonable suspicion that the companies regularly coordinated their behaviour in subscribing to tenders. This took place in the years 1998 and 1999. Ten companies or parts of companies were involved in this on a regular basis and three companies were involved incidentally. NMa bases its conclusions in this investigation on material encountered during visits to companies within the context of its investigation into the construction industry.

Shortly after this, NMa announced that it suspected 18 road construction companies of entering into cartel agreements in relation to three asphalt plants in which they participated. NMa drew up a report which set out the reasonable suspicion that the construction companies had coordinated the affairs of the three asphalt plants. The 18 construction companies entered into agreements with regard to the price of asphalt, the planning and allocation of asphalt production and divestments and investments in the asphalt plants. The agreements related to the years from 1998 up to and including 2002.

At the end of December, NMa concluded an investigation into possible cartel agreements by five construction companies with regard to the construction, maintenance and renovation of athletics tracks. NMa suspects the construction companies of systematically coordinating their subscription behaviour and dividing the assignments amongst themselves. This coordination took place up to and including 2000 and involved tens of projects.

In 2003 the investigation into possible infringements of the Competition Act in the construction industry will continue. NMa announced this at the end of 2002 in its NMa Agenda 2003. At the beginning of 2003, NMa concluded the investigation into cartel agreements in relation to large infrastructural works in the region of Haarlemmermeer, including Schiphol Airport. NMa suspects eight companies of consulting each other and dividing assignments amongst themselves.

NMa's suspicion relates to the period from the beginning of 1998 up to and including 2000 and relates to 15 large infrastructural projects. NMa started its investigation in January 2002 and bases its findings, for instance, on data from the parallel accounts of the company Koop Tjuchem and material encountered during company visits in April and December 2002.

Parliamentary inquiry into the construction industry

In the spring of 2002, the Lower House of the Dutch Parliament decided to hold an inquiry into the construction industry. The Minister of Economic Affairs entered into working agreements with the Commission of Inquiry to avoid undesirable interference between

investigations carried out by NMa and the Commission of Inquiry. At the request of the Commission of Inquiry, NMa provided much information on competition law and NMa's investigations into the construction industry. Apart from the role of construction companies, the Commission of Inquiry investigated, for instance, NMa's role as the regulator. In its final report, the Commission of Inquiry referred to NMa's present approach as diligent, industrious and thorough. However, the report also criticised choices made by NMa in the past. The Commission of Inquiry criticised NMa for being remiss in law enforcement, for setting priorities in a one-dimensional way and for being too passive in obtaining the parallel accounts referred to above. The Commission of Inquiry also concluded that extending NMa's statutory powers may be necessary if its present powers prove inadequate. The results of the parliamentary inquiry are the subject of consultation between the government and Parliament. Since the beginning of 2001, NMa has made more capacity available and deployed this capacity in the investigation of cartels.

Cooperation with the Public Prosecution Service

The Public Prosecution Service is also carrying out an investigation into the construction industry. This investigation concentrates on criminal offences. Since the companies and persons, which are the subject of investigation by the Public Prosecution Service and NMa, are to some extent the same, the Prosecution Service and NMa have entered into agreements to avoid any unfavourable interference which could result from this. The Public Prosecution Service and NMa set out these agreements in a covenant in March 2002. The agreements were renewed in 2003.

Regulation of the healthcare sector

To strengthen the burgeoning market forces in the healthcare sector, it is of great importance, partly in the interests of consumers, that the operation of market forces is not frustrated by the formation of cartels. The healthcare sector was therefore an important focus of NMa's attention in 2002 and will remain so in the coming years. In February 2003, the Minister of Health, Welfare and Sport issued instructions for the creation of a so-called 'market superintendent' as a chamber of NMa.

Guidelines for the healthcare sector

In October 2002, NMa drew guidelines for the healthcare sector. Through the publication of these, NMa wishes to make it simpler for providers and insurers of healthcare to assess forms of cooperation and practices themselves in the light of competition rules. In fact, the guidelines bring together the conclusions of the assessments made by NMa in more than 390 cases in the healthcare sector dealt with by NMa. A consultation round preceded the adoption of the guidelines.

In its guidelines, NMa clarifies which agreements restrict competition and are, in principle, prohibited. These include, for instance, price and tariff agreements, agreements to divide markets and coordinated boycott campaigns. Agreements such as these reduce the range of healthcare on offer and detract from consumers' freedom of choice. Professional practitioners, health insurers and other entrepreneurs in the healthcare sector can assess their forms of cooperation and practices against the Competition Act independently.

A healthcare insurer with a dominant position may not abuse this position by discriminating against healthcare providers or by refusing to enter into a contract with a healthcare provider without giving an objective justification for this. Health insurers with a dominant position are obliged to apply objective, transparent and non-discriminatory criteria in negotiating contracts with healthcare providers. The healthcare insurer, however, does not have to enter into a contract with everyone.

In its guidelines, NMa states that where cooperation increases efficiency or quality, agreements between entrepreneurs in the healthcare sector are to the benefit of consumers, provided competition is not restricted unnecessarily. This includes, for

instance, agreements which improve the level of quality, such as joint locum schemes and the joint creation of electronic customer databases. Such schemes may not be abused to exclude competitors.

Regulation of the healthcare sector

On the basis of the guidelines, NMa supervised the healthcare sector actively in 2002. In the first quarter of 2002, two exploratory research projects were started.

The first research project focused on the hospital market. There is reason to carry out research into the hospital sector because there is a widely held concern about a far-reaching tendency towards concentration and because the government is focusing on more demand-driven healthcare, in which those requiring healthcare actually have more freedom of choice. NMa is carrying out research into the possibility of enabling hospitals to compete with each other, partly in the light of developments in regulations, and into possible restrictions on competition resulting from any future mergers of hospitals. The second research project relates to the market for institutions governed by the Exceptional Medical Expenses Act [*Algemene Wet Bijzondere Ziektekosten (AWBZ)*]. Due to extensive regulation, and tore recently there was no question of competition to which the Competition Act applied in these sectors.

Decisions relating to the healthcare sector

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In 2002, NMa took two decisions on applications for exemption which originated from the healthcare sector. These related to the application submitted by the pharmaceuticals manufacturer, Astra Zeneca, for exemption of its prohibition of supplying medicines to third parties which is imposed on hospitals and the decision on the application by Zorgverzekeraars Nederland in relation to the 'Solidarity Protocol'.

Research into the financial sector

The financial sector plays a central role in the economy. In the Netherlands, the sector is characterised by a very high degree of concentration, but also by a high degree of opaqueness and cross shareholdings. These circumstances, the supposedly very high profits made on the retail side of the market and the interests of consumers are the reason that NMa has decided to subject this sector to systematic research.

Earlier research

NMa has already paid the necessary attention to several parts of the financial sector. For instance, NMa commissioned NERA in London (1999) and NEI in Rotterdam (2000) to carry out research for the assessment of concentrations in the banking insurance sectors in the Netherlands. In relation to applications for exemption from the prohibition of cartels, the code of conduct for mortgage loans and the interbank charge for processing giro collection forms were assessed. This gave NMa insight into parts of the financial sector. This resulted, for instance, in the conclusion that intensive permanent regulation was desirable with a view to enforcing the Competition Act.

Information and consultation document

In mid-2002 NMa published an information and consultation document within the framework of its research into the banking sector, in general, and electronic payment processing, in particular. Network services for debit-card transactions, in particular, and the role of Interpay was central to this. In the document, NMa gives attention to the competitive characteristics of the banking sector in the Netherlands and concludes that the Dutch banking sector reveals characteristics which justify NMa's special attention. This special attention is necessary due to the high degree of concentration, the complex cross shareholdings between banks, high barriers that make it difficult for business customers to switch banks and the high (financial) barriers to entry experienced by new entrants in developing a good reputation, name recognition and a branch office network.

By means of focused questions, NMa has given market players the opportunity to respond to the document and has received various responses.

Interpay: abuse of a dominant position

In 2002 NMa extended its investigation into the position of Interpay. Interpay is the sole supplier of support services for debit-card payments in the Netherlands. Interpay was set up by and is fully owned by large banks. In April 2003, NMa announced that it suspected Interpay of abusing its dominant position by charging retailers rates for debit-card transactions which were too high. NMa also suspects that the competition between banks is limited by the fact that Interpay operates as the central sales office of network services with regard to debit-card transactions. For this reason NMa drew up a report on Interpay and ABN AMRO Bank, Rabobank, ING Bank, Fortis Bank, SNS Bank, Friesland Bank, Van Lanschot Bankiers and Bank Nederlandse Gemeenten, which are the shareholders of Interpay. Interpay and the banks which are its shareholders will respond to the report in 2003 during the sanctions procedure. After this, NMa will decide whether a sanction will be imposed.

Financial Sector Monitor

In 2002, the Minister of Finance and the Director-General of NMa agreed that the financial sector would be monitored on a permanent basis within the framework of NMa's regulatory duties. For this purpose, the Financial Sector Monitor was launched by NMa. This market monitor will provide an annual overview of relevant developments in the financial sector starting in 2003 from the perspective of competition law.

Merger Control

Compulsory notification: Section 34 of the Competition Act

The realisation of a concentration before the director general has been notified of the intention to do so and a subsequent period of four weeks has passed, is prohibited.

Licence required: Section 37 of the Competition Act

2 The Director-General may determine that a licence shall be required for a concentration if he has reason to assume that a dominant position that appreciably restricts actual competition on the Dutch market or a part thereof could be created or strengthened as a result of that concentration.

No permission: Section 41 of the Competition Act

2 A licence shall be refused if a dominant position that appreciably restricts actual competition on the Dutch market or a part thereof could be created or strengthened as a result of the proposed concentration.

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Taking into Account Future Developments

This chapter describes which instruments NMa used in 2002 for merger control: the regulation of concentrations. The figures give insight into the number and diverse nature of the mergers and acquisitions which NMa assessed. The international context is also discussed. In the area of concentration regulation, a number of changes at the international level are in the offing. Special attention will be given to monitoring activities in relation to the conditions subject to which concentrations are approved. Notable cases and activities will be discussed below and summaries of several notable cases in 2002 are included in Part 4. A number of developments in practice, including the Guidelines for Remedies approved in 2002, are described in part 3.

Objectives of merger control

NMa exercises preventive regulation in relation to mergers, acquisitions and certain joint ventures (concentrations) in the Netherlands. All concentrations which involve companies with an annual turnover which exceeds thresholds stipulated in the Act, must notify NMa before realising the transaction.

The statutory system of regulation of concentrations is, in principle, reactive by nature. In other words, NMa carries out an investigation after companies have decided to realise a merger or acquisition and have notified NMa of their intention. NMa assesses whether the notified transaction will give rise to or strengthen a dominant position. The aim of this preventive assessment is to ensure that companies do not acquire a position in which they can behave independently of competitors and buyers and influence or eliminate competition significantly on a certain market.

NMa assesses whether a merger or takeover on a certain market will result in a lasting dominant position that will restrict competition. It is not sufficient to make a static analysis of market conditions at the moment NMa is notified of a concentration. As far as possible, NMa must take into account the expected developments occurring on the relevant markets.

Realising mergers and acquisitions before NMa has been notified of them is prohibited. This applies to concentrations of companies which had a total joint global turnover of more than € 113,450,000 in the previous year, of which at least two companies realise a turnover of more than € 30 million in the Netherlands. A large number of the concentrations of which NMa was notified in 2002 related to companies with a joint turnover of more than € 2 billion. If the joint turnover exceeds € 2.5 billion, in most cases the concentrations are subject to European regulation. The European Commission must be notified of these rather than NMa. There are exceptions to this if the company is active mainly in the Netherlands.

During the period in which NMa investigates the consequences of a concentration, the companies may not put the transaction into effect. If NMa does not suspect that a dominant position will arise or be strengthened, it will take a decision within four weeks that a licence is not required for the transaction and that the transaction may proceed – unless this term has been extended. This is the first phase or notification phase. If there is a suspicion that a dominant position will arise or be strengthened, the companies must apply to NMa for a licence and wait for the decision on this application before the transaction may be realised. This is the second phase or licensing phase. Within 13 weeks, a further investigation will

Performance indicators

Notifications processed within the statutory term*

2002	2001
100%	100%

Realisation compared to planning

Realisatie	Planning
77 (77%)	100

* *Assuming a term of four weeks (Section 37 (3) of the Competition Act).*

See also 'Customer/Environment perspective' in Part 1

Joint turnover of the companies involved (€)	Number of concentrations assessed
To 250 million	8
250 – 500 million	9
500 – 1,000 million	7
1,000 – 2,000 million	7
2,000 – 5,000 million	11
More than 5,000 million	21
Total*	63

* *Excluding decisions relating to the non-applicability of concentration regulation (3 decisions)*

NMa deployed 20 people for merger control

be carried out to establish whether the proposed transaction will, in fact, result in the emergence or strengthening of a dominant position which will appreciably impede competition on the Dutch market.

The obligation to notify NMa of a concentration rests with the parties to the transaction. NMa regularly checks whether companies which merge comply with the notification requirement. Additional capacity was deployed in 2002 for these verification activities. This capacity was available due to the smaller number of concentration notifications in the past year. After receiving reports, or on the basis of its own observations, NMa seeks verification of the nature and size of the transaction from the companies involved in the concentration. On the basis of the turnover of these companies, NMa checks whether it is authorised to assess the transaction in question. In 2002, NMa carried out various verification investigations. Of these, two ultimately resulted in notification of a concentration.

The trend towards a smaller number of concentration notifications, which started in 2001, continued in 2002. The raising of the turnover threshold at which notifying NMa becomes obligatory in the autumn of 2001 affected this fall in notifications. In addition, the economic situation has possibly affected the number of mergers and acquisitions.

Deployment of resources for merger control

NMa deployed twenty people on average for the regulation of concentrations in 2002. Since the number of notifications of concentrations decreased in 2002 compared to previous years, more capacity was available for proactive activities. These include drawing up guidelines which make the method of assessment more transparent and verifying compliance with the obligation to give notification.

Key Figures Merger Control	2002	2001
Notifications of concentrations	77	135
Withdrawn	8	8
Decisions in the notification phase	66	138
Not applicable due to the turnover thresholds	2	7
Not applicable, not a concentration	1	-
Licence required	1	2
Decisions in the licensing phase	0	1
Decisions pursuant to Section 40 of the Competition Act (exemption from the waiting period)	1	1
Decisions pursuant to Section 35 (3) of the Competition Act (confidentiality of data)	1	0
Not applicable due to the turnover threshold	2	7
Not applicable, not a concentration	1	-
Decisions in respect of mergers, in terms of Section 27 (a) of the Competition Act	5	13
Decisions in relation to acquiring control in terms of Section 27 (b) of the Competition Act	50	106
Decisions in relation to the creation of a joint undertaking in terms of Section 27 (c) of the Competition Act	8	12
Summary decisions	17	45
Cases in which the term was suspended	51 *	67
Completed within four weeks	21	77
Prenotification discussions	16	18
Informal opinions	18	35

* *Of which 7 cases completed within four weeks*

Results: instruments deployed

In 2002 NMa used various instruments for the regulation of concentrations. In addition to assessing notified concentrations, various documents were published this year to support the regulation of concentrations. The publication of guidelines promotes the efficient assessment of notified concentrations.

NMa strives to limit the (administrative) burden on companies and is aware that the aim of supervising concentrations – preventing dominant positions on Dutch markets – can and must be achieved in the most efficient way.

Concentrations which clearly do not give rise to problems are processed by NMa by means of a summary decision.

In 2002, no investigations occurred within the framework of an application for a licence. NMa concluded that a licence was required for the takeover of Casema by the American company Liberty, but an application was not submitted by the companies. In a number of cases, NMa carried out an extensive investigation in the initial phase. An example of this is the takeover of the construction company HBG by the BAM-NBM group, which NMa was able to approve in the notification phase after a thorough investigation, on condition that the interests in asphalt plants were divested. In the cases Liberty/Casema and DSM/Brokking an extensive investigation took place in the notification phase.

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Stimulating anticipation

Past decisions taken by NMa provide a basis for anticipating which companies can anticipate decisions. If concentrations in a sector have been investigated earlier, lessons can be drawn from the decisions taken by NMa with regard to the likely assessment of new proposed mergers and acquisitions in the same sector. There are signs that as a result certain concentrations which are more or less certain not to be approved are abandoned. It is reasonable to assume that this anticipatory effect will increase over time. This less visible effect of the Competition Act is not only favourable from the point of view of maintaining competition, but also because it contributes to limiting the administrative burden on companies.

In practice, companies appear to make regular use of the opportunity of holding a so-called 'prenotification discussion' with staff of NMa's Merger Control Department. This is a form of consultation prior to the formal notification of the concentration. Such discussions can result in considerable time savings, for instance because the parties can indicate and identify areas which lack clarity before giving notification of the transaction. Contact prior to notification may also give cause for the companies to amend the proposed transaction in such a way that it is more likely that NMa will approve the transaction. A good example of this is the case of Essent-RAZOB.

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Summaries

Time savings with regard to the assessment of a concentration by NMa are also achieved by answering questions posed by the companies or through advisers with regard to concentration regulation. NMa tries to answer these questions in the shortest possible time and to give its opinion. NMa has the impression that providing these informal opinions has already contributed considerably to providing clarity on how NMa approaches certain issues. The number of requests for such opinions from NMa in relation to concentrations seems to be declining. The number of questions may, of course, increase again if new questions arise in practice.

Sector research

NMa assesses concentrations in very many different sectors of the Dutch economy. Partly due to the anticipatory effect on the regulation of concentrations mentioned above, it may be worthwhile in certain sectors to carry out research without the necessity of doing so in relation to the concrete notification of a concentration. The desired effect of such research is twofold. Firstly, it may produce results which, when published, provide the sector in question with insight into the lines along which any future merger or acquisition will be assessed. As a result, companies may themselves make a better estimate of the outcome of any assessment by NMa in a concrete case. Secondly, NMa is well-prepared should it receive a notification from the sector researched.

Sectors in which concentrations were assessed in 2002	Number
Construction	11
Energy and waste processing	10
Financial services	2
Retail and wholesale	14
Transport	3
Healthcare	2
IT services and telecommunications	9
Hospitality industry and recreation	1
Manufacturing of goods	1
Other services	13
Total	66

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Regulation of the healthcare sector

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Part 2 page 39
Investigation into cartel infringements in the construction industry

In December 2002, NMa published a memorandum with the findings of research into concentrations in the energy sector. In the memorandum, NMa gives its provisional insights with regard to the assessment of future concentrations in the energy sector. Before this publication was approved, it was the subject of a consultation round. Various valuable responses were received and included in the research. Partly due to the responses, NMa intends to carry out or commission research into the factors that determine market power on the wholesale electricity market, in cooperation with the Market Surveillance Committee (MSC). This research will focus on defining the product market and the geographical market and defining market power.

In 2003, NMa will also carry out research into the hospital sector and the construction industry in relation to concentration regulation. Partly in the light of developments in legislation and regulations, NMa is investigating the opportunities that hospitals have to compete and possible anti-competitive effects which may result from possible future mergers of hospitals.

From the research carried out into concentrations in the construction industry, in particular in relation to the BAM-HBG case, it has emerged that the degree of concentration in certain segments of the construction industry justifies further research.

NMa therefore wishes to carry out or commission further research into competition in the construction markets, particularly in relation to situations in which there are few suppliers and a high degree of concentration. This is also important because the construction industry is susceptible to the formation of cartels.

European developments

Within the framework of the revision of European concentration regulation, the European Commission published a so-called Green Paper[1] at the end of 2001 containing points for discussion in relation to possible amendments to the European Merger Directorate. NMa and the Ministry of Economic Affairs jointly prepared the Dutch response to the Green Paper.

The Green Paper contains the European Commission's proposal to have the European Commission process concentrations, of which a number of Member States must be notified (multi-jurisdictional mergers), rather than the Member States. The aim of this amendment is to reduce the administrative burden on companies. The aim of the proposal to increase the practical usefulness of the referral system by simplifying the criteria applicable to this is to improve the distribution of cases amongst the European Commission and the various Member States. Subject to certain conditions, the European Commission may refer concentrations of which it has been notified to national competition authorities if the merger or acquisition relates mainly to markets in the Member State in question. The European Commission may also process concentrations at the request of one or more Member States which would otherwise have to be assessed by one or more Member States, if the concentration affects a larger market.

In the Green Paper, the European Commission also proposes extending the terms within which decisions must be taken if the companies in question provide solutions (remedies) to competition concerns which have been identified. This results in more time for a careful investigation and for careful treatment of the case in the Advisory Committee of Member States. In the Green Paper, the European Commission introduces the discussion on a possible fundamental amendment to the criterion on which the assessment of concentrations is based. At present, the criterion is whether or not a dominant position will arise or be strengthened—the dominance test. A different criterion is 'a substantial reduction in competition'. This criterion is applied in various countries, including the United States.

On 11 December 2002, the European Commission published a first draft of an amended Merger Regulation. At the same time draft guidelines were also published with the aim of

1 *COM(2001) 745/6 - 11.12.2001, obtainable from http://europa.eu.int/comm/competition/mergers/review/green_paper/en.pdf*

Concentrations assessed in 2002 of which notification was also given in other countries	Total
Notification in two Member States	
· Netherlands and Belgium	1
· Netherlands and Germany	7
Notification in three Member States	
· Netherlands, Germany and Austria	2
Notification in more than three Member States	
· Netherlands, Belgium, Germany, Portugal	1
· Netherlands, Germany, Italy, Austria Portugal	1
Total	12

clarifying the European Commission's practice in relation to merger control. These Horizontal Merger Guidelines are now the subject of consultation. The proposal for an amended Merger Regulation has been presented for approval to the Council of the European Union. The European Parliament is also being consulted. The Council of the European Union is expected to approve the new Merger Regulation in 2003 and it is expected to take effect on 1 May 2004.

Remedies in relation to concentrations

Remedies are conditions linked to the approval of a concentration of companies. A condition which is frequently imposed is the obligatory sale of part of a company. Remedies may prevent the emergence or strengthening of a dominant position without NMa having to block a merger or acquisition entirely to achieve this by refusing to grant a licence. In this way NMa can intervene effectively and efficiently without having to go further than is strictly necessary to ensure competition on the relevant markets. In December 2002, NMa approved the Guidelines for Remedies.

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Guidelines for Remedies

The Competition Act does not explicitly provide NMa with the possibility of taking a decision that a licence is not required for a concentration subject to conditions. In certain circumstances competition concerns which arise may, however, be allayed in the notification phase if the parties amend the notification. In such cases, a licence is no longer required for the concentration. In the case of BAM-HBG the notification was changed during the procedure. In the case of Essent - Razob the transaction was amended in the prenotification phase. This avoided a lengthy and intensive licensing investigation in these cases. For these solutions it is necessary that the competition problem is clear and that the parties' proposals will solve the problem without any doubt.

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Summaries

Monitoring remedies

If remedies are the solution to a competition problem which has been identified, it is necessary to verify that the conditions are implemented correctly. In 2002 monitoring took place of remedies imposed earlier.

Case 1331/PNEM/MEGA - Edon In the case of PNEM/MEGA - Edon, in which NMa granted a licence subject to conditions in 1999, a fine was imposed on Essent in 2002 due to the sale of its interest in a certain composting plant (Purva) without obtaining the necessary prior approval of the buyer from NMa. This is the first time that NMa has imposed a fine for an infringement such as this.

Case 1538/De Telegraaf - De Limburger In the case of De Telegraaf - De Limburger, De Telegraaf was required, for instance, to guarantee the commercial and editorial independence of Dagblad De Limburger and Het Limburgs Dagblad. Due to the economic circumstances, De Telegraaf presented its plans for cost savings to NMa in 2002. In this regard, NMa indicated that De Telegraaf could implement the cost savings but that those newspapers should continue to operate entirely separately and that the management boards of the newspapers must continue to the responsible for the commercial operation of their own newspapers. Concretely this meant, for instance, that the management boards had to take their own investment decisions, that the editorial boards were responsible for the contents of the newspapers and that the staffing of the editorial boards should be adequate to guarantee this independence.

Case 1528/Wegener - VNU In the case of Wegener - VNU NMa approved Wegener's plans for cost savings in relation to the newspapers BN/De Stem and Provinciale Zeeuwse Courant subject to more or less the same conditions. In this case, in relation to monitoring remedies, other developments also occurred. To guarantee competition in the Gelderland

region, Wegener had to give assurances that it would sell a number of daily newspapers when it acquired VNU. Wegener appealed against NMa's decision and the appeal was upheld in part by the Court of Rotterdam. Wegener then merged Gelders Dagblad, Arnhemse Courant and De Gelderlander. In 2001, the Trade and Industry Appeals Tribunal [*College van Beroep voor het bedrijfsleven*] reversed the ruling of the Court on appeal.
To guarantee competition in the Gelderland region, Wegener is obliged to cooperate fully in the sale of the respective daily newspapers. Research commissioned and carried out by NMa has shown that there is little likelihood of selling these newspapers in their original form, but that there are buyers interested in purchasing at least parts of these daily newspapers. In order to ensure the effect of the conditions originally imposed by NMa, Wegener is required, for instance, not to increase the prices it charges subscribers and advertisers in the area by more than the prices of its other daily newspapers for three years, to maintain the editorial editions of De Gelderlander and to retain the possibility for regional and local advertisers to advertise in parts of the coverage area. This package of measures will ensure that the effect of the original conditions imposed will be maintained as far as possible.

Competition Act and Prices

The expectations with regard to the economic effect of the Competition Act, which came into force in 1998, were always high: an increase in competition, strong economic growth, and a better and more adequate range of products on offer and, in particular, a significant downward pressure on prices.

As was indicated in the Annual Report for 2001, it is useful for NMa's reporting to measure these expectations regularly. Measuring the effects of the Competition Act provides an analysis of the effectiveness of it and contributes to optimising the available policy instruments. For this reason, economic research is carried out to establish what the effects have been of the prohibition of cartels and merger control. This research is consistent with the international trend towards concrete analysis of the economic effects of competition policy.[1]

The potential effect that the competition regime in the Netherlands has of lowering prices has been the subject of numerous exploratory econometric analyses. Researchers have calculated that inflation may be more than one percentage point per annum lower due to the better operation of market forces.[2] In addition to the one-off effect that supracompetitive prices fall to a lower equilibrium level, these analyses acknowledge a dynamic chain effect due to the fact that competition stimulates a growth in productivity, which in turn results in a fall in cost per unit of product. Competition can, for instance, exert downward pressure on inflation figures, possibly on a lasting basis.

Insufficient time, however, has passed since the Competition Act took effect for conclusions to be drawn as to whether it has had the permanent effect of reducing inflation. On the basis of the figures published by the Central Bureau of Statistics, it can be concluded that the average price/cost margin of companies in the Netherlands fell significantly after 1997 and is four percentage points below the long-term average.[3] The average price increase during the first three years that the Competition Act was in effect two percentage points lower than that reported for actual cost increases and demand factors. The new relationships of competition in the Netherlands therefore seem to have had the effect of driving down prices.

An effect in this order of magnitude is to be expected on the basis of international academic research and the experience of other competition authorities.[4] Analyses of available data in specific competition cases show that distortions of competition result in prices on the relevant market which are on average 5 to 10 percent higher than the competitive level. The end of the 'cartel paradise' in the Netherlands in 1997, as it were, partly released this supracompetitive price level.

This complication does not occur in relation to merger control by NMa, because the favourable effects of merger control only occur after the emergence of a dominant position – which would result from the concentration – has been prevented. NMa may require a licence for a concentration and may refuse to grant one, but it may also ensure that the transaction is amended by imposing further conditions.

It is important to acknowledge that preventing anticompetitive concentrations not only involves mergers which are blocked after the companies in question have notified NMa of a concentration (compliance required in accordance with administrative law). After all, there are also companies which would embark on a merger in the absence of

1 *S. Davies and A. Majumdar, The Development of Targets for Consumer Savings Arising from Competition Policy, OFT Discussion Paper, Londen, 2002.*

2 *H. Nieuwenhuijsen and J. Nijkamp, Competition and Economic Performance, EIM, Zoetermeer, 2001, P.A.D. Cavelaars, Does Competition Enhancement Have Permanent Inflation Effects?, Kyklos 2003, Vol. 56, No. 1 pp. 69-94.*

3 *F. Warzynski, The Dynamic Effect of Competition on Price Cost Margins and Innovation, PhD Thesis, University of Louvain, 2003, Chapter 3, in particular pp. 51-57, P.A.G. van Bergeijk and M. Verkoulen, 'Heeft de Mededingingswet al effect?', ESB, April 2003*

4 *NMa's practical experience confirms these data; see 'Driving up prices in the construction industry' below.*

Concentration Mergers examined	Outcome of intervention by NMa
• SEP – EPON – EPZ –EZH – UNA	application withdrawn
• RAI – Jaarbeurs	prohibition
• Internatio- Müller – Brocacef	application withdrawn
• Staatsloterij – Lotto – Bank-giroloterij	prohibition
• FCDF – De Kievit	approval subject to conditions
• PNEM/Mega – Edon	approval subject to conditions
• The Greenery – Fruitmasters	application withdrawn
• Wegener Arcade – VNU Dagbladen	approval subject to conditions
• De Telegraaf – De Limburger	approval subject to conditions
• Rémy Cointreau – Bols	approval subject to conditions
• Gran Dorado – Center Parcs	approval subject to conditions

concentration regulation, but which now anticipate that NMa will not approve of the merger in question and therefore decide against it (spontaneous compliance). It is difficult to quantify these repressed intentions to merge. Internationally it is therefore common practice to make a conservative estimate by restricting oneself to the effects of those concentrations which are not approved, at least not in their proposed form.[5]

A concentration resulting in the emergence or strengthening of a dominant position does not occur because of merger control. As a result, the unfavourable effects of the proposed concentration do not occur. Insight into the costs and benefits of applying concentration regulation can therefore only be obtained through model-based calculations. By means of a simulation method used by competition authorities, for instance in United States and Scandinavia, research was carried out into the concentration cases that have occurred in the past five years.

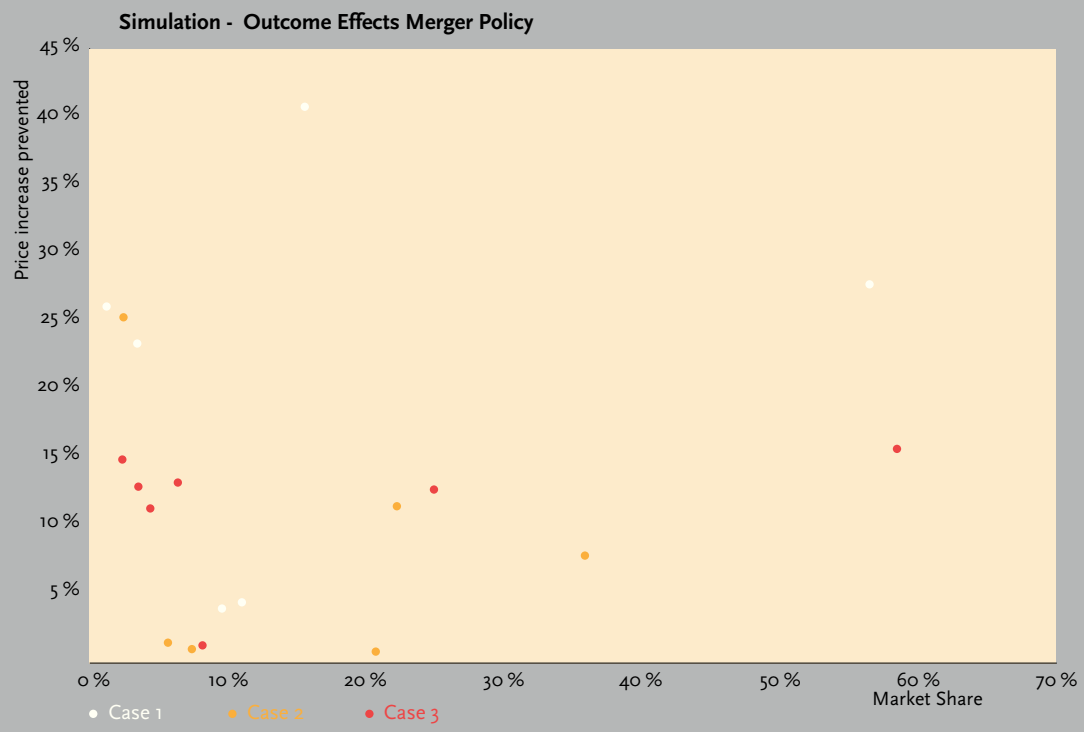
This model[6] is populated by data which NMa collects for this assessment. This relates, for instance, to prices, sales volumes and demand and substitution elasticities.

The analysis focuses on simulating the expected market equilibrium after a number of market players have merged and the resulting company, which has a dominant position, is able to determine the prices of numerous goods. By comparing the situation with the actual market outcomes at the moment that notification is given of the concentration, it is possible, for instance, to determine the effects of the merger on prices and volumes and, in relation to this, the changes in the consumer surplus and the net increase or decrease in prosperity.

5 *P. Nelson and S.Sun, Consumer Savings from Merger Enforcement: A Review of the Antitrust Agencies' Estimates, Antitrust Law Journal, Vol. 69, 2001*

6 *The key element in the exercise is a Bertrand-Nash model for heterogeneous goods, in which companies optimise profit on the basis of the information available to them. L. Froeb and S. Tschantz, How Much Information is Required to Accurately Predict Merger Effects?, Vanderbilt University, 2001*

The figure below illustrates the method on the basis of the outcomes of the model for four different relevant markets. The market share per market player and the expected price increase are reflected in the figure. Due to the often considerable price increases, it appears from this more detailed research that the decision at the time not to allow the merger to proceed in its proposed form was at least correct. On the basis of additional simulations, the conservative conclusion that concentration regulation by NMa on average prevented price increases of 5 to 10 percent is justified.



Driving up prices in the construction industry: an economic perspective

To obtain insight into the parallel accounts of the construction company, Koop Tjuchem, NMa analysed and classified the data of the 3465 agreements of more than 300 companies for the period 1985-1998 recorded in the accounts.

NMa used two methods to estimate the upward trend in prices. Firstly, the (promises of) payments between the members of the cartel recorded in the parallel accounts were studied. A disadvantage of this method is that it does not determine the additional profit which accrues to the contractor. This method therefore results in an underestimate. On the basis of this calculation, NMa arrived at an average mark-up of 9 percent for the projects recorded in the parallel accounts in the year 1998.

Secondly, NMa analysed the subscriptions to tenders in which the cartel was not awarded the contract. In the case of these tenders, the cartel's offer (which was undercut) and the subscription price for which the contract was awarded are known. The successful subscription price is the (apparently profitable) amount for which the contract was awarded to a competitor which was 'not a member of the cartel'. On the basis of these data, it is possible in retrospect to determine the amount by which those involved intended to drive up prices. The proposed markup ranges from an average of 9 percent in 1995 to 12 percent in 1998.

With regard to the amount, the extent to which prices were driven up corresponds to the findings of academic research in other countries and market segments. The interval, within which NMa's estimates fall, does not deviate from the findings and experience in practice of other competition authorities. Nevertheless, questions were raised in the media with regard to whether the claim that the cartels drove up prices was realistic because profits in the construction industry did not appear to be remarkably high.

Driving up prices, however, is not always translated unambiguously into higher profits. The price effect results in losses in social efficiency, which are not reflected in the profit-and-loss account. This involves not only a fall in production, but also inefficient production and payments between companies which are not recorded in the companies' accounts. Ultimately these inefficiencies are reflected as expenses in the official company accounts. Only the net profits of the cartel, the actual extent to which prices are driven up, is reflected in observably higher profits. For customers, however, this is of little importance: on average, they have had to pay approximately 10 percent too much.

Regulation of the Energy Markets by DTe

This chapter describes the instruments which DTe deployed for its regulation and supervision of the energy markets. The instruments are described and presented as figures. Special attention is given to the coming regulatory period and the regulation of quality. The relationship between DTe and market players, the way decisions are taken and developments at the European level are also discussed.

DTe's objectives

DTe, as a chamber of NMa, regulates access to the energy transmission and energy distribution grids and, where possible, promotes competition on the energy markets. DTe strives to achieve efficiency *and* quality in the interests of consumers. DTe's guiding principle is that, where possible, market forces should be stimulated and, where necessary, the effects of market forces should be simulated.

DTe implements the Electricity Act of 1998 and the Gas Act, both of which are the result of EC directives[1].

1 *Directives 96/92/EC and 98/30/EC of the European Parliament and the Council of 19 December 1996 and 22 June 1998 respectively in relation to common rules for the internal market for electricity and gas respectively. Amendments to these Directives were approved at the end of 2002 by the Council of Energy Ministers.*

Deployment of resources for the regulation of the energy markets

DTe deploys 55 people to regulate the energy markets.

DTe was reorganised on 1 January 2002. The organisation now has three units: Regulation, Markets Infrastructure and Supervision. In addition, the organisation includes the Market Surveillance Committee (MSC) Taskforce and the Information and Data Management Department. DTe's staff increased in 2002 from 35 to 55 employees. An Energy unit was also set up within NMa's Legal Department to handle administrative appeals and judicial appeals against decisions taken by DTe.

DTe's budget for 2002 amounted to approximately € 9 million, comprising € 6.5 million for staff and expenditure on goods and services and € 2.5 million for research. The Minister of Economic Affairs approved the contribution scheme for 2002 in the second half of 2002.[2] This scheme includes the amounts levied in accordance with Section 85 of the Electricity Act of 1998 and Section 64 of the Gas Act for activities carried out in 2002 in relation to the implementation of these Acts. DTe issued invoices for a total amount of almost € 1.9 million to licence holders, electricity grid and gas network managers and companies which were granted an exemption in 2002, pursuant to Section 15 of the Electricity Act of 1998.

2 *Cost Recovery Scheme for the Energy Sector for 2002 [Regeling kostenverhaal energie 2002]. Netherlands Government Gazette, 22 August 2002, No. 160, pp. 7 and 8.*

Results: instruments deployed

DTe's agenda was dominated mainly by the further development of a firm and proactive regulatory policy, the commencement of preparations for the next regulatory period and the operation and amendment of the Guidelines pursuant to the Gas Act. Rulings of the Trade and Industry Appeals Tribunal [*College van Beroep voor het bedrijfsleven (CBb)*] in relation to differentiated efficiency factors (price caps) for the supply and distribution of electricity respectively affected DTe's work. Considerable attention was paid to settling administrative and judicial appeals and proposals were formulated aimed at 'streamlining' and, where possible, shortening the decision-making process.

Type of activity		Numbers
Method decisions	17	14
• Technical conditions		1
• Price caps gas network managers		2
• Guidelines for Gas Transmission and Storage 2003		
Implementation decisions	329	
• Tariffs 2002/2003		237
• Granting of licences		39
• Section 11/82 conditions Gas Act		53
Supervision of compliance	29	
• Binding instructions		27
• Orders subject to penalties		2
Advice to the Minister of Economic Affairs	20	
• Second revised decision on the administrative appeal against the X factor for the supply of gas		1
• Exemption from the obligation to appoint a grid/network manager		13
• Consent to the appointment of a grid/network manager		3
• Liberalisation		2
• Interim reports on audits		1
Decisions on administrative appeals	80	
Total number of decisions and occasions on which advice was given	475	

In 2002 DTe made use of the following instruments:
- regulatory decisions in relation to electricity and gas;
- tariff decisions in relation to electricity and gas;
- technical preconditions for the transmission of electricity;
- granting of licences for the supply of electricity and gas to captive customers;
- supervision of compliance with the Electricity Act of 1998 and the Gas Act (including the deployment of law enforcement instruments);
- advising the Minister of Economic Affairs;
- contributions to international consultative bodies of European regulators for the energy sector.

In relation to electricity and gas, DTe took a total of 375 decisions in 2002 and advised the Minister of Economic Affairs on 20 occasions. In 2002, 125 notices of administrative appeal against decisions taken by DTe were settled, 80 by means of an administrative appeal. During the proceedings, 45 administrative appeals were withdrawn.

Compared to 2001, the total number of decisions and recommendations fell slightly in 2002. This is due to rulings by the Trade and Industry Appeals Tribunal on the differentiation of efficiency discounts (price caps) for the supply and transmission of electricity. As a result of these rulings, DTe was not able to take decisions on tariffs for the transmission of electricity for most electricity grid managers and all gas network managers in 2003.

The substantive aspects of DTe's various decisions and recommendations are discussed below.

Second regulatory period: yardstick competition and quality

In 2002, DTe started preparations for the second regulatory period. This relates to the introduction of yardstick competition in combination with quality regulation, a revision of the regulatory regime for the so-called 'transmission system operator' (TSO) for electricity, the grid manager of the national high-voltage grid TenneT, the introduction of a regulatory regime for a TSO for the gas network and an overall evaluation of the Tariff Code.

TSO: *transmission system operator*
For electricity: the manager of the national high-voltage grid
For gas: the manager of the high-pressure gas network

In this second regulatory period, DTe wishes to introduce a system of yardstick competition. This means that the individual caps on the prices which energy companies may charge, the 'X factors', will be based on the average efficiency improvement in the sector. The grid companies can make a profit if the improvement in their efficiency exceeds the average for the sector. This gives the grid companies an incentive and average efficiency will increase. Buyers profit from the efficiency improvement because this is reflected in lower prices.

To ensure that efficiency improvements are not made at the expense of the reliability of the grid, DTe will apply the system of yardstick competition in combination with quality regulation. DTe wishes grid companies to find a balance between the income and expenditure relating to reliability. The reliability of the Dutch electricity grids will be guaranteed by means of quality regulation, referred to above. The additional cost of achieving a higher level of reliability must be offset against the advantages to consumers of a decrease in the number of power failures. As a result, the maximum desirable level of quality is provided at the best possible price.

In 2002, DTe published an information and consultation document entitled 'Yardstick Competition for Regional Electricity Grid Managers', which introduced the concepts of yardstick competition and quality regulation. To ensure maximum participation of market players in designing this regulatory system, intensive and informal consultation took place between DTe and market players through a contact group. This contact group was set up by EnergieNed. In the first half of 2003, DTe will discuss the results of the information and consultation round in an open discussion with market players. DTe expects to take measures in 2003 aimed at finalising the individual price caps for the next regulatory period. A condition for this is that the Electricity Act of 1998 is amended. This will be discussed further in the section 'Decisions implementing the Electricity Act of 1998 and the Gas Act'.

At the beginning of 2003, DTe provided market players with information and entered into consultation with them in relation to the amendment of the regulatory regime applicable to the electricity TSO (TenneT) and the introduction of a regulatory regime for a gas TSO.

Method decisions

Technical conditions

In 2002, DTe took a total of fourteen decisions amending the Technical Conditions applicable to energy companies. A large number of these decisions related to the liberalisation of energy users.

This involved clarifying the Technical Conditions following problems which arose with the extension of liberalisation to the second tranche of energy users on 1 January 2002. Examples of these are the conditions which apply to the connection register, making switching between suppliers possible and the situation with regard to relocation.
In addition, amendments were made to the Technical Conditions which are aimed at extending liberalisation to the final group of energy users on 1 January 2004. With these amendments, the Technical Conditions are ready for the opening of the consumer market, and grid managers and suppliers have sufficient time to prepare their systems for this.
DTe expects one more proposal to amend the Technical Conditions in relation to the 'Supplier of Last Resort' scheme. The grid managers have jointly indicated that they will submit this proposal at the beginning of 2003. Due to the timing of this, DTe can no longer guarantee that this amendment will be implemented in time for the opening of the market.

On 18 October 2002, the Trade and Industry Appeals Tribunal passed a ruling on the judicial appeal brought by VEMW in relation to the Grid Code. The Tribunal ruled that the Grid Code did not provide a basis for drawing up regulations for the daily auction, as

decided by the grid manager of the national high-voltage grid, TenneT. DTe acknowledges that it is extremely important that there should be no uncertainty on the market with regard to the continuity of the daily, monthly and annual electricity auctions. DTe has amended the part of the Grid Code in question in such a way that it provides a framework under administrative law within which the auctions are implemented. The actual implementation of the auctions is based on auction regulations. In these regulations, the Dutch and foreign managers of cross-border transmission networks set out the conditions under civil law for participation in and settlement of the auction, which are agreed in consultation with each other.

Last year the Market Surveillance Committee made recommendations with regard to the transparency of the Dutch electricity market. The recommendations explained that at present the Dutch electricity market is not sufficiently transparent and that (more) information with regard to supply and demand and imports and exports must be publicised. Partly on the basis of this advice, two decisions were taken.

The first decision, Decision No. 100696/6 of 19 March 2002, requires TenneT to publish the development of demand on the Dutch electricity market, the so-called 'system load', of the previous working day and the total of forecast imports and exports of the previous day. This information is essential for making investment decisions. Information on imports and exports enables market players to forecast price developments, both in the domestic and foreign markets.

The second decision, Decision No. 100950 of 17 December 2002, stipulates, for instance, that parties with connections with an electricity generation capacity of more than 5 MW per annum must provide information on their nominal power and daily information on the available power. TenneT publishes the nominal and available power as an aggregated figure. By combining this information with the information on the system load, market players can estimate the capacity on the imbalance market. In order to eliminate temporary imbalance between the demand and supply of electricity in the Netherlands, electricity generators make their imbalance capacity available to TenneT.

This information simplifies the process of estimating the economic value of the power which a market player can utilise to restore system balance. Companies are therefore in a better position than at present to assess whether or not and at what price they wish to offer imbalance power to TenneT (in so far as they are not legally obliged to do so). Only TenneT is informed of this and TenneT can then decide exactly how much imbalance power is available at any moment in the Netherlands.

Tariff Code

In 2002, DTe started an evaluation of the electricity Tariff Code. The market was consulted extensively in order to analyse in more detail how the Tariff Code functions, on the basis of experience of the present Code, which took effect in 1999, the effect of the Code, and suggestions for improvements. The evaluation process will result in decisions which will be taken in 2003, after which the grid managers will start working with the new updated Tariff Code.

Guidelines for gas transmission and gas storage 2003

In 2002, DTe adopted Guidelines for Gas Transmission and Gas Storage for the third time. These guidelines promote the operation of market forces in the gas sector. The guidelines provide the basis for dispute resolution by NMa. These guidelines stipulate that Gas Transport Services, the network part of Gasunie, will reduce its transmission tariffs by five percent in 2003. Gasunie must also set up a national 'balance point' at which gas contracts can be traded easily. This will make a considerable contribution to promoting the liberalisation of the gas market.

NMa and DTe announced that they would carry out joint research into the operation of the small consumers' market and any impediments to this. This market is mainly relevant

to buyers who are captive customers at present and who will join the liberalised market on 1 January 2004. The results of this investigation are expected in the course of 2003. The regional gas transmission companies must provide a justification for their tariffs on the basis of efficient economic costs. By requiring this, DTe has provided an incentive to strengthen the negotiating position of grid users.

The gas storage companies, NAM and the Bergen Concessionaries, are required to make a considerable part of their storage capacity available to third parties. The tariffs for their services must be based on efficient economic costs and relevant substitutes, such as storage facilities elsewhere. It appeared from the consultation round held prior to the adoption of the Guidelines in 2003 that there was also a need for an independent system operator (TSO), like TenneT in the case of the high-voltage grid. Gasunie has already taken steps in this direction.

Implementation decisions

Tariffs 2002/2003

On 6 February 2002, the Trade and Industry Appeals Tribunal ruled in the judicial appeal brought by N.V. RENDO against the electricity supply tariffs for the year 2002 that the differentiated price caps applied by DTe had insufficient basis in the Electricity Act of 1998.[1]

1 *Ruling of the Trade and Industry Appeals Tribunal, Awb 01/623.*

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Court Rulings

This ruling resulted in the revision of the system of price caps for licence holders in the electricity sector. Partly in the light of the temporary character of the regulation of supply tariffs and on the advice of DTe, the Minister of Economic Affairs adopted a new simplified regulatory method, including a uniform price for the supply of electricity based on this. This price cap is 10 percent per annum for all companies and is calculated by comparing the procurement costs of electricity in 2000 with the expected procurement costs for 2003. On average, the (expected) procurement costs in this period will fall by 10 percent. On the basis of these new price caps, DTe has taken new tariff decisions for 2002. The new tariffs have been set on the basis of the tariffs for 2000, which were different in the case of each company. A minimum tariff has been introduced for suppliers of electricity, which already had low tariffs in 2000. They may apply this minimum tariff as their tariff. The consequence of the new system is that tariff decisions in relation to the supply of electricity to small consumers will no longer be taken each quarter but once a year.

The Trade and Industry Appeals Tribunal made a 'similar' ruling on November 2002 with regard to the method of setting price caps in relation to electricity grids.[2] In this judgement, the Tribunal ruled that the statutory framework set out in the Electricity Act of 1998 provided insufficient grounds for imposing differentiated price caps on grid companies. In particular, since this relates to a permanent regulatory task, the Ministry of Economic Affairs decided to clarify the Electricity Act of 1998 in this regard. By means of a bill amending the Electricity Production Sector (Transition) Act, the Electricity Act of 1998 will be amended so as to provide an adequate legal basis for imposing differentiated price caps on grid companies. The Lower House of the Dutch Parliament approved this amendment at the end of 2002[3].

2 *Ruling of the Trade and Industry Appeals Tribunal, Awb 01/841.*

3 *Proceedings of the Upper House of the Dutch Parliament, 2002-2003, 28.174, No. 110.*

In 2002, DTe was not able to take decisions on the transmission tariffs for 2003 of most of the electricity grid managers and all the gas network managers. This means that most of the transmission tariffs for the year 2002 will also apply provisionally to the year 2003. By doing so, it is DTe's aim to restore calm to the market and provide clarity for consumers. In the case of three companies, namely TenneT BV, BV Transportnet Zuid-Holland and Eneco Netbeheer Weert BV, DTe did set grid tariffs for the year 2003. This was because these companies had already agreed to the 'X factor', the price cap, imposed by DTe earlier.

Within the framework of Section 40 (2) of the Electricity Act of 1998, DTe assesses whether 'substantial investments' by grid managers justify an increase in the transmission tariff.

In 2002, DTe assessed eighteen applications. This relates to exceptional and significant investments in the extension of the grid. If these are approved, the grid managers may increase their tariffs to finance their investments. A dismissal does not mean that DTe is of the opinion that the investments need not be carried out, but that the grid manager must finance the investments from their normal tariffs.

On 15 May 2002, DTe informed the grid managers of the criteria on which DTe bases its assessment of the grid managers' investment proposals. Briefly, as a result of changes to legislation and regulations, grid managers may be confronted with the need to invest in the expansion of their grids, which they cannot finance from their normal tariffs. These investments must have a unique character. If all grid managers have to make similar investments, this is taken into account in setting the price caps. Investments incur risk (for instance, the development of so-called 'Vinex' locations, growth in the economy). Grid managers already receive compensation for this through a risk component in their allowed returns. For specific projects which incur higher than average risk, DTe will not be inclined to make additional allowance in the tariff. For this reason, substantial investments will occur sporadically. Partly due to the ruling by the Trade and Industries Appeals Tribunal with regard to the method of price capping applied to the grids, decisions with regard to substantial investments in 2002 were deferred.

Granting of licences

The licensing system for the supply of electricity to small consumers, pursuant to Section 95c of the Electricity Act of 1998, took effect following the liberalisation on 1 July 2001 of the market for electricity generated by sustainable means. Suppliers who wish to deliver such electricity to small consumers are required to have a licence. DTe has already granted licences to 28 companies, pursuant to Section 95c of the Electricity Act of 1998, for the supply of electricity generated by sustainable means.

Section 11/82 conditions pursuant to the Gas Act

Section 11 of the Gas Act stipulates that each gas transmission company must set conditions and make these available for public inspection. The conditions stipulate the minimum criteria which *the technical design and operation of pipelines and installations* must meet in order for these pipelines and installations to be connected to the gas transmission company's gas transmission network. This section implements Article 5 of the European Gas Directive in national legislation. Article 5 of the European Gas Directive obliges Member States to ensure that the gas transmission companies draw up and publish technical operational requirements for the technical design and operation of LNG installations, storage installations, transmission and distribution networks and direct pipelines. These operational requirements must guarantee the interoperability of the systems and must be objective and non-discriminatory. The Member States must ensure that the European Commission is informed of these technical operational requirements. Pursuant to Section 11 of the Gas Act, DTe may instruct gas transmission companies to amend the conditions if, in its opinion, this is necessary with a view to compliance with the criteria referred to above or if the European Commission is of the opinion that this is necessary.

With a view to the implementation of Section 11 of the Gas Act, after adopting the Guidelines for Gas Transmission and Gas Storage for the year 2002 in September 2001, DTe started assessing the conditions which the gas transmission companies had submitted in draft form. This assessment resulted in a provisional opinion issued by DTe in December 2001, followed by amended, almost uniform, design conditions by gas transmission companies, of which the European Commission was notified on 16 April 2002. The assessment of the conditions by DTe, together with the instructions of the European Commission, resulted in a decision on 4 November 2002 by the Director of DTe, pursuant to Section 11 (5) of the Gas Act.

Section 82 of the Gas Act stipulates that the Director of DTe, on behalf of the Minister of Economic Affairs, each year assesses the *conditions* which gas network managers intend to apply in relation to the transmission of gas and the services necessarily related to this, insofar as such transmission and services relate to gas intended for customers who consume less than 170,000 m3 of gas.

The accordance with Section 82 of the Gas Act, the Director of DTe may instruct the gas network managers to amend the conditions, if it appears from the conditions that the network manager will not be able to provide for the transmission and services necessarily related to this adequately or efficiently, or that the conditions are not fair, are not transparent or are discriminatory. In accordance with Section 82 (2), the conditions must relate to quality criteria which the gas network managers are required to meet in providing their services. These criteria, in any event, relate to the technical specifications to be applied, restoring gas transmission outages, customer service and compensation in the event of serious outages. The assessment of the conditions submitted by the gas network managers resulted in 25 decisions in December 2002.

The network managers have also been informed that additional provisions must be included in the conditions for the protection of these consumers in relation to the extension of liberalisation to the third tranche of consumers, namely small consumers as of 1 January 2004.

Supervision of compliance

Proactive regulation

The regulation exercised by DTe is partly repressive and ad hoc by nature. The repressive aspect is reflected in the fact that DTe takes action after 'the damage has already been done' and infringements can no longer be prevented. The development of a proactive regulatory policy means investing in the structure of and the approach taken to regulating the sector, rather than achieving short-term successes. In DTe's opinion, it is essential that a consistent and integrated regulatory policy is pursued. Regulation can only be carried out effectively if it is an integral part of DTe's policy. DTe draws up an enforcement plan which sets out the aim of regulation and the applicable procedures, and the detail in which regulation will be exercised. The application of clear norms means that DTe will strive towards a 'Charter of Accountability' (an agreement on responsibilities) for regulated companies. The importance of an enforcement plan is also acknowledged by the Lower House of the Dutch Parliament. The legal basis for this has been created in the amendment to the Electricity Production Sector (Transition) Act. DTe will also develop an assessment model which will put into effect its priorities with regard to the regulation of grid managers. DTe will consult the sector with regard to the development of a structured assessment model. The entire regulation cycle will therefore follow a fixed pattern.

Audits

An important part of DTe's proactive regulation is the carrying out of audits of the approximately 45 managers of electricity grids and gas networks. On the basis of on-site inspections, DTe compares the actual situation of the grid or network manager with the requirements pursuant to the Electricity Act of 1998 and the Gas Act.

The legislation and regulations compel the grid or network companies and supply companies, which are part of the same group, to operate independently of each other and to promote competition on the market for the supply of gas and electricity. On the basis of audits, DTe assesses whether a grid or network manager meets this statutory obligation and what action is still necessary to satisfy the criteria. At the end of 2002, approximately half of all the audits had been carried out. DTe has drawn up an interim report for the Minister of Economic Affairs. In mid-2003 the first round of audits of all the grid and network managers will be completed and the final report will be presented to the Ministry of Economic Affairs.

Binding instructions and orders subject to penalties

At the beginning of 2003, DTe had only issued binding instructions to a small number of regional gas transmission companies in relation to the Guidelines for 2003. DTe regards this as a favourable development. After all, in 2001 DTe had to issue binding instructions to all the gas transmission companies and a number of gas storage companies in relation to the Guidelines for 2002.

In 2002 DTe imposed binding instructions on three electricity producers because they had refused to provide data on the cost of electricity produced by them. By means of binding instructions, DTe compelled the companies to provide the data within six weeks. In 2002, in the case of one producer DTe went further and imposed an order subject to a penalty due to the producer's failure to comply with a binding instruction.

Switching, lenient measures

Since the beginning of 2002, DTe has regularly received reports that customers who wish to change from one energy supplier to another, so-called 'switching', were experiencing difficulties doing so. Large and medium-sized companies have been free to choose their own energy supplier since 1 January 1998 and 1 January 2002 respectively, within the framework of the liberalisation of the energy market. Consumers of electricity generated by sustainable means have been free to choose a different supplier since 1 July 2001.

To clarify the technical preconditions for switching, DTe amended the Technical Conditions in a number of respects in 2002. Examples of these are the conditions applicable to the connection register and conditions applicable to relocation. In addition, amendments were made to the Technical Conditions aimed at the liberalisation of the last group of energy users on 1 January 2004. With these amendments, the Technical Conditions are ready for the opening of the market to consumers and the grid managers and suppliers have ample time to prepare their systems for this. Following complaints with regard to switching, DTe issued binding instructions to three grid managers.

In 2003 and 2004, DTe will also respond to complaints with regard to the switching of customers. This will certainly be of considerable importance, since all households and small business that consume energy will be free to choose their own energy supplier on 1 January 2004. This final tranche in the liberalisation of the energy market involves more than 6 million customers. DTe expects that a large number of these customers will wish to switch suppliers. Adequate administrative processing of applications to switch is therefore of the utmost importance. In order to take effective action against the failure to process applications to switch properly, it is important that DTe extends its 'toolkit' as soon as possible to include the possibility of imposing fines on energy companies which do not meet the conditions that make switching feasible.

Switching, severe measures

In 2002, DTe received its first formal complaint in relation to switching problems. The reason for the submission of the complaint by the company ANY-G was the fact that the grid managers had not processed the switching of customers from one energy supplier to another correctly or in time. In accordance with regulations, pursuant to the Electricity Act of 1998 (the Grid Code), grid managers are obliged to respond to an application to switch within one working day. Following the complaint made by ANY-G, DTe carried out a further investigation. DTe issued binding instructions to three grid managers, namely N.V. Continuon Netbeheer, Essent Netwerk Noord B.V. and ENET Eindhoven B.V. These three grid managers are required to provide DTe with further data, for instance with regard to processing times, the number of refusals and the reasons for refusing applications to switch made on behalf of ANY-G. On the basis of these data, DTe will ascertain whether the companies have adhered to the applicable requirements and terms.

Advice given to the Minister of Economic Affairs

Consent to the appointment of grid managers and exemptions

In 2002, DTe advised the Minister of Economic Affairs to give his consent to the appointment of three network managers. In all cases, this related to a gas network manager.

In 2002, DTe processed 13 applications for exemption from the obligation to appoint a grid or network manager. Companies which owned an electricity grid, to which a limited number of people or companies are connected, may be granted exemption by the Minister of Economic Affairs from the obligation to appoint a grid manager. The Minister bases his decision on the advice of DTe. In ten cases, this resulted in DTe's advising the Minister. In three cases, after consultation between DTe and the companies involved, a formal application for exemption was not submitted.

Relationship between DTe and market players

In the period from 2000 to 2003, DTe developed and applied a clear system for regulating electricity and gas, in accordance with its statutory task and political and social expectations. In doing so, DTe made a deliberate choice to provide strong incentives aimed at promoting efficiency and competition, based on rational and academically well-founded methods which are consistent with internationally accepted regulatory practice.

The statutory deadlines in the first three years were very strict. It could be expected that the energy companies would not acquiesce in the choices made by DTe. Some tension and friction between the regulator and regulated companies was inevitable. All the parties –DTe, the energy companies and the responsible Ministry – have had to determine their positions in the past period within the force field of the liberalised market. The courts, media and various branch organisations have also played a role in this. 'California', the problems with switching and the debate on privatisation have contributed to considerable changes in the force field within which DTe has to carry out its tasks.

At present, DTe is reassessing its own position, namely the way it develops and prepares its plans and ideas for the next regulatory period and its relationship with the energy companies and other market players. In the coming period, with its new phases in liberalisation and regulation, DTe will have to take into account the knowledge, ways of managing their companies and interests of market players, without compromising its regulatory principles. This implies, for instance, a more open consultation structure than in the previous period. The measures necessary for this were already taken in 2002. DTe already works more closely with market players. This ought to result in more streamlined and transparent decision-making and other procedures. Changes have been made to the way DTe communicates. More than previously, DTe makes use of the knowledge of market players. Consultative groups have been set up on specific topics in cooperation with market players. In addition, DTe consults energy companies more intensively on an individual basis.

DTe's decision-making process

In the fourth quarter of 2002, DTe started a process aimed at shortening the decision-making process. In the present situation, the Director of DTe takes all primary decisions. Those who are directly affected by a decision may submit a notice of administrative appeal. NMa's Legal Department processes the administrative appeal and advises DTe. The Director of DTe takes the final decision on the administrative appeal. Interested parties may file a judicial appeal against this decision with the Trade and Industry Appeals Tribunal.

In accordance with the Uniform Public Preparation Procedure Act [*Wet uniforme openbare voorbereidingsprocedure*], administrative authorities have been given the possibility of opting for the uniform public preparatory procedure in relation to certain decisions. This Act is expected to take effect on 1 July 2003. If DTe opts for this public procedure in preparing decisions, it will not be possible to file an administrative appeal.

At the end of 2002, DTe started an information and consultation process to inform all relevant parties of present and new legislation and regulations and to consult on DTe's proposed way of working and the shortening of the decision-making process. A number of the so-called 'method decisions' lend themselves to the application of the uniform public preparatory procedure, particularly due to its unambiguousness and general applicability. This also applies to decisions with regard to the priority allocation of transmission capacity, partly due to the large number of interested parties involved in this.

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Development of legislation, tasks and role

In addition, other legislation and regulations are being developed which will allow for a more efficient and shorter decision-making process. In accordance with the Bill, which will grant NMa the status of an autonomous administrative authority, and the amendments to the Electricity Act of 1998 and the Gas Act in this regard, a party affected by a decision will be given the option of skipping the administrative appeals procedure or not doing so. In principle, DTe cannot influence this choice.

European developments

At the end of 2002, the Council of Energy Ministers reached agreement on the Electricity and Gas Directives. If the European Parliament approves this common standpoint, the Directives will stipulate, for instance, when the energy markets of the Member States must be open. This will take a further step in the direction of integration and the creation of a single European energy market. This has little practical significance for the Netherlands, since the Dutch energy market will be fully liberalised on 1 January 2004 according to the present plan. The amended directives, however, do have practical significance for the Netherlands with regard to the legal separation between the transmission and supply of gas from the high-pressure gas network and the creation of a manager for this high-pressure gas network, the gas TSO. As was indicated, Gasunie has already taken the first steps in this direction.

Within the European context, agreement has also been reached on a directive with regard to non-discriminatory access to cross-border transmission grids. This directive gives the European Commission the authority to take specific implementation measures in relation to electricity aimed at promoting cross-border trade. This relates to aspects such as a cost allocation mechanism for TSOs to make it possible to manage congestion at the border and, in particular, to harmonise the structure of transmission tariffs.

In 2002 DTe again made an active contribution to various international energy dossiers. In particular, within the context of CEER (Council for European Energy Regulators), DTe cooperated with the European Commission and ETSO (the platform of European TSOs) to develop a new cost allocation formula for cross-border electricity transmission. The above-mentioned parties did not reach agreement in 2002 on a permanent cost allocation system. As of 1 January 2003, a cost allocation system will operate which is only a limited improvement on the 'temporary' system introduced in 2002. Further work will be carried out on a permanent scheme in 2003. CEER and the European Commission will ensure that the proposed permanent cost allocation system is embodied in the European Commission's directives referred to above after 2003.

Another example of DTe's international contribution is in the area of gas transmission. The present tariff structure for calculating gas transmission tariffs is not the same in every Member State of the European Union. This is an obstacle to trade. CEER and the European Commission are convinced that a so-called 'entry/exit system' will be most conducive to the further development of the European market. A system such as this, in which the tariff is determined independently of geographical location, is already applied in several countries, including the Netherlands. Many large European network managers, in particular in Germany, are opposed to the introduction of such a system.

The European Commission believes that the new directive will provide it with an instrument to ensure that the development of a large European market takes place more quickly, better and more efficiently. After all, agreements on international trade in electricity and gas will no longer be free of any commitments. DTe is in favour of this.

It is important that the role of national regulators is also strengthened at the international level. This can be achieved if the European Commission takes the advice of European energy regulators into account more in relation to implementation. DTe will also make an active contribution to the further expansion of CEER in 2003.

Market Surveillance Committee

DTe closely monitors developments on both the electricity and gas markets so that, where necessary, it can amend its decisions on the Technical Conditions and its Guidelines with a view to further facilitating and promoting the operation of market forces. The Market Surveillance Committee (MSC) and the MSC Taskforce linked to this played an important role in this in 2001. The focus of the MSC Taskforce, a joint initiative of NMa and DTe, is abuse or possible abuse of power by market players and the structure of the energy market.

In 2002, MSC completed its 'June-July Price Spike Investigation Report'. The most important findings of this confidential report were published in a press release. This report did not give cause to start a formal NMa/DTe investigation into the abuse of power by market players on the electricity market in the period of June and July 2001.

In addition, MSC published its view on total energy plants and the generation of electricity by sustainable means at the end of 2002. DTe implemented the advice given by MSC in 2000 with regard to transparency by amending the Technical Conditions and the Guidelines and by taking decisions to improve the transparency of the electricity market.

Regulation of quality

Quality reports of electricity grid managers

The electricity grid managers report to DTe each year before 1 November[6] on the quality of their services and the transmission service on the grid managed by them during the past year. Since the necessary amendments to the Technical Conditions with regard to quality, as referred to in the Electricity Act of 1998[7], could not be made before 2000, 2001 was the first full year on which the grid managers reported. During 2001, the grid managers were consulted with regard to a uniform method of reporting. The grid managers subsequently submitted their first reports to DTe at the end of 2002 on the level of quality achieved. The reports include the quality of the transmission service, in particular outages of the transmission service, compensation paid in the event of serious power failures and the quality of customer service, such as the processing of correspondence and timely announcement of maintenance work.

The table on page 67 provides an overview of the most important parts of the reports. The first column provides the annual duration of outages in 2001 experienced by consumers. The duration of outages is understood to be the time that an average low-voltage customer does not receive electricity. The second, third and fourth columns indicate the extent to which the grid manager's customer service meets the agreed norm. The last two columns provide information on the number and level of compensation payments in relation to outages exceeding four hours.

The assessment of the above-mentioned quality reports has resulted in a number of findings.

The reports submitted to DTe include all outages, including lengthy outages. In addition, DTe has received reports from all the grid managers, even those who did not participate in EnergieNed's voluntary Nestor reports in 2001. On the basis of the reports submitted and the data which they contain, DTe reached the conclusion that the annual duration of outages in 2001 for the Netherlands as a whole per customer with a low-voltage connection amounted to almost 37 minutes. This figure cannot be compared on a one-to-one basis with the annual duration of outages of 31 minutes, referred to in the Nestor report for 2001, partly because lengthy outages are not included in this report. A reservation must be made

6 *Pursuant to Section 39 of the Electricity Act of 1998.*

7 *This relates to Section 31 (1) (f).*

Grid manager	Outage [a]	Services to small users [b]			Compensation payments [c]	
	Annual outage per connected customer (minutes)	*Norm exceeded by* 1	2	3	*No.*	*Amount paid (in ff)*
Netbeheer Centraal Overijssel d)	0.0	0.1%	0.0%	0.0%	0	0
Eneco Weert	2.4	0.0%	1.0%	7.0%	0	0
InfraMosane	3.4	0.3%	0.0%	0.0%	0	0
ONS Netbeheer	8.0	0.0%	2.0%	0.0%	24	840
Essent Netwerk Friesland	11.6	0.0%	2.0%	0.0%	148	5,000
Essent Netwerk Limburg	13.3	0.3%	8.0%	11.9%	27	9,695
Essent Netwerk Brabant	20.0	3.4%	9.0%	7.5%	11,694	58,3415
Eneco Delfland d)	24.1	6.3%	0.0%	4.2%	0	0
Delta Netwerkbedrijf	24.3	1.2%	3.0%	3.0%	336	11,400
Continuon Netbeheer	24.3	2.7%	23.9%	1.0%	8,425	288,248
EWR Netbeheer (Continuon)	24.7	3.9%	32.8%	19.4%	0	0
RENDO Netbeheer	27.4	0.8%	33.3%	0.0%	0	0
Eneco Midden Holland d)	28.1	9.7%	0.1%	0.0%	1,451	49,383
Essent Netwerk Noord	34.7	25.3%	2.8%	2.7%	0	0
Westland Energie Infrastructuur	37.0	3.4%	0.,0%	0.0%	28	980
Elektriciteitsnetbeheer Utrecht	39.8	2.3%	0.1%	0.0%	1,323	46,300
Noord West Net (Continuon)	41.3	16.2%	23.3%	5.4%	14,816	589,209
Transportnet Zuid-Holland	47.0	(no small users)			0	0
Eneco Netbeheer [d]	54.1	16.1%	19.9%	0.3%	22,498	897,589
Eneco Zuid Kennemerland	59.2	0.0%	0.1%	0.0%	20	681
NRE Netwerk (Eindhoven)	70.3	2.0%	4.0%	3.0%	0	0

a) Relates to Section 3.3.1 of the Grid Code.
b) Relaties to several norms, as referred to in Section 6.2 of the Grid Code:
Norm 1: within two hours after notification by the party with a connection, the grid manager shall be present on-site in the event of a malfunction of the connection (Section 6.2.4.1).
Norm 2: the grid manager shall process correspondence from a connected party within 10 working days. If a solution is not possible within this period, the party connected shall receive notification within 5 working days stating the period within which an adequate response may be expected (Section 6.2.4.2).
Norm 3: the grid manager shall inform the party with a connection of work scheduled by the grid manager, which will result in an interruption to the transmission service to the party with a connection, at least three working days in advance. (Section 6.2.4.6).
c) Relates to Section 6.3.1 of the Grid Code.
d) Includes services to small gas users.

with regard to the figure of almost 37 minutes calculated by DTe because the administrative organisation and internal audits of the grid managers were not sufficiently well organised in 2001. The actual quality of the transmission service provided to customers therefore probably deviates from the reported quality. In 2003, DTe will take measures to further improve the reliability of the registration of these data.

The large differences in the figures for the annual duration of outages probably relate to the size of the grid managers. For statistical reasons, the duration of outages of smaller grid managers, in particular, show a fairly volatile trend, without this necessarily bearing a relation to the quality of the grid manager. Only on the basis of an average calculated over a number of years is it possible to draw definitive conclusions. Since the administrative organisation and internal audits of the grid managers were not sufficiently well organised in 2001, some caution is required in assessing the figures, even in the case of the larger grid managers whose figures are more reliable from a statistical point of view.[8]

No clear cause can be identified for the differences in their reports on their services between the grid managers. In this regard, the collection of data also does not appear to be as reliable in all cases. In addition, some grid managers do not keep records of the services they provide to wholesalers. The actual quality of the service provided to customers therefore probably also deviates from the reported quality.

8 *See the advice of DTe to the Secretary of State for Economic Affairs, Mr Wijn, of 25 February 2003, ref. 101509/5.B275.*

An amount of almost € 2.5 million in compensation payments was paid to more than 60,000 customers. This is almost one percent of the total number of customers. The further development of quality regulation will probably result in an extension of this reporting in the future.

Since the statutory reporting on the quality of electricity supply occurred for the first time in 2001, it is not yet possible to identify or report on trends. It appears that a uniform method of recording and reporting is important if the level of electricity supply in the Netherlands is to be ascertained and monitored clearly.

To improve reporting on the quality criteria in the short term, DTe presented the Secretary of State of the Ministry of Economic Affairs, J.G. Wijn, with its advice, which included a number of recommendations to improve the recording and reporting of interruptions in the supply of electricity and the provision of services. One of these recommendations involves bringing forward the moment of reporting, so that reliable data with regard to the quality of electricity supply in the Netherlands can be made available earlier.

Quality reports of licence holders on the supply of electricity to captive customers

The electricity licence holders report to DTe each year before 1 November[9] on the quality of the services they provided in the past year. In the course of 2001, consultation took place with licence holders regarding a uniform method of reporting. The licence holders reported to DTe for the first time at the end of 2002 on the quality they had achieved. The reports included the quality of services in relation to the supply of electricity to captive customers and the processing of complaints with regard to the supply of electricity. The quality aspects of the technical specifications, restoring outages and compensation in the event of serious outages are already reported by grid managers and are not included in the quality reports of the licence holders.

The licence holders are permitted to collect connection and transmission payments on behalf of the grid manager[10]. This one-stop-shop idea is also reflected in the parliamentary debate on Section 59 of the Electricity Act of 1998[11], in which the licence holder is referred to as the first point of contact for everything relating to the supply and transmission of electricity. In the case of many energy companies, the processing of correspondence by the grid manager and licence holder was not recorded separately in 2001. The licence holders in question therefore refer to the reports of the grid managers in this regard. It is therefore not possible to draw up a separate table for the services provided by the licence holders. It is possible to conclude that the recording of this data is not as reliable in the case of all licence holders. DTe's recommendations with regard to improving registration and recording by grid managers therefore also apply to licence holders.

9 *Pursuant to Section 54 in conjunction with Section 39 of the Electricity Act of 1998.*

10 *See Section 63 of the Electricity Act of 1998.*

11 *Proceedings of the Lower House of the Dutch Parliament, 1998-1999, 26 303, No. 3, p. 33.*

Transport Regulation

On 1 September 2001, the Office of Transport Regulation was launched as a project. The aim of this project is to prepare for the setting up of a new organisational unit within NMa, namely the Office of Transport Regulation. This chamber of NMa will carry out sector-specific regulation assigned by the legislature to NMa in the Passenger Transport Act of 2000 [*Wet personenvervoer 2000*], the Aviation Act [*Wet Luchtvaart*] and the Railways Act [*Spoorwegwet*].

In 2002, the intended date on which the Office of Transport Regulation would be launched was postponed from 1 January 2003 to 1 January 2004. The reason for postponing the launch date was the delay in the legislative processes in relation to the Railways Act and the Aviation Act.

On 1 January 2002, the first regulatory duties pursuant to the Passenger Transport Act of 2000 took effect, as a result of which the Office of Transport Regulation has, in fact, become operational. As of this date, the Office of Transport Regulation supervises the municipal transport companies in the Netherlands. This regulation focuses on fair competition.

Aim of regulation by the Office of Transport Regulation

A municipal transport company active on the market for public transport, which is (still) closed to competition, which also competes on other transport markets, possibly has a competitive advantage compared to other transport companies. To prevent this, municipal transport companies may not carry out activities other than public transport and activities directly related to this (such as maintenance). Activities such as transporting disabled people and taxi transport must be separated to prevent unfair competition.

Staff of the Office of Transport Regulation may, if necessary, carry out on-site inspections at companies, inspect documents and obtain information. In 2002 it was not necessary to make use of these powers.

Deployment of staff and resources for the Office of Transport Regulation

Office of Transport Regulation in 2002: 8 employees

In 2002, a total of eight people were assigned the task of setting up the Office of Transport Regulation and carrying out the tasks pursuant to the Passenger Transport Act of 2000. One-and-a-half full-time equivalents were deployed for the regulation of municipal transport companies. The remaining capacity was deployed for the railways and aviation dossiers, management and support.

Since the sector-specific legislation, in which the tasks of the Office of Transport Regulation have been set out, are the responsibility of the Minister of Transport, Public Works and Water Management, the project and the regulatory activities are financed by this Ministry. The budget of the Office of Transport Regulation for the calendar year 2002 amounted to € 1,452,681. Of this, € 998,136 was available for the Office of Transport Regulation project and € 454,545 for regulation pursuant to the Passenger Transport Act of 2000.

Results: activities in 2002

In the past year, the Office of Transport Regulation familiarised itself with the municipal transport companies and started making an analysis of the activities of the companies to determine whether they are acting in accordance with the Act. The Office of Transport Regulation processed eight cases in relation to its regulatory tasks. Of these, three were settled by means of a ruling. The other cases will be concluded in 2003.

The Office of Transport Regulation has made substantive contributions to the development and drafting of relevant legislation, both for the Railways Act and the Aviation Act. Work has also been done to acquire the necessary sector knowledge, to recruit staff, to report bottlenecks and to determine implementation processes and procedures. To ensure that its regulation is as effective as possible from its inception, the Office of Transport Regulation has started analysing the playing field in order to position itself correctly from the start.

Future developments

For NMa and the Office of Transport Regulation project, 2003 is an important year. The parliamentary decisions on the Aviation Bill and the Railways Bill are expected this year. The Authority aims to have completed all its preparatory activities in 2003, after which regulation of the railway sector and the aviation sector will be added to its present tasks and on 1 January 2004 the Office of Transport Regulation will formally commence its activities in all respects.

PART 3 Developments in Practice

Position of the Consumer in Procedures

The consumer benefits from optimal competition in relation to price, quality and choice. Amongst others, the aim of the Competition Act is to serve this interest. Consumers will usually have contact with NMa if they submit a complaint about cartel agreements or the abuse of a dominant position or a contravention of specific legislation. NMa attaches considerable importance to serious complaints and reports from consumers and these may give cause to start an investigation. The formal legal position of consumers is discussed below.

A consumer may only play a role in the procedures under administrative law if he or she is an 'interested party' in terms of the General Administrative Law Act. Only an interested party may compel NMa to take a decision on his or her complaint. If NMa takes a decision, only an interested party may submit an administrative or judicial notice of appeal. An administrative or judicial appeal filed by a consumer who is not an interested party must be declared inadmissible. In a few cases a decision is taken following a complaint made by a consumer without taking a decision on whether the complainant is an interested party or not. If this consumer subsequently files a notice of administrative appeal against such a decision, with regard to its admissibility, a decision will be taken on whether the consumer is an interested party. In addition, the interested party concept plays a central role in the preparation of certain decisions, since documents in the dossier are only available for inspection by interested parties and only interested parties are entitled to give their opinion or to be heard.

Pursuant to Section 1:2 (1) of the General Administrative Law Act, an appellant is deemed to be an 'interested party' if he or she has an interest which is directly involved in the decision. In accordance with established case law, this means that the appellant must have an interest of his or her own which can be objectively determined, is current and personal, and which is also directly involved in the contested decision. In practice, the requirement of a personal interest is the greatest obstacle for a consumer. In accordance with this criterion, he or she must distinguish himself sufficiently from others.

The application of this criterion may be illustrated by several decisions which NMa took in 2002. Comité Verlaging Vliegtarieven Suriname [Committee for the Reduction of Airline Tariffs to Surinam] campaigned against the tariffs for flights on the route between Amsterdam and Paramaribo and vice versa. In the decision on the administrative appeal, it was decided that the interests of the individual members of the Committee (a group without a constitution or legal personality) were not personal interests, because these interests could not be distinguished from the interests of any random third parties who flew that route. It had not been shown that the individual members of the committee were disadvantaged in a way that was different to others.

NMa also received a complaint about the granting of financial support in accordance with the Political Parties (Subsidies) Act [*Wet subsidiëring politieke partijen*] to political parties elected to the Lower House of the Dutch Parliament, while a party such as Leefbaar Nederland did not receive such support. Mr Van der Post argued that he was an interested party because he paid taxes which benefited the competitors of Leefbaar Nederland. According to him, the objectives of Leefbaar Nederland could not the realised because of this beneficial treatment and, as a result, no improvement could be made to his environment. In this decision on the administrative appeal, it was also decided that the

appellant did not distinguish himself from large numbers of other parties and that he did not suffer any exceptional disadvantage which was different to that experienced by others. Since no characteristic individual interest was present, he was not deemed to be an interested party. A final example is the case in which Scheepsbouwkundig Advies en Reken Centrum B.V. (SARC) complained about a condition applied by Dutch banks (and, in particular, ABN AMRO BANK N.V.) in providing securities services. In the case of this administrative appeal, consideration was also given to the fact that the interest of SARC as a (potential) customer of the banks was not an interest which was distinguished from the interests of many other people who make use of the securities services of banks in a way which was relevant in law. In this case, there was also no personal interest and the appellant was not an interested party.

Court Rulings: General Competition Regulation

In 2002, the Court of Rotterdam ruled on 15 cases involving NMa. Three cases deserve attention in this annual report because they were important to NMa, in particular in relation to the substantive application of competition law. In Case No. 1 (NOS/HMG vs Director-General of NMa/Telegraaf), the Court ruled on a case of the abuse of a dominant position relating to the applicability of intellectual property rights. The Libertel case is important for the appreciability test and the (limited) applicability of the European block exemption for vertical agreements. Finally, in the SEP case the Court ruled on the abuse of a dominant position in the case of a refusal to supply.

In addition, the judgement by the Presiding Judge of the Court of The Hague in interlocutory proceedings brought by Vodafone is important in relation to NMa's right to publish information on its activities and the outcomes of these activities.

NOS/HMG vs Director-General of NMa/Telegraaf

The judicial appeal in NMa's Case No. 1, NOS/HMG vs Director-General of NMa/Telegraaf[1], relates largely to the degree to which a refusal to supply programme listings, which are protected by intellectual property rights, may result in the abuse of a dominant position. As NMa stated in the decision on the administrative appeal, in accordance with European case law, exercising intellectual property rights may only give rise to abuse of a dominant position in exceptional cases. In the Magill ruling, the European Court of Justice states four 'special' or 'exceptional' circumstances which give rise to abuse. NMa argued – in contrast to NOS and HMG – that these conditions do not apply cumulatively. The Court concurred in this. The Court noted in this regard that a concept such as 'special' or 'exceptional' circumstances leaves room for the development of law and for taking into account specific aspects of the case under consideration. According to NMa, exceptional circumstances were indeed present in this case which gave rise to an abuse of a dominant position. The Court first established what the relevant market was and whether a dominant position on this market existed. In the Court's opinion, the weekly programme listings of the broadcasting companies constituted the relevant market. The television broadcasters, in fact, have a monopoly with regard to the use of their own programme listings, by which a dominant position is established. NOS also has a dominant position because, in accordance with the Media Act [Mediawet], it has at its disposal the programme listings of the public broadcasting companies. NOS therefore has a de facto monopoly on the 'combined' programme listings of the public broadcasting companies. Furthermore, in the opinion of the Court, NOS's monopoly is reinforced by prohibiting parties other than NOS to reproduce or publish these 'combined' programme listings.

The Court concurred with NMa's three main considerations with regard to the abuse of a dominant position. Firstly, the Court ruled that NOS's programme listings are indispensable to the product that De Telegraaf wishes to offer, namely a weekly TV guide. Secondly, the Court is of the opinion that every form of competition on the derived market for the weekly publication of programme listings – without the involvement of the present providers of these data (the broadcasting companies) – is excluded by the refusal to supply these data. Finally, according to the Court there is no objective justification for NOS to refuse to grant a licence, neither on the grounds of a general exceptional interest, nor – as was argued – on the grounds of intellectual property rights.

1 *Court of Rotterdam 11 December 2002, Reg. Nos: MEDED 01/2430-RIP and MEDED 01/2474-RIP*

Libertel Central to the *Libertel*[2] case was the approval clause in so-called service provider agreements. In accordance with the service provider agreements, which Libertel, now called Vodafone, entered into with various service providers, the service providers were permitted to offer mobile telephone subscriptions for their own account and risk in the Netherlands via the Libertel network. The service provider agreements included a clause prohibiting service providers from transferring their subscription databases to a third party in the event of the termination of these service provider agreements or a cessation of the service provider's activities. The Court did not consider whether the obligation to obtain approval had the purpose or consequence of restricting competition. The Court accepted NMa's argument that there was an appreciable restriction due to (i) the limited number of players on the market, (ii) Libertel's position, which was not insignificant, and (iii) the fact that Libertel was not only active as a provider of mobile telephone services, but also had its own mobile telecommunications network. On the basis of these considerations, the Court expressly did not give an opinion on NMa's argument that , in principle, appreciability is a given in the event of a 'limited objective' (in other words, provisions with the purpose of restricting competition). In short, the Court based its decision with regard to appreciability only on the general characteristics of the case and not on market share. The second element in which the Court found in favour of NMa was the argument that the approval clause was not covered by the European block exemption for vertical agreements because this clause, according to the Court, does not relate to the (main) purpose of the (vertical) service provider agreements, namely the sale of air time. Since the approval clause only applies on termination of the service provider agreements or cessation of the service provider's activities, it is not in accordance with the definition of a vertical agreement contained in Article 2 of the block exemption. This was the first ruling in which the Court expressed an opinion on the provisions of this block exemption and, by doing so, has shown a willingness to interpret the contents of this exemption according to its purpose.

2 *Court of Rotterdam 11 September 2002, Reg. Nos: MEDED 00/2176-SIMO, MEDED 00/2177-SIMO and MEDED 00/2190-SIMO (Vodafone Libertel and Unipart Group vs Director-General NMa and Unipart and Libertel).*

SEP In de *SEP* case[3], amongst other issues the Court had to express an opinion on whether NMa was correct in its assessment that N.V. Samenwerkende elektriciteitsproductiebedrijven (SEP) had abused its dominant position because it had refused to import and transmit electricity on behalf of Norsk Hydro (refusal to supply). SEP was the national grid manager, now TenneT. The Court noted that SEP, as the owner and manager of the national grid, the main transmission grid for public electricity supply, had control of an 'essential facility', for which there was no alternative. The refusal to supply, ascertained by NMa (in essence, this is what the the conditions which SEP imposed on Norsk Hydro amounted to), is relevant in competition law, since SEP—as a *de facto* monopoly on the relevant market—made it impossible for Norsk Hydro to transmit the electricity it required. As a result, Norsk Hydro was excluded from (further) competition with distribution companies in the Netherlands. This is the derived market for the sale of electricity, on which SEP's shareholders are active. On the basis of the above, the Court decided that NMa had rightly concluded that SEP had abused its dominant position. The ruling in this case is also important for the interpretation of the Electricity Act of 1989 and for NMa's policy on fines.

3 *Court of Rotterdam, 26 November 2002, Reg. No.: 00/1002 MEDED (SEP).*

Interlocutory proceedings Vodafone Libertel N.V. The judgement[4] in the interlocutory proceedings brought by Vodafone is important in relation to NMa's right to publicise and make transparent its activities and the results of these.

NMa intended to publish a report, which set out the results of market research in the area of mobile telephony. This survey was important, partly in relation to whether the five companies which provide mobile telephony in the Netherlands on an 'interconnection' basis have a dominant position and possibly abuse this position by charging excessive interconnection rates. Interconnection means that a subscriber of company A can call a subscriber of company B.

The report was partly based on data which the companies had submitted at NMa's request. On requesting the data, NMa had asked the companies to indicate which data

4 *Judgement of the Court of The Hague in interlocutory proceedings of 1 October 2002 (KG 02/1016)*

should be considered confidential. NMa was of the opinion that it had treated the data marked confidential with care by only including data and research results in the report which could not be traced to individual providers and the data which they had provided. In a ruling of 1 October 2002, the Court ruled in interlocutory proceedings that NMa had not exercised sufficient care. In any event, NMa should have consulted Vodafone before publishing the report.

The Court was also of the opinion that Vodafone was legally obliged to provide the requested information. Given this obligation, it was appropriate that NMa exercise caution in publishing a report based partly on data that parties were obliged to provide. The Court also referred to the parliamentary debate on the Competition Act, in which it appears that information relating to undertakings must be treated with the utmost care. The Court also considered it justified that NMa sent the report to OPTA, the Director-General of Competition of the European Commission and the Ministry of Economic Affairs.

Court Rulings Sector-Specific Regulation: Energy

The year 2002 was the first year in which the Trade and Industry Appeals Tribunal ruled on a large number of proceedings in relation to the Electricity Act of 1998. The Tribunal is the first court of appeal and only body that assesses decisions taken by DTe. Three issues, on which the Tribunal ruled following judicial appeals filed by numerous companies, are of particular interest. These relate to an important aspect of tariff regulation, namely the discount or price cap (referred to as 'X' in the Act), imposed on supply companies and grid managers. In addition, the Tribunal examined the Technical Codes (the Grid Code, the System Code and the Measurement Code) closely. A large number of companies also filed judicial appeals against one of the tariffs charged for electricity transmission, namely the National Uniform Producers' Tariff [*uniform producenten transporttarief*].

X Decisions At the beginning of February, in a case concerning the minimum tariffs set by DTe for the supply of electricity by the company Rendo, the Trade and Industries Appeals Tribunal ruled that the price cap (efficiency discount), on which these tariffs were based, was in conflict with Section 57 of the Electricity Act of 1998. The Tribunal ruled, for instance, that it was not sufficient for DTe only to determine a method, but that the price cap had to be a figure, which may also not vary per quarter, but must be fixed for three years. In addition, the price cap for all companies must be the same and may not differ from one company to the next. As a result of this ruling, a new price cap, that is a new X, was set which had to apply to all companies, requiring an adjustment to the tariffs of other companies in the sector.

In calculating maximum tariffs, which are the maximum amounts which grid managers may charge for connections and electricity transmission, DTe is required to apply a price cap, an X, in accordance with the Electricity Act of 1998. The decision to adopt this X was also declared null and void by the Tribunal in November. In this ruling, the Tribunal also decided that Section 41 of the Electricity Act of 1998, which was applicable at that moment, could only be interpreted to mean that the price cap may not differ from one grid manager to the next. The Lower House of the Dutch Parliament has since passed a bill which makes it possible to determine an individual X factor, in other words for each grid manager.

Technical Codes Various aspects relating to the technical codes were raised in a number of rulings, both with regard to procedural and formal aspects (for instance the authority of the Director of DTe) and substantive aspects. The Trade and Industry Appeals Tribunal, for instance, ruled in two cases filed by Vereniging voor Energie, Milieu en Water (VEMW) [Association for Energy, Environment and Water] and producers respectively on the role of representative organisations in procedures. It appears from this that the procedure, as set out in the Electricity Act of 1998 and implemented by DTe on the basis of the rules contained in the General Administrative Law Act, offers sufficient guarantees that these organisations may contribute to the proceedings.

In relation to a large number of substantive items, the Tribunal decided in favour of DTe in a number of cases, and against DTe in others. For instance, in the judicial appeal filed by VEMW against the part of the System Code which governs the procedure for the recognition of programme managers by TenneT, the national grid manager, the Tribunal decided in favour of DTe. Contrary to the argument put forward by VEMW, the Tribunal ruled that a far-reaching detailed description of the test used by TenneT to assess whether

a programme manager possesses sufficient expertise and facilities is unnecessary, certainly since the programme manager can file a judicial appeal against TenneT's decision.

The Tribunal did decide in favour of VEMW with regard to the argument that the various codes give the grid managers too many powers to deviate from the code if the results are clearly unacceptable. According to the Tribunal, this offers too little (prior) certainty with regard to whether the grid manager is required to adhere to or is authorised to deviate from the codes in certain situations.

In a ruling in a case brought by wind energy producers, the Tribunal also confirmed DTe's standpoint that no exception from the scheme applicable to programme managers had to be made for these producers.

In the case brought by the producers, the judicial appeal was declared unfounded on a number of counts and well founded in a number of other respects. One of the points which the Tribunal deemed to be well founded related to the quality criteria. In this regard, the Tribunal noted that DTe's decision not to consider quality levels in the administrative appeals procedure, but to do so in a different context, constituted an incorrect implementation of the administrative appeals procedure. The consequence of this was that DTe must still take a decision on these objections raised by the producers and must amend the chapter of the Grid Code on the transmission service and the level of quality of this service.

National Uniform Producers' Tariff A National Uniform Producers' Tariff [*Landelijk Uniform Producenten Transportarief (LUP)*] applies to electricity producers with their own production facilities, which are connected to the national high-voltage grid. They are charged 25 percent of the sum of the transmission-related expenses. The National Uniform Producers' Tariff also applied in 2001 to importers that imported electricity on the high-voltage grid. By means of a decision amending the Tariff Code, DTe abolished the National Uniform Producers' Tariff for the import of electricity.

An administrative appeal and a judicial appeal against the abolition of the National Uniform Producers' Tariff was filed by various Dutch producers who were of the opinion that this would result in a distortion of European competition (the level playing field). The National Uniform Producers' Tariff would have the effect of a disguised export levy or a similar measure. The Director of DTe has the discretionary power to introduce a National Uniform Producers' Tariff with regard to imports. The decision to abolish the National Uniform Producers' Tariff relates to developments in this area at the European level. These developments are moving in the direction of a *point-tariff* system in which producers only pay a transmission tariff once in the Member State of origin, and not in all the separate Member States to which or through which electricity is transmitted. A National Uniform Producers' Tariff on imports is not compatible with a system such as this. The Tribunal ruled that DTe had acted within its powers by originally introducing and subsequently abolishing the National Uniform Producers' Tariff on imports. The judicial appeal was declared unfounded in this respect.

Energy Legislation and Publication It occurs with increasing frequency that the Director of DTe is requested to provide information obtained in the course of activities relating to the implementation of the Electricity Act of 1998 and the Gas Act on the grounds of the Government Information (Public Access) Act [*Wet openbaarheid van bestuur (Wob)*]. In accordance with Section 7 of the Electricity Act of 1998 and Section 35 of the Gas Act, read in conjunction with Section 34, such data may only be used for the application of the Electricity Act of 1998 or the Gas Act. Initially the Director of DTe took the position that these sections contained special regulations with regard to publication and that he could only honour a request for information if this information was necessary for the application of the Electricity Act of 1998 or the Gas Act.

In its ruling of 10 October 2002, in the interlocutory proceedings between Produktschap Tuinbouw [Horticulture Marketing Board] and the Director of DTe, the Administrative Law Division of the Court of The Hague ruled, however, that Sections 34 and 35 of the Gas Act should not be regarded as exhaustive special regulations governing publication, in terms of Section 2 of the Government Information (Public Access) Act, which therefore have precedence over the Government Information (Public Access) Act. According to the Court, Sections 34 and 35 of the Gas Act should not the regarded as secrecy clauses. The Court is of the opinion that Section 34 of the Gas Act was intended to limit the use of the information obtained by the Director of DTe and not as a means of refusing to make such information available to third parties without taking into account the rules set out in the Government Information (Public Access) Act. Finally, the Court gave consideration to the fact that Section 10 of the Government Information (Public Access) Act – which includes grounds for exception in relation to the obligatory provision of information – offers sufficient guarantees to ensure the proper implementation of the substantive provisions of the Gas Act.

The Director of DTe has not filed a further appeal against this ruling with the Administrative Law Division of the Council of State. With regard to Section 7 of the Electricity Act of 1998, there appears to be no reason why the Court would rule differently in relation to Sections 34 and 35 of the Gas Act.

The Presiding Judge of the Civil Law Division of the Court of The Hague, in his ruling in interlocutory proceedings of 6 July 2001, No. KG 01/646, earlier prohibited the State from informing licence holders in any way whatsoever of Gasunie's sales prices. In this regard, the Presiding Judge took into account the fact that the right of publication cannot be derived from Sections 34 and 35 of the Gas Act. The administrative and the civil-law courts therefore appear to concur. The Presiding Judge did not take a decision on whether the State is obliged, in accordance with Section 8 of the Government Information (Public Access) Act, to take the initiative in making the information available. Since it was sufficiently plausible that sales prices are sensitive commercial data, in the light of Section 10 (1) (c), the State could not appeal to such an obligation on any grounds whatsoever.

Guidelines for Remedies in Relation to Mergers

In December 2002, NMa published the Guidelines on Remedies. In these guidelines, NMa presents its present insights into remedies in relation to proposed mergers and takeovers. Remedies are conditions linked to the approval of a concentration. The guidelines give insight into the substantive requirements which remedies must meet and the way remedies should be submitted and implemented.

NMa invited the parties involved to offer comments and suggestions during a consultation round. It appeared from the responses that NMa's insights are clear and that the proposed approach is considered to be workable in practice. The responses have resulted in a number of amendments to the definitive guidelines.

NMa's guidelines are consistent with the policy of the European Commission in this area. The guidelines must make it simpler for the parties to anticipate NMa's general criteria with regard to remedies when submitting remedies. This will promote quick processing of these cases.

The guidelines deal with 'structural remedies' and 'behavioural remedies'. Structural remedies affect relationships of control and result in a structural change in the market, such as the sale of one or more units of the companies which are to be merged. On the other hand, behavioural remedies imply that the company, which results from the concentration, will behave in a particular way or will refrain from certain behaviour. Behavioural remedies therefore imply continuous supervision of the behaviour of companies. Structural remedies change the structure of the market in a lasting manner and, in principle, require no further supervision after their implementation. Structural remedies are therefore to be preferred above behavioural remedies.

The point of departure for remedies is that the initiative for proposing remedies lies with the parties after NMa has informed the parties of the competition problems that have been identified. Proposals for remedies must be clear and detailed, they must fully remove the competition problem and should be submitted in good time, so that NMa has sufficient time to assess the effect of the remedies. A so-called 'market test' will often form part of this assessment. In the case of such a market test, NMa presents the remedies to market players to obtain an impression of the effectiveness and feasibility of the proposed remedies.

The part of the company to be divested must meet a number of conditions. Firstly, the part of the company to be divested must be viable. In addition, this part of the company must actually be in a position to compete with the new company effectively and in a lasting manner.

In the remedies the parties must stipulate the period within which the part of the company will be divested. This period must be as short as possible and, in principle, is subject to a maximum of six months. The parties must also stipulate in the remedies that they will maintain the part of the company for the period from the moment the decision is taken until the moment at which the part of the company is actually divested as an independent entity, separate from the parties, and must guarantee its viability, saleability and competitive strength. The parties are required to appoint an independent trustee (attorney), approved beforehand by NMa, to supervise this.

The parties are also required to appoint an independent trustee, approved beforehand by NMa, for the divestment. This trustee must supervise the divestment process. If the parties

are not able to sell the part of the company within the specified period, the trustee is required to sell the part of the company within a specified period at any price.

The remedies must include a provision that the parties or the trustee may only proceed to sell and transfer the part of the company after NMa has approved the proposed buyer, the deed of purchase, the deed of transfer and all other agreements between the buyer and seller. The following criteria apply to this: the buyer must be fully independent of the parties and their group companies and the buyer must have sufficient financial resources, proven expertise and the incentive to continue the divested part of the company as an actual competitor of the parties. Furthermore the acquisition of the part of the company by the proposed buyer may not give rise *prima facie* to new competition problems.

Finally, the guidelines draw attention to the fact that if the parties do not take the restrictions and/or regulations linked to the licence into account, NMa may impose a fine and/or an order subject to a penalty. Even if the parties proceed to bring about a concentration, after they have solved the competition problem by amending the notification of the concentration, and do so in a way which is not in accordance with the amended notification, a fine and/or and order subject to a penalty may be imposed.

Assessment of Mergers: Taking into Account Future Developments

Concentration control is aimed at assessing whether a merger or acquisition on certain markets results in a lasting dominant position. In this regard, it is not sufficient to apply a static analysis of market conditions at the moment that NMa is notified of a concentration. As far as possible, NMa must take into account developments which are expected to occur on the relevant market. These may be trends which put an apparently strong position of the companies involved into perspective, but it is also possible that such trends strengthen suspicions that a dominant position will arise or be strengthened. Examples of such developments include amendments to legislation, technological developments, recent new entrants and changes in consumption patterns.

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Summaries

An example of the considerable role of future developments in the handling of cases is the assessment of the consequences of the takeover of Casema by Liberty. The possible consequences of the proposed digitisation of cable networks in the Netherlands and the implementation of new European guidelines for the definition of the relevant market and the assessment of the consequences of the concentration were examined.

As a result of the digitisation of the cable networks, the transmission capacity, for instance, of cable networks increases. This extra transmission capacity can be used for the transmission of radio and television (RTV) packages other than the standard package offered by the cable operator. This could be either an RTV package provided by the cable operator or packages provided by third parties. In the light of the possible amendment of Dutch legislation and regulations, a cable operator could also be obliged to provide access to its network to third parties. As a result of these developments, the geographical market for RTV could be broadened and cable operators, which are not only active in their own coverage areas, will compete directly with each other.

With regard to broadband Internet access, future developments are considered in this case. Broadband Internet access can be offered via the cable or via xDSL. Internet access via the cable entered the market in few years before xDSL and consequently has an advantage with regard to the number of subscribers. As a result of this, Liberty and Casema currently have a large share of the market for broadband Internet access. Since the introduction of xDSL, the number of buyers has increased sharply. In this case, on the basis of calculations using various scenarios, it was concluded that it was likely that the market share of the parties would decrease sharply in the next few years and that KPN would remain more or less the same size. The dynamism of the market, which was still young, also led to the conclusion that there was no reason to assume that the concentration would lead to the emergence or strengthening of a joint dominant position.

If NMa has already carried out economic research into a specific case, this may provide NMa with a reason to carry out an investigation which extends beyond the notification of the concentration in a particular sector. This is the case, in particular, if market conditions and opportunities for competition in a particular sector are subject to exceptionally rapid change. In the past year, a consultation document and a report on concentrations in the energy sector were published for this reason. These documents examined, for instance, the consequences for the assessment of concentrations on the emergence of new marketplaces in which electricity is traded, the trends in the area of liberalisation in the Netherlands and abroad, the relevance of a distinction between ‘grey power’ and electricity generated on a sustainable basis and the relevance and the degree of concreteness of the new European

energy directive. Consideration was also given to the extent to which changes to the definition of the market and, for instance, the increase in the degree of concentration in the electricity and gas sectors would change the assessment of the effects of a concentration. An outcome of the research carried out in 2002 is that NMa intends to carry out or commission research into the wholesale market for electricity.

In the past, in assessing mergers of hospitals, it was concluded that strict legislation and regulations almost entirely excluded competition between hospitals. Every assessment of concentrations of hospitals, however, includes an assessment of whether changes have occurred in this regard. In assessing the merger between the hospitals, *Sint Antonius Ziekenhuis* and *Mesos Medisch Centrum*, it appeared that more scope for the operation of market forces between the various market players seems to have emerged this year. In practice, there are more signs of the operation of market forces. If this trend continues, NMa will assess the effects of hospital mergers on competition in this market. NMa is at present carrying out research in this area.

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Summaries

Assessment of Mergers: The Gatekeeper Function

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Summaries

In 2002, the 'gatekeeper function' of a company played a significant role for the first time in a decision relating to concentration regulation. This related to the proposed takeover of the cable company Casema by Liberty Media. In this context, a gatekeeper function means that an entity emerges which other players on the market cannot circumvent. Despite the fact that this entity does not have a monopoly, it may have a disproportionate effect on supply on the market. This occurs, for instance, in the case of parties that stand between producers and buyers, such as trading companies, retailers or, as in this case, cable companies.

The idea behind the concept of a 'gatekeeper function' is the following. In order to market a new product, a supplier must have access to an important distribution channel in order to achieve the necessary critical sales volume. This is necessary to recover expenses, such as investments in radio and television advertising, or to generate sufficient income, such as subscriptions or advertising income. If a party controls a considerable part of the market, it is possible for this party to determine, to a large extent, what products enter the market and are consequently available to users. Products which are not purchased by a company in such a powerful position, have almost no chance of reaching end-users. After all, it is not worthwhile marketing a product other than through this 'gatekeeper'. The 'gatekeeper' therefore ultimately decides the likelihood of success of new products.

In earlier decisions, the European Commission stated that a gatekeeper function may arise as a result of a concentration. An example of this is Case IV/M.890 - Blokker/Toys 'R' Us. Blokker has such a large share of the Dutch market that access to and support by at least two of the three Blokker chains is essential for the successful strategic introduction of a new product in order to recover the cost of the market launch.

The gatekeeper function also played a role in Case IV/M.1221 - Rewe/Meinl, in which a trading company would have acquired such a position on the procurement market that suppliers would not have had any other sales opportunities than those provided by the trading company.

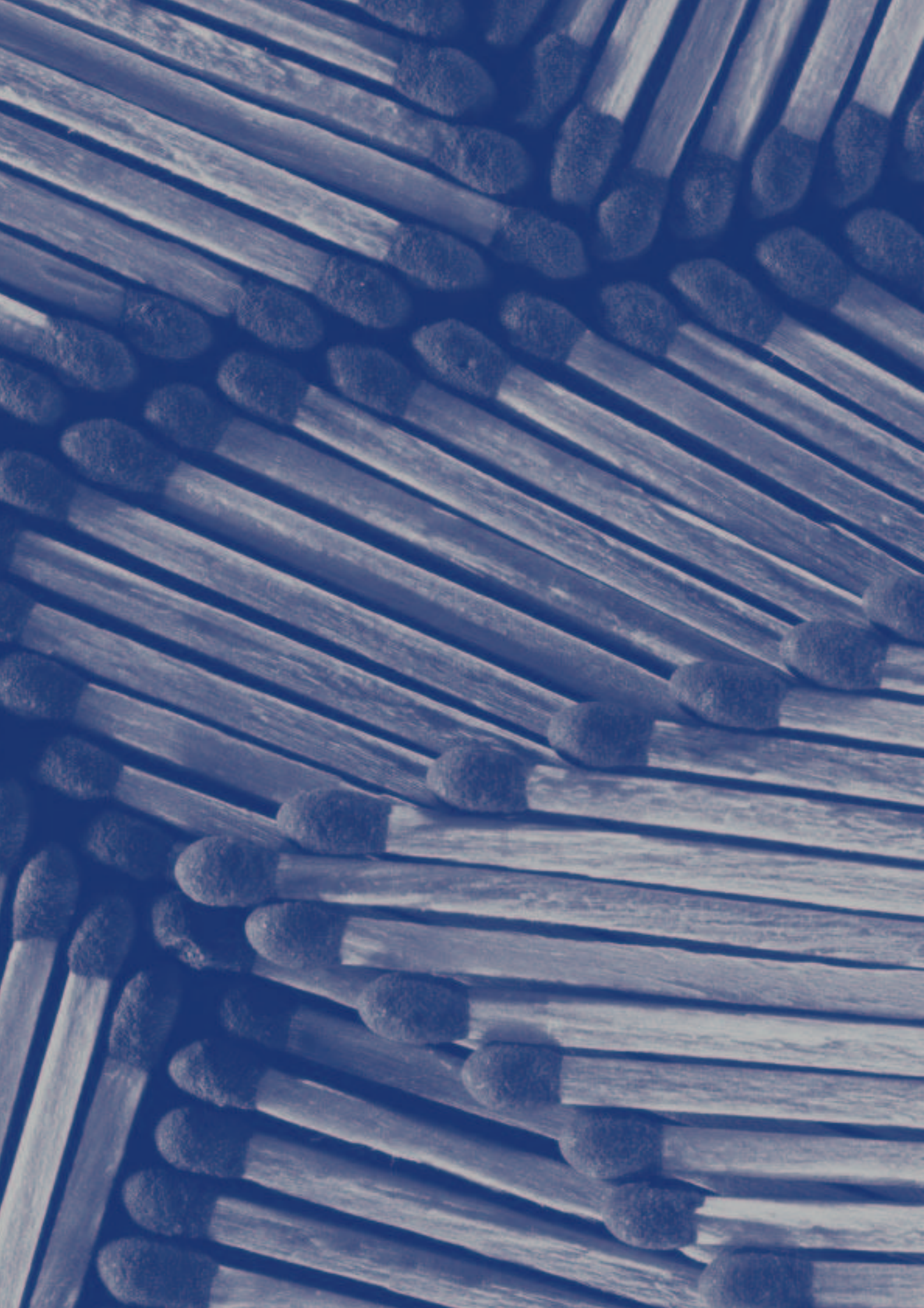
Finally, the European Commission, in the Case COMP/M.1439 - Telia/Telenor, stated that the new combination resulting from the concentration would acquire a dominant position due to its large market share in Sweden (60 to 70 percent), as a purchaser of content for the compilation and supply of programme packages. Cable operators may have a similar gatekeeper function. Every broadcasting company which wishes to focus on channels financed from advertising income would have to cooperate with the new combination to reach a sufficient number of households to ensure that sufficient income can be generated from advertising and subscriptions. In this regard, the European Commission referred to the specific importance of transmission in major population centres, because these are of special interest to advertisers and therefore to commercial broadcasting companies and the fact that the gatekeeper function which has arisen can be used to negotiate preferential or exclusive distribution rights.

It appears from the investigation of the Liberty-Casema case that it was plausible that the merged company would fulfil a gatekeeper function on the market for the compilation and supply of standard packages as a result of the combination of Liberty and Casema, since the combined company would control 60 percent of the cable network in the Netherlands.

Various channels would have little chance of surviving as they would not being transmitted in the region covered by Liberty, the owner of UPC, and Casema.

The effect of the gatekeeper function could even be strengthened by the fact that Liberty is vertically integrated. After all, Liberty is not only able to determine which channels are offered to consumers (from its position on the cable market), but also has an interest in exploiting this possibility through its participating interests in programme suppliers. In this decision, NMa has shown that mergers or takeovers, particularly under circumstances of this sort, may possibly result in the emergence or strengthening of a dominant position.

PART 4 Decisions



The Entire Chain: From Primary Decision to Appeal

In this part, NMa's decisions are discussed. This relates to activities throughout the entire decision-making chain. This chain is illustrated below. A good example of this, which is also topical, is given particular attention, namely decisions to impose fines due to an infringement of the prohibition of cartels. The position of consumers in proceedings before NMa is discussed in Part 3 of this annual report. This part of the annual report contains summaries of cases and overviews of the decisions taken by NMa and court rulings.

Part 3 page 73
Position of the Consumer in Procedures

The decision-making chain

For NMa and its chambers, decisions in the form of generally binding regulations (in particular, legislation and Orders in Council) are usually take as the point of departure. The Electricity Act of 1998 and the Gas Act give the Director of DTe some powers to issue general regulations, such as technical codes for grid management. These are not discussed here..

The decision-making chain may be represented as follows:

- guidelines
- primary decisions (in individual cases)
- decisions on administrative appeals
- judicial appeals to a court.

Guidelines

The powers of NMa and its chambers in their areas of operation provide room for flexibility and choices within the framework that has been created. In order to ensure transparent communication of NMa's choices in particular areas to citizens and companies, NMa draws up guidelines. In its guidelines, NMa sets out how it will use its powers and provides reasons for this.

Legally guidelines are policy rules. In principle, policy rules are binding on NMa and, partly for this reason, must meet the strictest legal criteria and criteria with regard to their implementation. However, policy rules are not legal provisions which are binding on the courts. If a decision based on guidelines is disputed in court, the court must be presented with a convincing defence of the guidelines. Before adopting guidelines, NMa often publishes them in a consultation document and holds a consultation round in which all parties can present their opinions. In determining the Guidelines for the Setting of Fines, consultation was not appropriate because the imposition of sanctions is a good example of an issue which is decided by the regulator. Holding consultation rounds provides a good overview of the relevant facts and the various interests involved and promotes support for the guidelines and the use of NMa's powers.

In 2002, following consultation, the Guidelines for Healthcare [*Richtsnoeren voor de Zorg*], the Leniency Guidelines [*Richtsnoeren Clementietoezegging*] and the Guidelines for Remedies [*Richtsnoeren Remedies*] were adopted.

Primary decisions

The Director-General of NMa and the Director of DTe derive various powers from the Competition Act [*Mededingingswet*], the Electricity Act of 1998 [*Elektriciteitswet 1998*] , the Gas Act [*Gaswet*] and the Passenger Transport Act [*Wet personenvervoer 2000*] to take decisions in relation to individual companies or private individuals. In relation to the Competition Act, for instance, this might involve an exemption from the prohibition of cartels, a licence for a concentration or the imposition of a fine. In the case of energy legislation, the possibilities include setting maximum tariffs for an energy company or granting licences to supply electricity generated by sustainable means.

Part 2 page 37
Imposition of fines

Before a decision is taken to impose a fine or an order subject to a penalty pursuant to the Competition Act, a formal and important step must be taken: the reasonable suspicion that an infringement has been committed must be set out in a report. Drawing up a report is the conclusion of an investigation under competition law. The report sets out why an infringement of the Competition Act has been committed on the basis of the facts which have been established. The report is drawn up with a view to imposing a sanction. The decision is prepared by NMa's Legal Department. The report and the dossier on which the report is based are transferred to the Legal Department for this purpose.[See also 'The imposition of fines' in Part 2.]

Performance indicators

Administrative appeals pursuant to the Competition Act processed within the statutory term*

2002	2001
31%	24%

Realisation compared to planning

Realised	Planning
62 (159%)	39

* *Assuming a term of 10 weeks (Section 7:10 of the General Administrative Law Act).*

See also 'Customer/Environment perspective' in Part 1.

Performance indicators

Administrative appeals in relation to energy settled within the statutory term*

2002	2001
15%	-

Realisation compared to planning

Realised	Planning
125 (63%)	200

* *Assuming a term of 10 weeks (Section 7:10 of the General Administrative Law Act).*

See also 'Customer/Environment perspective' in Part 1.

Administrative appeals

Interested parties may file an administrative appeal against an primary decision. The same administrative body which took the primary decision, in other words the Director-General of NMa or the Director of DTe, rules on the administrative appeal. The preparation of decisions on administrative appeals is the responsibility of the Legal Department.
The administrative appeals procedure is set out in the General Administrative Law Act [*Algemene wet bestuursrecht*]. Holding a hearing is an important part of this. The officials on the Appeals Board, or a majority of them, who also draw up the draft decision on the administrative appeal, are not involved in the case prior to the hearing. In 2002, 187 notices of administrative appeal were processed.[1]

Where administrative appeals are filed against decisions in which a sanction is imposed due to an infringement of the prohibition of cartels, a slightly different procedure is followed. Since the primary decision in cases involving fines is prepared by the Legal Department itself, the appellants are not heard by officials of the Legal Department, but by an independent board which gives advice on the administrative appeal. This change in the procedure provides a better guarantee against partiality. After the independent board has given its advice, the Legal Department draws up a draft decision and presents this to the Director-General of NMa.

In 2002, one administrative appeal against a decision to impose a fine was processed. This related to a fine imposed on Deutsche Post International B.V. and Trans-o-flex Schnell-lieferdienst GmbH for providing NMa with insufficient information regarding the acquisition by Deutsche Post of Correct Express Beheer B.V., a subsidiary of Trans-o-flex. In this case, NMa declared that the administrative appeal was partially well founded and revoked the fine. The company could not be held responsible for providing insufficient information. In this case, NMa followed the advice of the Administrative Appeals Board.

Judicial appeal to the court

It is possible to appeal against a decision in relation to an administrative appeal by lodging a judicial appeal with the Administrative Court. With regard to decisions taken in accordance with the Competition Act, judicial appeals must be filed with the Court of Rotterdam. It is possible to appeal against the judgement of the Court by appealing to the Trade and Industry Appeals Tribunal [*College van Beroep voor het bedrijfsleven*]. With regard to decisions in accordance with the Electricity Act of 1998 and the Gas Act, judicial appeals maybe filed with the Trade and Industry Appeals Tribunal which is also the highest court of appeal.

1 *This relates to 125 cases in the area of energy and 62 in the area of competition. Cases in the area of energy are often be grouped around a single decision or type of decision, so that the cases within a single group may also be regarded substantively as a single case. In isolated instances, this also applies to competition cases.*

Summary of Reports and Decisions

Reports

The investigation carried out by NMa into infringements of the Competition Act resulted in nine reports in 2002, which set out a reasonable suspicion that an infringement had been committed. The investigation into the construction industry resulted in five reports, which have been discussed in Part 2 of this Annual Report. Following the report drawn up by NMa of the mobile telephone operators, fines were imposed in December 2002. This case is also discussed in Part 2 of this Annual Report. The reports drawn up by NMa in 2002, following investigations into the cleaning services branch and the bicycle branch, are summarised below.

Part 2 page 39
Investigation into cartel infringement in the construction industry

Part 2 page 37
Imposition of fines

Case 2021/OSB Ondernemersorganisatie Schoonmaak- en Bedrijfsdiensten (OSB)

On 26 August 2002, following an investigation, NMa drew up a report are on Ondernemersorganisatie Schoonmaak- en Bedrijfsdiensten (OSB), an organisation representing companies in the cleaning and business services sector, and a number of its larger members for issuing recommended prices and coordinating price increases. The members of OSB represent 60 to 70 percent of the total market turnover of the cleaning services branch. In 2000, the total turnover of the branch amounted to approximately € 2.4 billion.

It appeared from NMa's investigation that OSB had, for instance, provided its members with a model for calculating hourly tariffs. OSB also expressly advised its members to increase their tariffs annually, as well as in the interim, on the basis of percentage price increases set by OSB.

NMa is of the opinion that OSB used these price recommendations as a means of coordinating the price increases of its members. NMa is also of the opinion that a number of members of OSB infringed the prohibition of cartels because they were directly involved in arranging and coordinating the price increases. Subsequently the majority of these companies actually adopted the price recommendations.

The recommended price increases related in any event to the period from January 1998 up to the end of 2000. In this period, price increases of 2.9, 3.7, 5.4 and 2.5 percent were recommended.

On the basis of the report, NMa imposed fines on OSB and a number of cleaning services companies at the end of 2003.

Case 1615/Bicycle Manufacturers

On 28 November 2002, NMa drew up a report on the bicycle manufacturers Gazelle, Giant, Batavus, Koga Miyata, Sparta and Union. The investigation into the bicycle branch, which took place in the period from September 2000 to November 2002, also resulted in the drawing up of a report on two branch associations (see below).

In terms of turnover, the bicycle manufacturers have a joint market share of approximately 86 percent of the markets for the production and sale of bicycles to retailers in the Netherlands. In the report on the above-mentioned bicycle manufacturers, the following infringements of the prohibition of cartels were ascertained.

Gazelle, Batavus, Koga Miyata, Giant and Sparta participated in any event from the beginning of 1998 up to the end of 2002 in a system for exchanging information which involved the exchange of detailed market information every two months. Union participated in the system of exchanging sensitive competitive information up to its bankruptcy in November 2001.

This exchange of sensitive competitive information, in combination with an oligopolistic market structure, a high degree of concentration and barriers to entry, had the effect of restricting competition.

The agreements or concerted practices investigated related to increases in recommended retail prices for bicycles in the 2001 bicycle season, changes to payment discounts and the application of a maximum margin for buyers. These agreements or concerted practices for within the scope of the prohibition of cartels.

Case 2973/Bovag and NCBRM On 28 November 2002, NMa also drew up a report on two branch organisations representing bicycle retailers, namely Bovag and NCBRM. According to NMa, these associations strongly urged their members, the bicycle retailers, not to do business with two large suppliers of company bicycles. According to Bovag and NCBRM, the profit margin paid to bicycle retailers by these two suppliers on the sale of business bicycles was too low. In addition, Bovag and NCBRM made various recommendations to their members with regard to the prices and tariffs to be charged to customers for, for instance, service and maintenance.

When competitors unite in a (branch) organisation which subsequently issues recommended prices, they restrict competition. Joint recommended prices or price increases make it possible to predict what the pricing policy of competitors will be. This is in conflict with the prohibition of cartels. The branch organisations now have the opportunity to respond to the report. After this, NMa will take a final decision on whether an infringement has been committed and, if so, whether a fine and/or an order subject to a penalty will be imposed.

Decisions on complaints

A number of outcomes of cases settled by NMa in 2002 following complaints that had been submitted are discussed below.

Case 560 /prohibition of the 'no-cure-no-pay' clause in the Code of Conduct of the Netherlands Bar Association [Orde van Advocaten] In a decision of 21 February 2002, NMa stated that the prohibition of advocates to bill on a 'no-cure-no-pay' basis in personal injury cases was an infringement of the prohibition of cartels. Article 25 (2) and (3) of the Code of Conduct for Advocates of the Netherlands Bar Association [*Orde van Advocaten (NOVA)*] prohibits lawyers from agreeing with their clients that a fee will be charged only if a certain result is achieved ('no cure no pay') or that their fee will amount to a certain part of the value of the result achieved through the lawyer's efforts (*'quota pars litis'*).

Considerations: NMa is of the opinion that this prohibition imposed by the Netherlands Bar Association coordinates the behaviour of personal injury lawyers since they are not able to agree to this method of billing with their clients. Other parties, such as legal consultancy firms, are able to do so and are able to offer a service in which the (financial) risk borne by the client in relation to the outcome of a case may be shared or even taken over entirely. This means that individual lawyers are limited in their freedom to determine their own policy with regard to the method of billing, an important means of competing. Competing offers based on 'no cure no pay' or '*quota pars litis*' are easier for the client to compare than offers based on other permissible methods of billing. In addition, the 'no-cure-no-pay' option, in addition to existing legal schemes) increases access to lawyers and consequently to the courts for the less wealthy.

In NMa's opinion, the independence, partiality and integrity of lawyers is not in jeopardy if 'no cure no pay' or '*quota pars litis*' agreements are entered into in personal injury cases . Of course, lawyers are at liberty to continue to offer other methods of billing which are allowed at present. NMa noted that the prohibition of 'no cure no pay' in personal injury cases impedes the operation of market forces more than is necessary.

As the Netherlands Bar Association will in future have to present such code of conduct to the Ministry of Justice for assessment, as a consequence of an amendment to the law, at the time that this decision was taken NMa decided against initiating a procedure which would result in the imposition of a fine or an order subject to a penalty. An amendment[1] to legislation has now been passed, as a result of which codes of conduct drawn up by the Netherlands Bar Association are subject to a form of regulation by the Ministry of Justice.

1 *Proceedings of the Upper House of the Dutch Parliament, 2000-2001, 26940, No. 207*

Cases 1119, 1719 and 2487/EnTrade, Compass Energy and Kuwait Petroleum Europoort vs Gasunie's Commodity Services System On 29 March 2002, NMa dismissed the complaints filed by EnTrade, Compass Energy and Kuwait Petroleum Europoort against parts of Gasunie's so-called Commodity Services System [*Commodity Diensten Systeem (CDS)*]. The Commodity Services System, which applied up until 1 January 2002, is the tariff system used by Gasunie for the transmission, additional services and supply of natural gas to buyers whose annual consumption exceeds 10 million m^3.

Consideration: NMa ruled that elements of the Commodity Services System had discriminatory effects and that Gasunie consequently had abused its dominant position. This relates, for instance, to the system of points where gas enters or exits the transmission network, the so-called entry and exit points. The system resulted in Gasunie's customers being charged a transmission tariff on the basis of a virtual entry point, while customers of other gas suppliers were charged a transmission tariff based on the actual entry point. As a result, Gasunie's customers paid a transmission tariff based on a transmission distance which was shorter on average than the customers of other gas suppliers. The transmission tariff which Gasunie was able to charge was therefore lower on average than the transmission tariff paid by customers of other gas suppliers, as a result of which these customers were placed in an unfavourable competitive position.

In addition, NMa noted that the balancing regime applied by Gasunie was discriminatory. On the basis of this system, gas suppliers other than Gasunie had to pay high penalties if their offtake of gas was too high or too low ('network imbalance'), while this did not apply to gas supplied by Gasunie.

NMa decided not to draw up a report. Imposing a fine subject to a penalty was deemed inopportune, since the infringements referred to were no longer being committed. As of 1 January 2002, the Commodity Services System was replaced by a new system of indicative tariffs and conditions. These indicative tariffs and conditions are regulated by DTe. A fine was also deemed inopportune since in 2001 DTe did not take action against the Commodity Services System subject to a number of conditions. In the light of this, a fine in relation to years prior to the implementation of sector-specific regulation was also considered inopportune.

The complaints also related to components of the transmission tariffs of the Commodity Services System. NMa decided not to assess these components substantively because DTe regulates these transmission tariffs and had already imposed a number of binding instructions. Complaints about other tariffs related (partly) to the gas supply market. NMa decided not to start an investigation into this complaints since this market still had to be developed. For this reason it is not desirable to subject these tariffs to a cost-oriented regime.

Case 2810/EnergyXs vs Nuon EnergyXs submitted a complaint against, amongst others, N.V. Nuon Energy Trade & Wholesale. The complaint was directed towards the length of the period of notice which Nuon applies in its electricity supply contracts. According to EnergyXs, a consequence of these periods of notice is that buyers are restricted in their freedom to opt for a new supplier and that these periods of notice therefore have exclusionary effects.

Considerations: NMa dismissed this complaint because the grid managers (including Nuon) started providing customers with information on the periods of notice in good time. Customers knew that they were free to opt for a new energy supplier on 1 January 2001. There were therefore no exclusionary effects.

Case 2925/KNS vs. Schuitema In May 2002, NMa received a complaint from Koninklijke Nederlandse Slagersorganisatie (KNS) [*Royal Netherlands Butchers' Organisation*]. KNS's complaint concerned Schuitema Vastgoed B.V. (Schuitema Vastgoed). The complaint related to a provision in the lease agreement in which Schuitema Vastgoed acts as the lessee of a shopping centre. The provision included a so-called exclusivity clause which read as follows: *'the lessor shall relinquish its right to lease areas for the accommodation of a supermarket and/or liquor store or butchery in the shopping centre of which the leased area is a part.'*

Considerations: As a result of this provision, a member of KNS was prohibited from setting up a butchery in the shopping centre in question. The Branch Protection Agreements (Exemption) Decree [*Besluit van vrijstelling branchebeschermings-overeenkomsten*][2] did not apply in this case because this related to a shopping centre which had existed for longer than six years. Following this complaint, two officials of NMa carried out an on-site company investigation at Schuitema Vastgoed. During this investigation, lease agreements of Schuitema Vastgoed were inspected with a view to the inclusion of such exclusivity clauses. Such clauses did occur in a small number of other lease agreements of Schuitema Vastgoed. On the basis of the outcome of the company visit, NMa urgently requested Schuitema Vastgoed to amend the lease agreements which included the exclusivity clause. Schuitema Vastgoed subsequently informed the parties to the contracts with a lease agreement which contained the prohibited exclusivity clause that the clause in question was null and void. NMa received copies of the letters to the other parties to the contracts.

2 *Decision of 25 November 1997, Netherlands Government Gazette, in relation to the exemption of branch protection agreements in new shopping centres from the prohibition of competition agreements.*

Case 2996/Shakie's Fresh Fruit Shakes B.V. vs NS Stations B.V. and Servex B.V. On 14 August 2002, NMa dismissed the petition by Shakie's Fresh Fruit Shakes B.V. (Shakie's) to impose a provisional order subject to a penalty on NS Stations B.V. and Servex B.V.

Shakie's was set up on Utrecht Central Station and Amsterdam Central Station as a 'fresh fruit shake bar'. NS Stations manages and operates stations and the accompanying grounds. Servex operates catering businesses and dispensing machines from which food and beverages can be obtained at stations of the Nederlandse Spoorwegen [Netherlands Railways]. In January 2002, Servex started selling fruit shakes through its Swirl's outlets on two NS Stations at which Shakie's has outlets and two stations where Shakie's has been attempting to lease locations for two years. These products are the same as Shakie's products.

Shakie's is of the opinion that NS Stations and Servex have abused this dominant position (Section 24 of the Competition Act). This abuse supposedly took the following form: (i) excessive rentals, (ii) refusing access to an 'essential facility' (locations at NS Stations at which food and beverages are sold to railway passengers), (iii) refusal to supply (refusal to enter into new lease agreements with Shakie's).

In addition, Shakie's argued that it satisfied the condition of urgency, because it had suffered a loss as a result of the aforementioned practices since January 2002 and had consequently experienced serious financial difficulties. The company feared bankruptcy within the foreseeable future.

Considerations: The petition to impose a provisional order subject to a penalty was dismissed because there is no *prima facie* evidence of an infringement of the Competition Act. A deciding factor in this regard was the fact that it could not be determined with certainty after an initial investigation that a dominant position existed. The arguments or evidence presented by Shakie's in themselves not sufficient to conclude that the relevant geographic market is limited to (one of) the (large) stations.

Within the framework of the processing of the complaint against NS Stations and Servex by Shakie's, research into comparative pricing will be carried out in 2003 in order to determine the relevant geographical market.

Decisions on applications for exemption from the prohibition of cartels

The outcomes of a number of cases, which NMa settled in 2002 following applications for exemption from the prohibition of cartels, have been summarised below.

Case 749/REG On 2 August 2002, NMa decided to grant Federatie van Energiebedrijven in Nederland (hereinafter 'EnergieNed') [Federation of Energy Companies in the Netherlands] an exemption from the prohibition of cartels for its Scheme for the Recognition and Certification of Gas Installers [*Regeling voor de erkenning en certificering van gastechnische installateurs*] (hereinafter 'REG 1994'). EnergieNed is the branch organisation for all companies in the Netherlands active in the area of the production, transmission, trade or supply of gas, electricity and heating.

Considerations: The notified scheme, REG 1994, is the result of a decision taken by EnergieNed. The aim of REG 1994 is to maintain or promote the quality and safety of gas installations. For this purpose, REG 1994 distinguishes between unregistered installers, registered installers and registered certified installers, also referred to as guaranteed installers. The distinction referred to above, is based on various criteria, whereby a registered certified gas installer has to meet higher quality criteria than a registered gas installer. The scheme adopted by EnergieNed is not a registration and certification scheme for the members of EnergieNed, nor is it a registration and certification scheme set up by installers or their branch organisation, but a quality scheme which gas transmission companies impose on the installers of gas installations.

The competitive position of companies which are not registered or certified in accordance with REG 1994 is not adversely affected by this scheme. The registration and certification scheme is open and transparent by nature and the criteria for admission are objective. Finally, REG 1994 offers independent recourse to appeal. More specifically, every company is free to pass on the cost of audits or the cost of certification. REG 1994 also does not appear to have resulted or to result in barriers to, restrictions on or distortions of competition between companies.

Case 728/Joint Operating Agreement Vliegasunie B.V. On 20 November 2002, NMa decided that the Joint Operating Agreement of Vliegasunie was partly not eligible for exemption from the prohibition of cartels and partly did not infringe the prohibition of cartels. On the basis of this agreement, a number of electricity production companies cooperate (within the framework of a cooperative joint-venture with Vliegasunie B.V.) in the sale of the solid remains of fly ash, bottom ash and flue gas desulphurisation gypsum, which are released in coal-fired electricity generation.

Considerations: In the assessment, it is important that no information is exchanged with regard to the individual quantities and qualities of fly ash, bottom ash and flue gas desulphurisation gypsum through Vliegasunie, or between the shareholders of Vliegasunie. In NMa's opinion, no competition problems occur on the electricity production market.

NMa is of the opinion that the joint commercialisation of fly ash, bottom ash and flue gas desulphurisation gypsum does restrict competition. With regard to the joint sale of fly ash and bottom ash, however, NMa ruled that this was clearly not appreciable and was therefore not an infringement of the prohibition of cartels because the parties held a very small position on the relevant market.

On the market in which the parties are active in the joint sale of flue gas desulphurisation gypsum, NMa ruled that there was an appreciable restriction on competition. In this regard, the conditions for exemption from the prohibition of cartels were not fulfilled.

The application for exemption was dismissed because the agreement partly did not infringe the prohibition of cartels and for the rest did not meet the conditions for exemption.

Case 1994/prohibition of supplying third parties AstraZeneca On 9 July 2002, NMa decided that the prohibition of the supply of medicines outside the premises of the hospital imposed on hospitals and pharmacies by the pharmaceuticals manufacturer AstraZeneca was in conflict with the Competition Act. Exemption from the prohibition of cartels was therefore not granted for this prohibition. The hospitals, which purchase medicines from AstraZeneca, receive very high discounts on condition that they only use these medicines for patients who are admitted to hospital (hospital healthcare). The sale of these medicines, for instance to private individuals or pharmacies (community healthcare), is explicitly prohibited by AstraZeneca.

Considerations: By applying a prohibition, AstraZeneca maintains an artificial price difference between the hospital healthcare segment and community healthcare segment. This restricts potential competition and AstraZeneca denies hospitals the incentive to switch to competitive medicines which have the same effect. Without prohibitions on supplying third parties, different medicines may be chosen and the total costs may be lower than at present.

It is the legislator's aim to enable hospitals to compete with pharmacies by giving hospitals the possibility of supplying medicines to patients who are not hospitalised, through polyclinic pharmacies at or near the hospital. This will give consumers more freedom of choice with regard to the purchase of medicines. In addition, pharmacies will be encouraged to approve their efficiency and quality and an incentive may be given to provide medicines that are cheaper than the present maximum prices. AstraZeneca's prohibition of supplying third parties impedes these effects intended by the legislator.

For pharmaceuticals manufacturers it is of considerable importance to acquire a significant position in hospital healthcare. General practitioners often prescribe the same medicines to former hospital patients as those prescribed by the specialist in the hospital (the so-called knock-on effect). Due to the high discounts given by AstraZeneca, it is more difficult for manufacturers to acquire a position on the hospital healthcare market, because as a result of these high discounts hospitals will not be inclined to switch to a competing medicines. The criteria for the granting of an exemption from the prohibition of cartels were not met.

Case 2605/Zorgverzekeraars Nederland - Solidarity Protocol On 16 December 2002, NMa decided not to grant approval to the so-called 'Solidarity Protocol' of the private healthcare insurers, united in Zorgverzekeraars Nederland (ZN). According to NMa, these agreements restrict competition between insurers and resulted in premium increases for policyholders. NMa therefore has not granted an exemption from the prohibition of cartels.

Considerations: The agreements in the Solidarity Protocol limit private healthcare insurers in their freedom to attract policyholders with low premiums at the expense of competitors. The agreements consequently result in less competition between private healthcare insurers and in premium increases, in any event for younger policyholders. Since almost all private healthcare insurers in the Netherlands are affiliated to ZN, these effects would be felt throughout the market. In NMa's opinion, the agreements therefore contravene the prohibition of cartels.

The Solidarity Protocol sets a bandwidth for premium differentiation according to age in relation to individual insurance products. The Solidarity Protocol also ensures that low premiums for group insurance policies (for instance, those entered into by companies for their employees) are subsidised by higher premiums for personal insurance policies. For this purpose, the Protocol links the claims/premium ratio of the group insurance portfolio to that of the personal insurance portfolio. NMa is of the opinion that each insurer must, in principle, be able to determine the degree of solidarity which it applies to its group of policyholders. The Solidarity Protocol, however, results in a collective norm for the degree of solidarity in this market.

ZN has not presented a plausible case that the Solidarity Protocol will result in appreciable economic advantages which may outweigh the disadvantages to competition.

A fall in the premiums of older policyholders is not to be expected. Research even shows that the premiums of older policyholders will increase due to the introduction of a premium bandwidth for personal insurance products. If the reduction in premiums, expected by ZN, does occur in the case of older policyholders, this will have to be funded by younger policyholders in the form of an increase in premiums.

Limiting the premium subsidisation of group contracts by personal contracts will also result in premium increases, particularly for those insured under group contracts. The premium reduction expected by ZN in the case of holders of personal insurance policies, as a result of the decrease in the premium subsidy, is not likely, in NMa's opinion, because this reduction is limited by the bandwidth for premium differentiation.

Case 1919/SAVI On 3 September 2002, NMa decided not to grant an exemption from the prohibition of cartels to Stichting Aanbestedingsvraagstukken Installatietechniek (Savi), for the notified tender scheme. Savi promotes the interests of technical installation companies in the area of central heating and air conditioning, sprinklers and electrical engineering in the Netherlands. Savi submitted an application for exemption for a scheme in relation to contributions to subscription costs and the formation of a fund (hereinafter 'the Scheme'). Funds are obtained by the members of the scheme from the assignments acquired during a year, which are paid out to members who have were awarded tenders during that year. The amounts disbursed depend on the amounts of the contracts for projects which have been awarded and are set out in a table. Parties who wish to participate, can notify Savi per project.

Considerations: Every company which subscribes to projects has an incentive to increase the amount of the tender. Parties issuing tenders will be confronted with contracts for higher amounts because (at least in part) the subscription costs will be reimbursed.

The subscription threshold will also be lowered, resulting in unnecessary subscription costs. These additional subscription costs will result in higher subscription payments. The cost of these payments will therefore have the effect of increasing prices.

After the tender procedure, Savi informs the respective parties of the level of the tender and the amount for which the contract was awarded. Despite the fact that this information is provided afterwards for similar new projects, it could mean that participants will be in a better position to anticipate the intensity of mutual competition, which may also restrict competition. The application for exemption from the prohibition of cartels does not meet the criteria. The scheme does not contribute to the improvement of production or of distribution. Savi's assertion that the users (the parties issuing tenders) benefit from a fair share of the advantages of the scheme cannot be followed. In addition, Savi has not shown that the situation on the market makes the scheme necessary.

Case 2798/Vereniging Belangen Behartiging Schildersbedrijven (BBS) Vereniging Belangen Behartiging Schildersbedrijven (BBS), the association for the promotion of the interests of the painting industry, requested an exemption from the prohibition of cartels for its tendering schemes in 1988. This application for exemption was dismissed by NMa (decision in Case No. 381 and Administrative Appeal No. 2414).

On 3 December 2001, NMa carried out an on-site inspection at BBS. A number of parties responsible for implementing the BBS schemes were visited, the so-called 'Trusted Representatives'. It appears from the research carried out by NMa and the declarations given that BBS continued to carry out its prohibited tendering schemes, in any event until 3 December 2001. During the company visits, a number of representatives of painting companies, together with a Trusted Representative, were encountered during a meeting. In a subsequent investigation on 14 December 2001, a statement was taken from all the other Trusted Representatives. In addition, it appeared from NMa's investigation that (a number of) Trusted Representatives of BBS carried out various other activities which gave rise to a suspicion that a serious infringement of the prohibition of cartels had been committed.

This relates, for instance, to holding prior meetings with painting companies, passing on/exchanging information on prices, costs, budgets and offers and preferential treatment.

On conclusion of NMa's investigation, BBS decided to dismantle and abolish its organisation entirely. In the light of this, NMa deemed it inopportune to continue its investigation. On 13 August 2002, NMa closed the so-called BBS dossier.

Case 231/Medicom Zes On 20 December 2002, NMa decided not to grant an exemption from the prohibition of cartels for a joint venture agreement entered into by six construction companies in the general partnership, Medicom Zes. Medicom Zes was established in 1975 and is active, for instance, in the area of the construction, reconstruction and renovation of hospitals.

Considerations: NMa has assessed the relevant parts of the Joint Venture Agreement and the amendments to this. The six construction companies had given each other the undertaking that they would bring certain projects into Medicom Zes.

Medicom Zes is a cooperative joint venture and consequently a joint venture which must be assessed in accordance with the prohibition of cartels. It appears from the assessment that the joint venture only had the aim of distributing projects amongst the participants. The result of this was that the partners of Medicom Zes no longer compete with each other, in any event in relation to these projects. This is in conflict with the prohibition of cartels. Medicom Zes has, for instance, not given sufficient reasons and presented a plausible case as to how the cooperation results in efficiency advantages which benefit users. The criteria for exemption from the prohibition of cartels have therefore not been met. NMa has therefore dismissed the application for exemption.

Case 18 and 1162/Joint exploitation of rights live to broadcasting of Dutch Premier League football On 19 November 2002, NMa decided not to grant an exemption from the prohibition of cartels for the joint exploitation of rights to live broadcasting of Premier League football. Notification of the scheme was given in 1998 by the 18 professional football organisations, united in Eredivisie N.V.

Considerations: Each professional football organisation is the holder of the rights to broadcast its own home matches. The professional football organisations agreed that they would jointly exploit their live broadcasting rights and divide the total revenues amongst themselves to increase the price paid for the rights and to limit supply. This agreement constitutes a serious restriction on competition between professional football organisations. As a result of the agreements between the professional football organisations, the number of Premier League matches which are broadcast live on television is limited. As a result, consumers can only watch 10 to 20 percent of the 306 Premier League matches played on television. Since almost exclusively the matches of Ajax, PSV or Feyenoord are broadcast, consumers do not have the possibility of watching other matches. In addition, this method of exploitation results in a situation where all the broadcasting rights are sold to only one licensed broadcaster. Other licensed broadcasters may not broadcast the other matches. The licensed broadcasters freedom of choice and that of consumers is limited by this policy.

As a result of NMa's decision, in future the professional football organisations must trade their own home matches. In contrast to the present situation, smaller professional football organisations may have their own home matches broadcast live by national or regional television channels. Their home matches against the top clubs are certainly interesting for licensed broadcasters, as are, for instance, derbies and European qualifying matches. Clubs may also profit more directly from good performance in a season. The joint trading of broadcasting rights by a smaller number of professional football organisations may well qualify for exemption. This may result in interesting packages of broadcasting rights for a wide range of licensed broadcasters.

In principle, a certain form of financial solidarity between professional football organisations in the Dutch Premier League is allowed. The joint sale of broadcasting rights, however, is not necessary to maintain a form of financial solidarity. Even if broadcasting

rights were sold separately, clubs may relinquish part of their revenues for redistribution in equal parts to the 18 professional football organisations. This could help to bring about a balanced competition.

NMa sees no problems with regard to competition law in relation to the joint trading by professional football organisations of a total overview of summaries of Dutch Premier League matches, as presently broadcast by NOS. The combining and joint trading by the professional football organisations of rights to broadcast summaries, which are used to provide a total overview, results in a product which none of the professional football organisations could produce on its own.

To give the professional football organisations the opportunity to adjust to the new situation, it was decided that the decision would take effect on 1 August 2003 after the current football season.

Case 2036/Heineken On 28 May 2002, NMa decided that Heineken's standard agreement for the hospitality industry did not contravene the prohibition of cartels. The application for an exemption from the prohibition of cartels was therefore not necessary.

Considerations: The standard contracts of which notification was given by Heineken included an exclusive purchase clause for lager for an unspecified term with a period of notice of two months (with the exception of the lease agreements which were entered into for a specified period). Exclusive purchase clauses are not regarded by NMa as clauses aimed at restricting competition which for that reason alone would be subject to the prohibition of cartels. Exclusive purchase clauses may have the effect of restricting competition.

The duration and extent of this exclusivity was ultimately decisive in the assessment. Firstly, the exclusivity is limited to draught lager, so that the free sale of bottled beer is not restricted. In addition, companies in the hospitality industry are at liberty to terminate the agreement and there are no significant obstacles to doing so. This means that Heineken's competitors may continuously approach Heineken's outlets and make competitive offers. This is in contrast to the 'tied' customers of Heineken's competitors, since these brewers benefit from the block exemption pursuant to European Directive 2790/1999.

The position of these smaller breweries, compared to the larger Heineken (with its market share of 50 to 55 percent), is favourably affected as a result of this. After all, Heineken cannot approach its competitors' tied customers. It is unlikely that these agreements will have the effect of protecting the market. NMa therefore also concluded that these agreements were not contrary to the prohibition of cartels.

With regard to the lease agreements (in which exclusivity is agreed for the term of the lease) it was concluded that this did not constitute an appreciable restriction on competition, given the relatively small number of outlets in the hospitality industry which are tied to Heineken in this way.

Case 2084/Designer Outlet Centre Roermond and Case 2435/Batavia Stad This relates to two similar applications for exemption from the prohibition of cartels in relation to a new phenomenon in the Netherlands, namely the factory outlet centre. This is a shopping centre in which a 'concentration' of sales areas are created in a tourist setting, in which damaged factory rejects, shop surpluses, experimental collections et cetera are sold in leased shop units at reduced prices. The relevant aspect from the perspective of competition law was the minimum discount clause included in the lease agreements.

Considerations: NMa concluded that this minimum discount clause did not restrict competition by nature and also did not have the effect of restricting competition. In other words, the tenants do not use the minimum discount as a means of coordinating their prices. On-site investigation showed that the prices and discounts of the tenants differed considerably.

NMa also ascertained that the assortment criteria included in the agreement do not have the effect of excluding companies which offer the same or similar products from setting up

a shop. In other words, they do not serve as a prohibited branch protection clause. In the light of the nature of the retailers who are not allowed to sell their goods in FOC Lelystad and the ample sales opportunities which they have in the immediate vicinity, NMa also concluded that it was not plausible that competition is appreciably restricted by the assortment criteria.

Case 2331/ACM Fertiliser Guarantee Plan [ACM Mestgarantieplan] On 21 March 2002, NMa decided that the Fertiliser Guarantee Plan [*Mestgarantieplan]* of Aan- en Verkoop Coöperatie Meppel b.a. (ACM) did not contravene the prohibition of cartels. The application for exemption from the prohibition of cartels was therefore not necessary. The statutory system of manure sales contracts was introduced on 1 January 2002. The ACM Fertiliser Guarantee Plan for which an exemption was sought is linked to the introduction of this statutory system of manure sales contracts. ACM Manure Guarantee Plan involves the creation of a so-called basic pool of parties requiring animal fertilisers (crop farmers), on the one hand, and an pool of suppliers of animal fertilisers (livestock farmers), on the other hand, which are linked to each other. ACM acts as an intermediary in linking the parties who require and those who offer animal fertilisers. In addition, through an exclusive obligation to purchase on the part of those requiring fertiliser (the crop farmers), it guarantees that the animal fertilisers, for which a fertiliser sales contracts has been agreed, will actually be sold.

Considerations: Exclusive purchasing clauses as such are not regarded by NMa as clauses which have the aim of restricting competition and which for this reason alone are subject to the prohibition of cartels. Within the framework of the present application for exemption, an investigation was therefore carried out to establish whether and, if so, the extent to which the exclusive obligation to purchase had an (appreciable) effect of restricting competition. Given the fact that ACM has a market share of less than five percent on the national market for animal fertilisers, NMa concluded that there was no appreciable protection of the market by means of the exclusive obligation to purchase. ACM Fertiliser Guarantee Plan and the exclusive obligation to purchase included in it therefore do not constitute an infringement of the prohibition of cartels.

Case 2816/Cooperation between Dutchtone and Ben in the Construction of a UMTS Network

On 11 October 2002, NMa approved the proposed setting up of a joint-venture for the construction and management of part of the UMTS network of Ben and Dutchtone. An exemption is not required because the joint venture does not contravene the prohibition of cartels.

Considerations: NMa gave its approval because the joint-venture is limited to parts of the network which have hardly any effect on the quality of the network and the services which will ultimately be offered. The competition between the companies will not be restricted appreciably by this form of cooperation. By cooperating, Dutchtone and Ben aim to reduce the investments and operating expenses incurred by the construction of a network. For consumers, this means the quicker rolling out of the network and less impact on the environment, as fewer antenna stations will be required. NMa also took into consideration the fact that this is a market in its infancy, in which the achievement of success and the development of UMTS services is still uncertain. The fact that Dutchtone and Ben are two of the smaller players in the area of telecommunications services also played a role. In addition, Dutchtone and Ben may determine whether they give third parties access to the network independently of each other.

The notified joint-venture meets the criteria set out in the memorandum 'Joint Construction and Use of parts of the UMTS Network' [*'Gezamenlijke aanleg en gebruik van UMTS-netwerkonderdelen'*] published by NMa, OPTA and the Directorate General for Telecommunications and Postal Services on 26 September 2001.

Decisions in relation to merger control

A number of decisions are summarised below which were taken by NMa in 2002 in relation to merger control. In one case, a licence was required for the realisation of the concentration. This decision is discussed first.

Case 3052/Liberty Media – Casema

Parties and market definition: The notified transaction relates to the takeover of Casema Holding B.V. (Casema) by Liberty Media Corporation (Liberty). Liberty is active in the Netherlands through United Pan-Europe Communications N.V. (UPC). Both parties are active in the area of the transmission of radio and television signals and the bundling and selling of standard and enhanced packages. Two tiers can be distinguished in this market, namely the *upstream* and *downstream* segments. Liberty is also a supplier of programmes. In addition, the activities overlap, for instance in the area of Internet access and Internet network access. Finally, both parties are active in the area of telephony, leased lines and data (network) services.

Consequences of the concentration in the area of radio and television signals and the bundling of packages: Each cable operator has a dominant position with regard to the distribution of radio and television signals in its coverage area. A consequence of the concentration in question is that UPC and Casema jointly will have a dominant position in a larger number of areas. If a national market for the transmission of radio and television signals and for the bundling and sale of packages via the cable is assumed, the parties have a combined market share of approximately 60 percent. In addition, the new company will control the entire transmission in the Randstad, the coastal region of the Netherlands, as a result of the concentration.

There is reason to assume, both with regard to the *upstream* and the *downstream* sides of the market, that a dominant position may arise or be strengthened. With regard to the *upstream* markets, this provisional conclusion is based on the suspicion that after the concentration Liberty will become an obligatory partner for a significant number of programme suppliers. In addition, the strengthening of its power with regard to the procurement of *content* will give Liberty the possibility of determining both transmission prices and conditions. Liberty will also acquire the possibility of exercising considerable influence on the development of digital television in the Netherlands. As a consequence of these factors, Liberty may give preferential treatment to its own supplier of programmes. With regard to the downstream markets, this provisional conclusion is based on the suspicion that Liberty will be able to determine which channels consumers are fed after the concentration, that Liberty will be able to determine the development and provision of digital services after the concentration and the fact that Casema will disappear as a benchmark.

Consequences of the concentration with regard to the Internet: At present, through their subscribers, the parties have a market share of 40 to 50 percent on the market for broadband Internet access (subscribers to cable and xDSL). Due to the emergence of xDSL, this market share will fall in the coming years. On the basis of various calculations, it is likely that the parties will still have a market share of 30 to 40 percent in two years' time. Since KPN's market share will be of the same order of magnitude and since Wanadoo and its present broadband subscribers will not switch to Liberty, there is no reason to assume that the concentration will result in the emergence or strengthening of the dominant position of a single company.

Following the concentration, two large market players will emerge on the market for Internet access, namely Liberty-Casema and KPN. Due to the market dynamics, in particular, of this market, which is still young, there is no reason to assume that the concentration will result in the emergence or strengthening of a joint dominant position.

On the market for network access, the parties have approximately 30 to 40 percent of the connections suitable for broadband in the Netherlands. In this area, KPN also has a market share which is at least as large, so that there is no reason to assume that the concentration will result in the emergence or strengthening of the dominant position of a single company.

On the basis, for instance, of the above considerations in relation to radio and television, NMa concluded that a licence was required for the proposed acquisition of Casema.

After this, the parties decided not to go ahead with the concentration. Casema has since been sold to two investment companies. NMa approved this acquisition in Case 3255/Carlyle and Providence - Casema.

Case 2786/DSM - Brokking's Beheer *Parties and market definition:* The notified transaction related to the combination of the activities of NPK van Eck B.V., Vulcaan Meststoffenhandel B.V. and Moreels N.V. within a company which would be jointly controlled by DSM Agro B.V. and Brokking's Beheer B.V. The markets affected by this concentration are the market for the production of artificial fertilisers, the market for trading in artificial fertilisers without holding stocks and the market for wholesalers in artificial fertilisers which keep stocks, with a possible distinction between animal fertilisers and artificial fertilisers.

Consequences of the concentration: The joint market share of the parties on the markets for the production of artificial fertilisers and the market for *trading* in artificial fertilisers without keeping stocks, which may possibly be distinguished, does not amount to more than 15 percent, irrespective of the geographical definition. Given these market shares, it is not plausible, in NMa's opinion, that a dominant position on these markets will arise or be strengthened.

On a national market for the wholesale trade in artificial fertilisers, the joint market share of the parties is between 30 and 40 percent. The parties will therefore acquire a strong position on this market. NMa also concludes that a number of factors may put this strong position into perspective. Firstly, the total volume that Cebeco (which distributes artificial fertilisers through a joint venture with 23 agricultural cooperatives) trades almost as much as the parties. In addition, the parties are not able to behave independently of their buyers, the private retailers, because they are entirely dependent on them to realise their turnover. The parties need the retailers to sell their products to end-users. The parties have no means of doing this themselves. Finally, various market players have indicated that the parties could not substantially increase their prices due to various alternatives which end-users have. For instance, the competitive pressure exerted by the wholesale trade in animal fertilisers and foreign competition, in particular in the border areas with Belgium and Germany, must be taken into account. In addition, a limited degree of direct supply by producers also occurs at present.

Finally, NMa investigated whether a joint dominant position could arise as a result of the concentration, since the parties in this case and Cebeco will become the two large players on the market. It appears that the differences between the organisations, their objectives and the marketing of their products could result in the emergence of different business strategies and cost structures. In addition, the market is not transparent, as a result of which the emergence of a joint position of power is not likely. In the light of these considerations, the possibilities for entering the market, market developments and the responses of market players, NMa has concluded that there is no reason to assume that this concentration will result in the emergence or strengthening of a dominant position on the market for the wholesale trade in (artificial) fertilisers.

Case 2838/Sperwer – Spar *Parties:* The notified transaction related to the acquisition of all the shares in Spar Holding B.V. (Spar) by Sperwer Holding (Sperwer) and Spar Detaillistenvereniging, whereby Sperwer acquired 90 percent of the shares in Spar and Spar Detaillistenvereniging acquired 10 percent. Both parties are active in the supermarket sector.

Market definition: NMa's assessment of this case focused on three markets: (i) the market for the sale of daily consumer goods through supermarkets, (ii) the market for franchise services for supermarkets and (iii) the market for the procurement of daily consumer goods for sale through the retail trade. NMa has ascertained that the market for franchise services for supermarkets and the procurement market for daily consumer goods for supermarkets

is a national market. In contrast to earlier cases dealt with by NMa in the sector, no decision was taken as to whether the market for the sale of daily consumer goods via supermarkets was a national market or a smaller market with regard to its geographical dimensions. In NMa's opinion, from the point of view of the consumer, the geographical dimension of the market for the sale of daily consumer goods via supermarkets is limited to the urban conglomeration, city, town or neighbourhood in which the supermarket is located. In earlier cases, however, it was assumed that the market was a national market, partly because of a chain effect resulting from the fact that the areas in which supermarkets attract customers overlap and due to a uniform national commercial policy. NMa must investigate whether such a chain effect exists in each individual case. After all, it is possible that, for instance, as a result of a specific concentration, the chain effect could be disrupted, as a result of which the effects of the concentration must be assessed in relation to a smaller geographical market. In each specific case, a separate investigation must be carried out to assess whether and to what extent the parties involved in the case have such a uniform centrally directed policy which is determined at the national level and which has the de facto effect that little or no adjustments are made at the local/regional level to take into account local/regional competitive conditions. Since the geographical scope of the relevant market depends partly on the dynamics of the market and the dynamics of the market may change over time, NMa must examine each case separately with regard to this aspect. In addition, NMa must assess the interrelationships between the three aspects described above. It was not necessary to determine an exact definition of the geographical market because the ultimate assessment was not affected by this.

Consequences of the concentration: In this case, the activities attributable to the parties on the market for the sale of daily consumer goods via supermarkets overlap in four locations. From the available data per district, neighbourhood or town/city and the surrounding areas, it appears that the parties' activities experienced strong competitive pressure in the overlapping areas. NMa has concluded that there is no reason to assume that a dominant position may arise or be strengthened on a market which is smaller than the national market for the sale of daily consumer goods through supermarkets, the national market for franchise services for supermarkets and the national procurement market for daily consumer goods.

Case 2877/Sint Antonius Ziekenhuis - Mesos Medisch Centrum

Parties and market definition: The notified transaction relates to a so-called 'management merger' of Stichting Sint Antonius Ziekenhuis (Antonius) and Stichting Mesos Medisch Centrum (Mesos). In this case, the members of the Supervisory Board and the Management Board in accordance with the constitution of the foundation will continue to consist of the same people. In addition, both budgets will be divided between the parties and certain functions in the hospitals will be restricted on a lasting basis. Both annual accounts will be consolidated. Partly on the basis of this, NMa concluded that this was a merger, in terms of Section 27 (a) of the Competition Act. Both parties are active in the area of treating, nursing and caring for patients and providing specialist medical care.

Consequences of the concentration: In earlier decisions on hospitals, NMa concluded that competition between the hospitals was almost excluded because of strict legislation and regulations and the application of these. From research carried out by NMa in relation to this case, however, it emerged that the first signs of the operation of market forces are becoming visible. At present, insight is being given into waiting lists and maximum tariffs are used for operations for which there is a waiting list. In addition, it is possible for hospitals to generate additional income outside of their regular budgets and more use is being made of independent treatment centres. These developments may, for instance, result in a situation where actual competition between hospitals is no longer excluded. This also applies to the moment at which these proposed amendments take effect. On the basis of these considerations, amongst others, NMa concluded, in the light of present legislation and regulations and the application of these, that a dominant position would not emerge or be strengthened.

Case 2879/ Essent – RAZOB *Parties and transaction:* The notified transaction related to the acquisition of Regionale Afvalverwerkingsmaatschappij Zuidoost-Brabant (RAZOB) by Milieu B.V. (Essent). Essent and RAZOB are both active in the area of the disposal of non-toxic waste and the composting of organic waste. In addition, both Essent and RAZOB offer waste management services and both have waste forwarding stations, manage waste processing plants and have soil trading companies. In addition, various buyer-supplier relationships exist between Essent and RAZOB in the above-mentioned areas and with regard to the recycling of various types of waste.

During the prenotification discussion which NMa held with the parties prior to notification of the acquisition, it appeared that Essent and RAZOB would acquire a substantial joint market share of a national market for the composting of organic waste. To avoid the necessity of a licensing phase, the parties amended their original proposal prior to submitting a formal notification. Essent will not acquire control of RAZOB's composting facilities, unless it has divested its majority shareholding in one of its own organic waste installations within eight months after the date of NMa's decision to a buyer approved by NMa beforehand. In addition, the purchaser of the majority shareholding must be independent of Essent, Essent must not have joint or exclusive control after the transfer of the organic waste installation to be transferred and the buyer must be a viable and existing company which has the financial means and expertise to operate on the market as an active competitor. Until the moment of divestment, Essent will strive to maintain the competitive strength and the saleability of the organic waste installations to be divested as separate entities. If the divestment does not occur within eight months, the later acquisition of RAZOB's composting facilities will once again have to be assessed against the provisions of the Competition Act.

Consequences of the concentration: As a result of the divestment of one of its organic waste installations described above, Essent's market share will only increase very slightly in the area of the composting of organic waste following the acquisition of RAZOB. With regard to landfill disposal of non-toxic waste, the parties will achieve a joint market share of 20 to 30 percent. It was clear earlier, however, that RAZOB's landfill site would be closed at the end of 2004, even if it were not to be acquired by Essent. As a result of the concentration, Essent's landfill capacity would be added only on a temporary basis and to a limited extent. In NMa's assessment of the consequences of the proposed concentration, the fact that a number of other players are active on the possible geographical markets on which Essent and RAZOB are active also played a role.

For the assessment of the possible market exclusionary effects of the proposed concentration, it is important that the municipalities influence the choice of the company that processes waste delivered to waste processing plants. With regard to most of the waste delivered to waste forwarding stations, RAZOB is obliged to pass on this waste to Afvalsturing Brabant, a subsidiary of Essent. RAZOB therefore has no only little control of the destination of the waste.

Case 2966/Rheinhold & Mahla - Honaert Beheer *Parties:* The notified transaction related to the sale by Honaert Beheer B.V. of Spreeuwenberg Holding B.V. and Hercules Beleggingen B.V. (jointly referred to as Spreeuwenberg) to Rheinhold & Mahla AG (R&M). R&M and Spreeuwenberg are both active in the area of applying installation materials and constructing scaffolding.

Market definition: It appears from the market research carried out by NMa that the conclusion maybe drawn that the industrial purchasers of scaffolding services (in this case, all buyers other than construction companies) in the Netherlands only purchase the services of scaffolding companies which meet certain criteria. These criteria relate, for instance, to specific knowledge with regard to the construction of scaffolding around all sorts of factories and industrial buildings. In addition, these companies must meet industrial safety and environmental standards, which are stricter than those which apply in the construction industry. The differences between carrying out scaffolding services

for the construction industry and for the industrial sector become more evident in the method of operation, the management and the logistics of this activity and in its commercial policy. NMa, however, did not take a decision on whether there was a market for the construction of scaffolding for industry and whether a further distinction must be made on the basis of economic sectors in which the buyers of scaffolding services are active. A further distinction such as this does not alter the substantive assessment.

Consequences of the concentration: R&M en Spreeuwenberg mainly provide scaffolding services in the Netherlands for customers in the industrial sector. In 2000, the parties achieved a joint market share of 30 to 40 percent on a possible Dutch market for scaffolding construction for the industrial sector. A number of factors, however, put this position in perspective. In addition to the parties, SGB is a player of stature and Mobuco also has a considerable position on this possible market. Other Dutch players in this area include, for instance, Hertel, Travhydro, Balliauw and LSB. In addition, the considerable procurement power of the large industrial purchasers of scaffolding services, does not make it plausible that the new combination will be able to operate independently of its customers. The possibility cannot be excluded prima facie that a joint position of power might emerge or be strengthened after the proposed transaction has been realised. The combination of R&M and Spreeuwenberg would be the largest player in the Netherlands after the proposed concentration, in addition to the two other large players, SGB and Mobuco. These players would have a joint market share of 70 to 80 percent after the proposed transaction. Following extensive market research, despite the high degree of concentration NMa concluded that there is no reason to assume that a joint dominant position may arise or be strengthened due to a combination of numerous factors. The market research showed, for instance, that there are no insuperable barriers to entry to the possible market for the construction of scaffolding for the industrial sector. Furthermore the conclusion cannot be drawn that this possible market is stagnating or transparent. Due to the lack of transparency, in particular, there is no way of monitoring who subscribes to which project and at what price. The lack of symmetry in the market positions of the three largest players also reduces the likelihood of tacit adherence to a strategy of reduced competition. In addition, the proposed transaction does not contribute to greater symmetry in the market shares of these players. It also appears from the market research carried out by NMa that potential competition will exist from the large players. These large players are only active at present in the area of scaffolding construction for the construction industry, but could also focus on the construction of scaffolding for industrial customers in the future, without considerable additional investment or a long transitional period.

On the basis of the above considerations, NMa concluded that a licence was not required for the proposed acquisition of Spreeuwenberg.

Case 2977/RWE Gas – Obragas

Parties and transaction: The notified transaction relates to the intention of RWE Gas Aktiengesellschaft (RWE) to acquire Obragas Holding N.V. (Obragas). Prior to the concentration, a number of amendments were made: (i) the economic ownership of the Obragas's gas transmission network was hived off and transferred to 'GridCo' and the legal ownership of the network was hived off and transferred to 'TitleCo'; (ii) the shares in TitleCo will be held by a number of municipalities in the province of Noord-Brabant and will not be transferred to RWE; (iii) TitleCo will hold a majority of the shares in GridCo and Obragas will have a minority shareholding; (iv) share certificates to the shares held by TitleCo will be issued to Obragas.

On the basis of the agreements between TitleCo, GridCo and Obragas and the articles of association of GridCo, NMa concluded that although Obragas will have a minority shareholding, it will have control of GridCo. The articles of association stipulate, for instance, that Obragas makes a binding nomination of directors and members of the Supervisory Board of GridCo. The general meeting of shareholders may rescind the binding nature of the nomination by passing a resolution with a majority of at least two thirds of votes cast, which represent more than half of the paid-up capital. TitleCo cannot rescind

the binding nature of the nomination itself. As a result of the notified transaction, RWE will therefore also acquire control of the economic ownership of Obragas's gas transmission network.

Market definition and assessment: RWE and Obragas are both active in the energy sector (electricity and gas). Both horizontal and vertical relationships exist between the parties in this sector. On none of the markets that can (possibly) be distinguished, however, does the joint market share of the parties appear to be larger than 15 percent. A licence is therefore not required for this proposed transaction.

Case 2987/KWVS - KPN Netwerk Bouw *Parties and market definition:* The notified transaction relates to Koninklijke Volker Wessels Stevin (KVWS) obtaining exclusive control of KPN Netwerk Bouw (Netwerk Bouw) . KVWS and Netwerk Bouw are both active in the area of engineering, construction and maintenance, and repair of ICT infrastructure. Netwerk Bouw is active, in particular, as a service provider for KPN Telecom's ICT infrastructure. NMa's assessment in this case focused particularly of the activities of the parties in the area of engineering in relation to technical installations (such as air-conditioning, lighting, telephone, sanitary facilities and the like) and engineering in relation to underground infrastructure (such as cables and pipelines).

Consequences of the concentration: If a distinction is made between engineering in relation to technical installations and underground infrastructure in relation to ICT infrastructure, KVWS and Netwerk Bouw have a significant market share in this area in the Netherlands. The assessment, however, only took account of the fact that KVWS's market position in relation to technical installations is relatively small. It appears from research carried out that there will still be sufficient other suppliers of note in the Netherlands in the area of technical installations for ICT infrastructure after the proposed concentration is realised. These include suppliers of products in the area of ICT infrastructure, such as Siemens and Ericsson, installers with an engineering department, such as Imtech, Getronics, Detron and GTI, and engineering firms, such as Arcadis. In addition, operators also carry out activities themselves to a certain degree in the area of engineering in relation to technical installations.

In the area of engineering in relation to underground infrastructure for ICT infrastructure, there are also sufficient other alternative suppliers of note in the Netherlands, according to the market players who were interviewed. Examples of these are 'traditional contractors' such as Baas (TBI), Bert van der Donk, Schuuring, Heijmans and NKM/Roelofsen, or installation companies which emphasise high-quality engineering, of which Imtech is the most important player. On the basis of the above points, for instance, NMa has concluded that there is no reason to assume that a dominant position will arise or be strengthened.

A number of market players submitted a complaint in relation to the notified concentration, in particular with regard to the existing relationships between KVWS and certain municipalities in relation to excavation rights and the joint venture of KVWS and BAM/NBM, called Trilink. Within this joint venture, KPN Telecom is the exclusive lessee of connecting networks which Trilink realises for its own account and risk. Research shows that KVWS maintains relationships with a small number of municipalities and the construction projects, for which the municipalities' gave permission, have already been carried out. Taking this into account, the market shares of the parties (approximately 10 to 20 percent) in the area of the construction of underground infrastructure (cables and pipes), and the presence of a large number of competitors in this area, NMa concluded that it is not plausible that KVWS will acquire a dominant position as a result of the proposed concentration or that such a position will be strengthened.

Case 3004/Deloitte & Touche - Arthur Andersen *Parties and market definition:* The notified transaction related to the transfer of the partners of Arthur Andersen Nederland to Deloitte & Touche Nederland. NMa concluded that Arthur Andersen Nederland was

an independent economic entity at the time of the notification because it had withdrawn from the international network of Andersen Worldwide. Both Deloitte & Touche Nederland and Arthur Andersen Nederland are active exclusively in the Netherlands in the area of accountancy, advisory and/or consultancy services. Large and listed companies mainly make use of the accountancy services of the large accountancy firms, also referred to as the 'Big Five'. These firms have a broad geographical network and the specific knowledge required to serve the international capital market. In this case, the separate market for auditing and accountancy services for large and listed companies, which are clients of the 'Big Five', was therefore assumed. The other activities of Deloitte & Touche Nederland and Arthur Andersen Nederland are not discussed further here, since their joint position with regard to these activities is relatively small.

Consequences of the concentration: NMa concluded that the joint market share of the parties is smaller than 30 percent, while the three largest competitors all have a market share of 20 to 30 percent. As a result of the break-up of Andersen Worldwide's international network, the parties estimated that the expected loss in turnover of Arthur Andersen Nederland from international referrals amounted to 30 to 50 percent, while Arthur Andersen Nederland had already lost 10 to 20 percent of its customers. Finally, it appeared from market research carried out by NMa that BDO Walgemoed CampsObers was also amongst the largest players and that these companies at least exercised a certain competitive pressure with regard to large, non-multinational companies. NMa concluded that the parties did not have an individual position of power.

In the past, the European Commission determined that a number of factors facilitate the parallel behaviour of various providers of accountancy services. Nevertheless, it did not find evidence of a joint dominant position. NMa's market research in this case did not provide such evidence. According to the market players, the acquisition will not have unfavourable effects and some buyers even expect better service and quality. Various purchasers considered service provision by four large firms of accountants acceptable. In fact, this is a salvaging operation; without the acquisition, the effect on the market would hardly be different. According to a competitor, price competition has increased and is not transparent because, in most cases, a discount is granted on the rates charged. Various buyers do not purchase their auditing and consultancy services from the same company any longer, which is experienced as a stimulus to competition. In addition, accountancy firms which work for small and medium-sized companies are exerting competitive pressure. On the basis of these considerations, NMa concluded that a joint dominant position did not exist, so that there was no need for a licence .

Case 3028/Euretco – Poelman *Parties and market definition:* The acquisition of Poelman Beheer Leek B.V. (Poelman) by Euretco N.V. (Euretco) could take place as early as two days after NMa was notified, because NMa took a decision to honour the application by the parties for exemption from the statutory waiting period of four weeks. The usual assessment in accordance with competition law occurred afterwards. Both Euretco and Poelman are active in the clothing branch.

Considerations: According to the parties, the acquisition had to occur as soon as possible due to Poelman's financial problems. In this regard, they drew attention to the following facts: (1) Poelman's financial resources had already been frozen for several months, as a result of which it could not make payments, (2) Poelman's most important financier withdrew its credit facility and had indicated that a certain amount had to be repaid, (3) goods that had been ordered, which were essential to Poelman's continuity, where no longer supplied and (4) a large number of creditors had postponed deliveries until a later date or intended to apply to have Poelman declared bankrupt if it did not meet its outstanding financial obligations in the (very) short term. Poelman found a new financier, subject to the condition, however, that a third party stood security. Euretco was willing to do so, provided it acquired a controlling interest in Poelman. With the prospect of a solution, Poelman obtained a moratorium from its present financier.

In the light of these facts, NMa concluded that the parties had presented a plausible case that Poelman would suffer irreparable damage if the obligatory waiting period was taken into account. In addition, it appeared that postponement of the proposed transaction would very probably result in a sharp fall in the value of Poelman. By implementing the proposed concentration in the short-term, Euretco was able to avert Poelman's bankruptcy and, by doing so, the adverse effects are on the value of Poelman. The application for exemption from the statutory waiting period was therefore granted.

Several weeks after this decision, following the usual procedure, NMa decided that a licence was not required for this concentration.

Case 3040/NPL – SUFA *Parties and market definition:* The notified transaction relates to the acquisition of Stichting Uitvoeringsorgaan Financiële Akties (the organiser of the BankGiroLoterij, a lottery based on bank account numbers) by the foundation Stichting Nationale Postcode Loterij (NPL), a lottery based on postal codes. Both parties are active in the area of organising lotteries and games in addition to lotteries. The Management Board of NPL is also the Management Board of Fondsen Promoties (organiser of the *Sponsorloterij*, the sponsor lottery). The assessment of this case focused on the possible markets for lotteries and bingo games, and fundraising. NPL and De Lotto are both active as lotteries for good causes, whereas their largest competitor Staatsloterij (the State Lottery) is not. In the light of the considerable similarities between the lotteries for good causes and the Staatsloterij , the fact that they are all large, national lotteries with similar main prizes and comparable jackpot systems, the similarities in the motive for playing, the lack of familiarity amongst some of the players with the precise destination of the proceeds, the considerable importance of high prices and jackpots and the many indications that the lotteries for good purposes and the Staatsloterij compete directly with each other, it can be concluded that there is no separate market for lotteries for good causes.

Consequences of the concentration: In the area of lotteries and bingo games, three players will remain active after this acquisition, namely the Postcode Loterij, De Lotto and the Staatsloterij. NPL will have a market share after the acquisition of approximately 35 percent. The Staatsloterij will be the largest with a market share of approximately 55 percent. In addition, these parties experience competitive pressure from scratch cards, small-scale lotteries, illegal and foreign lotteries, and bingo games. NPL's market share will only increase by a small percentage as a result of the acquisition and the Staatsloterij will remain by far the largest player on this market.

Since only a small number of players are active in the area of lotteries and bingo games, research was also carried out to establish whether there was a danger of coordination between these parties as result of which a dominant position could emerge. It appeared that the three players differ considerably from each other with regard to their size and products, the market does not lend itself to coordination between the parties, at present there is full-scale competition and the market may still grow. In the light of the above, NMa has no evidence that a single or joint dominant position may arise in the area of lotteries and bingo games.

With regard to the possible markets for fundraising, it may be stated that the proceeds of lotteries only comprise a small part (approximately 16 percent) of the total income stream of fundraising institutions. Other sources of revenue are, for instance, collections, direct marketing, sponsoring, organisations with their own lotteries, legacies and the like. If there were a market for fundraising, it is not plausible that a dominant position would emerge or be strengthened in the area of fundraising.

The organiser of De Lotto filed a judicial appeal against this decision by NMa.

Case 3074/BAM – HBG *Parties and market definition:* The notified transaction relates to the acquisition of Hollandsche Beton Groep N.V. (HBG) by Koninklijke BAM NBM N.V. (BAM). Initially the European Commission in Brussels was notified of the transaction, after which the case was referred to NMa at the request of the Dutch Minister of Economic Affairs.

The markets affected by this concentration are the market for project development, the market or markets for civil and utility construction and the market or markets for earthworks, hydraulic engineering and road construction, with regard to which a further distinction may possibly be made according to the size of the projects. In addition, the markets for asphalt are affected.

In general, a link between the size of the project and the size of the companies, which are suitable to carry out the projects, is assumed. Partly due to the size of construction projects, in particular in the area of earthworks, hydraulic engineering and road construction, it occurs frequently that companies do not subscribe independently, but as consortiums with one or more other companies. Even in such cases, the companies involved in the consortium must have a certain size in order to be eligible to carry out large construction projects. In order to investigate the extent to which construction projects of various sizes should be deemed to belong to the same market or to separate markets, an analysis of projects from € 10 million or more was made in this case. As part of this, the data in relation to bids for construction projects in various size categories were examined[3]. It appeared from the start that considerably more companies subscribed to projects in the areas of civil and utility construction and in the area of earthworks, hydraulic engineering and road construction in the category of € 10 to € 20 million than for projects of € 20 million or more.

3 *From EUR 10 million to EUR 20 million, from EUR 20 to 30 million, from EUR 30 to EUR 40 million, from EUR 40 to EUR 50 million and EUR 50 and above.*

Consequences of the concentration: For the assessment of the position of BAM/HBG and their competitors, it is not only important for NMa to investigate how many and which companies made an offer in each size category, but also how often companies subscribed and which company was ultimately awarded the contract. In this regard, NMa examined the data relating to the realisation of construction projects. In the case of civil and utility construction projects of € 20 million or more, there were sufficient competitors who subscribed with the same frequency as BAM and HBG. If the realisation of civil and utility construction projects in the various size categories is considered, it is notable that the larger the assignment, the more often BAM/HBG carried out one or more of the assignments. Of all the civil and utility construction projects above € 20 million, however, BAM/HBG did not carry out more than its competitors. In addition, its competitors, such as Heijmans, Hillen & Roossen en TBI, were in any event (also) invited to make an offer. With regard to earthworks, hydraulic engineering and road construction, it was also concluded that sufficient companies subscribed with a comparable frequency to that of BAM/HBG to large earthworks, hydraulic engineering and road construction projects in the various size categories. The information with regard to the number of earthworks, hydraulic engineering and road construction projects awarded to BAM/HBG also shows that many of these projects were carried out in combination with other companies and cannot therefore be attributed to BAM/HBG in their entirety. Neither in the area of civil and utility construction, nor in the area of earthworks, hydraulic engineering and road construction, is it possible to conclude that a dominant position threatened to emerge as a result of the concentration. In the area of earthworks, hydraulic engineering and road construction, NMa examined the railway construction market for the first time. Two competitors which are larger than BAM are active on this market and HBG adds hardly anything to BAM's existing position. In addition, customers in this market have a strong position. An increasing number of foreign companies are also active on the railway construction market in the Netherlands, as a result of which the emergence of a joint dominant position on this market is not likely. The investigation in this case also showed that the concentration would result in too strong a position on certain regional markets for asphalt. BAM would acquire control of asphalt plants in seven different areas with market shares varying from 40 to 60 percent. Since BAM/HBG would become larger in these markets than its largest competitor and this relates to an established market, its position would be too strong. The amended notification submitted by the parties, in which they undertake to withdraw from two plants within a certain period, to close two plants and to relinquish their interests in a number of plants ensures that BAM/HBG will not be able to acquire a dominant position in the area of asphalt.

Case 3018/Atos Origin - Telecom Software Solution and Case 3021/Atos Origin - NLC Holding *Parties and market definition:* Atos Origin Nederland B.V. (Atos Origin) is an IT service provider. Telecom Software Solution B.V. (TSS) was set up by KPN Telecom B.V. (KPN) before the transaction and includes various internal IT activities of KPN. This notified transaction related to the outsourcing by KPN of these activities through the transfer of all the shares in TSS to Atos Origin. The assessment of this case focused, in particular, on the possible market or market segment for the supply of IT services to target groups in the telecommunications, manufacturing and utilities industries.

Consequences of the concentration: The parties have a large market share on a possibly distinguishable market or market segment for the supply of IT services to the telecommunications sector. On the basis of market data provided by the research bureau IDC, the joint market share on this possibly distinguishable market or market segment amounted to approximately 60 to 70 percent. From the data provided by market players, it appears that the size of the market is probably considerably larger than appears from IDC's figures. On the basis of the most frequently cited estimates of market players, the joint market share of the parties amounted to less than 50 percent.

Within the market or market segment, which can possibly be distinguished, for the supply of IT services to the telecommunications sector, it appears that both the more generic services and more specific services are provided. Within the telecommunications sector, the parties are mainly active in the area of generic IT services, for which there is also a demand from other sectors.

Research carried out by NMa showed that at least a further eight other IT service providers provide services to the telecommunications sector. Another consideration, on which the decision is based, is the procurement power of KPN, by far the most important purchaser of IT services in the telecommunications sector. KPN must be deemed to be in a position to negotiate favourable delivery conditions from its suppliers. According to the parties, KPN only guaranteed Atos Origin a low amount in turnover and makes use of various IT service providers. Various IT service providers are preferred providers of KPN.

On the markets or market segments for the supply of IT services to the industry sector and the utilities sector, the parties achieve a joint market share of approximately 50 to 60 percent and 20 to 30 percent respectively. In both sectors, the addition of the activities of NLC are small. In addition, the market share of Atos Origin on these possible markets or market segments is due mainly to a number of large customers. In the industry sector, more than half of the service Atos Origin provides, is provided to its former parent company, Philips. This turnover resulting from supplies to Philips will fall and Philips will also purchased IT services from companies other than Atos Origin. Various large competitors are also active on these possible markets or market segments.

Partly on the basis of these considerations, NMa concluded that a dominant position would not emerge or be strengthened on the various possible markets or market segments.

Decisions to impose sanctions

In 2002, sanctions were imposed for infringements of the prohibition of cartels, for refusal to participate in NMa's investigations and for failure to comply with instructions linked to a licence for a concentration. The decisions in which the sanctions were imposed for refusing to cooperate are described below.

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Imposition of fines

Cases 3152-3156/KWS In April 2002, NMa carried out an on-site inspection at various locations of the KWS group. KWS refused to allow the inspection of its data, as they were instructed to do by NMa's officials. Only after police intervention was inspection allowed. By not complying with NMa's demand, KWS contravened the General Administrative Law Act under which cooperation is obligatory.

KWS was given the opportunity to respond to the report in which the offences were set out. KWS argued that it was prepared to cooperate, but only if NMa explained the aim and scope of the on-site inspections. Only then could KWS assess whether the inspection required was reasonable and the obligation to cooperate only applies to that which may be required within reason.

Assessment: In the decisions, the following arguments were advanced:

- there was evidence to suspect that KWS had committed serious infringements of the Competition Act;
- the investigation focused on ascertaining whether the suspected infringements had been committed; at the start of the on-site inspection, it is not necessary to say any more about the purpose of the visits than the fact that it related to an investigation into an infringement of Section 6 of the Competition Act; a specification of the concrete suspicions would increase the likelihood that evidence would be concealed;
- in addition, the investigation was focused, in other words it related to the data pertaining to particular persons or *particular* locations or *particular* projects, but after the start of the investigation it is not possible to state precisely which documents will be required for inspection;
- the aim and scope of the investigation were specified in sufficient detail to make it reasonable to require the company's cooperation.

KWS also appealed to the protection afforded by Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) to private homes and which, under certain circumstances also includes offices (ruling in the ECHR case in relation to the French company Colas Est). KWS compared NMa's on-site inspection to the case referred to in the ruling and concluded that NMa had acted against KWS in contravention of Article 8.

In the decision, it was argued that with regard to its investigative powers and guarantees French legislation, as applied to Colas Est, is not comparable to Dutch legislation, from which NMa derives its powers.

Fine: NMa imposed six fines on KWS due to its failure to cooperate (six because cooperation was refused by six parts of KWS). Since KWS did not present mitigating factors, in accordance with established policy the maximum fine was imposed, in other words six times € 4500, or a total of € 27,000.

Case 3075/Heijmans Beton- en Waterbouw During on-site inspections held on 27 March 2002 at Heijmans Beton- en Waterbouw, officials from NMa with responsibility for regulation requested interviews with three employees of the company in person. Heijmans refused this request and referred the officials to a different employee designated by Heijmans, to whom NMa's officials could put their questions. NMa's officials drew up a report due to the failure of Heijmans Beton- en Waterbouw to cooperate.

Assessment: Following the defence put forward by Heijmans Beton- en Waterbouw, NMa decided that it is not for the company to decide which people should be required to provide NMa's officials with information, but that, within the context of the investigation, NMa's officials may themselves decide which employees of the company are interviewed. The demand to be allowed to question individual employees of the company, who might have known of possible infringements of the Competition Act by the company on the basis of their own knowledge and experience, is not disproportionate. NMa also did not contravene the European Convention for the Protection of Human Rights and Fundamental Freedoms. Heijmans Beton- en Waterbouw has already filed an administrative appealed against the decision to impose the fine.

Fine: Following this administrative appeal, a (maximum) sanction of three times € 4,500 was imposed for three infringements.

Decisions on administrative appeals

In 2002 various administrative appeals were processed against decisions taken by NMa and DTe in accordance with the Competition Act, the Gas Act and the Electricity Act of 1998. The decisions on the administrative appeals in relation to gas and electricity are described below.

Price cap (efficiency discount) on licence holders for the supply of gas

As part of the programme in accordance with the Gas Act, the Director of DTe set the price cap (the *xt* factor) for companies that supply gas to consumers and other captive customers for the years 2002 and 2003. This means that the tariffs (excluding the procurement cost of gas) have been frozen for these years. The *xt* factor is set for each of these years on the basis of relative changes in the consumer price index (CPI).

A large number of supply companies (licence holders) filed administrative appeals against the decision of the Director of DTe. The Director-General of NMa, on behalf of the Minister, declared these administrative appeals to be partially well founded .

It can be concluded from the ruling of the Trade and Industry Appeals Tribunal of 6 February 2002 in relation to Rendo, that the *xt* factor for licence holders for the supply of gas must also be a single price cap and must be set for a period of at least three years. NMa, however, adhered to a maximum period of two years from 1 January 2002, because, in principle, all customers will be free to choose their own supplier from1 January 1994 onwards.

NMa is of the opinion, as is DTe, that the calculation of the *xt* factor for licence holders for the supply of gas on the basis of benchmarking – a comparison of the supply companies with each other – has too many disadvantages. In determining the expected development of efficiency in the supply of gas, as in the case of licence holders in the electricity sector, NMa assumed that it would be possible for suppliers to provide their services so efficiently that they could at least be provided at the same price as that charged in 2001. This means that an *X* factor was determined for each of the years 2002 and 2003 which was in line with expected inflation for these years, namely 3.1 percent.

In determining the *xt* factor, NMa may not take into account the individual costs of a licence holder. After all, it follows from the ruling by the Trade and Industry Appeals Tribunal in the Rendo case that the *xt* factor should be the same for all licence holders.

Binding instructions on gas transmission companies

The Director of DTe has the possibility of issuing binding instructions to a (former) monopoly which refuses to comply with certain (statutory) rules. The powers of the Director of DTe to issue binding instructions, pursuant to the Gas Act, relates, for instance, to the indicative tariffs and conditions which gas transmission companies must set in relation to the granting of access to their gas transmission network. In determining the indicative tariffs and conditions, the Guidelines for Gas Transmission for the Year 2002 must be taken into account. The Director of DTe issued binding instructions to all gas transmission companies in 2002 for their failure to comply with the Guidelines for Gas Transmission for the Year 2002. On 30 August 2002, the Director of DTe took a decision on the administrative appeals filed by the above-mentioned companies.

One of the most important issues disputed is whether the Guidelines for Gas Transmission for the Year 2002 should be regarded as policy rules applicable to DTe or as generally binding regulations for the gas transmission companies. The Director of DTe is of the opinion that the Guidelines are generally binding regulations. The administrative appeals of the gas transmission companies were therefore declared unfounded in this respect.

Binding instructions under the Electricity Act of 1998: Section 31a of the Electricity Act of 1998

Section 31a (1) of the Electricity Act of 1998 stipulates that a buyer, supplier or trader is prohibited, whether it does so indirectly or not or subject to conditions, to possess a quantity of transmission capacity on the cross-border grid which exceeds 400 MW.

In order to supervise compliance with this provision, the data provided by TenneT was used, which as the manager of the national grid is responsible for allocating transmission capacity intended for the importing of electricity into the Netherlands. It appears from this that four market players applied for more transmission capacity (were 'nominated') than was permitted, with the result that binding instructions were issued to these parties. In accordance with these binding instructions, the four market players were obliged to take all appropriate measures to terminate this infringement. Electrabel Nederland N.V. and Eon Benelux Energy B.V. responded separately to this by filing an administrative appeal against the binding instructions issued to them. B.V. Nederlands Elektriciteits Administratiekantoor also filed an administrative appeal against these binding instructions as a third party.

In its administrative appeal, Electrabel Nederland N.V. presented a sufficiently plausible case that it had already taken the necessary and appropriate measures. On the basis of recent nomination data, the Director of DTe wished to determined whether the measures taken had, in fact, achieved the intended aim. In the decision on the administrative appeal, the binding instructions were therefore amended accordingly.

The binding instructions issued to Eon Benelux Energy B.V. were upheld without amendment because it was not shown that Eon Benelux Energy B.V. had already taken appropriate measures.

The administrative appeal filed by B.V. Nederlands Elektriciteits Administratiekantoor was declared inadmissible because it did not have a direct interest in the binding instructions issued to its shareholders, Electrabel Nederland N.V. and Eon Benelux Energy B.V.

Binding instructions under the Electricity Act 1998: Section 5.6.12.1 of the Grid Code

Section 5.6.12.1 of the Grid Code stipulates that parties who are allocated import capacity on the daily auction, are required to trade the electricity transmitted on the Netherlands side through the Amsterdam Power Exchange (hereinafter 'APX'). To supervise compliance with this provision, a comparison was made between data provided by TenneT, which shows how much import capacity is allocated to a market player, and the data relating to offers on the APX. On the basis of this, it was ascertained that 11 market players had not utilised all the capacity allocated to them by offering electricity for sale on the APX. Binding instructions were therefore issued to these parties. On the basis of these binding instructions, the 11 market players were obliged to take all appropriate measures to terminate these infringements, as well as to give APX written permission to provide the Director of DTe with the data received from the market player, in order to make it possible to supervise compliance with the Grid Code. An administrative appeal was filed against four of the 11 binding instructions by the companies on which these were served. These were Essent Energy Trading B.V., Electrabel N.V., Reliant Energy Trading & Marketing B.V. and Eon Trading GmbH.

In their administrative appeals, a number of appellants stated that they would prefer to provide the Director of DTe with the required data themselves. For this reason, the binding instructions were amended in so far as the appellants are given the choice of either giving the above-mentioned permission to APX, or providing the director of DTe with the requested data themselves. For the rest, however, no evidence and circumstances gave cause to revoke the binding instructions. These decisions were therefore upheld in all other respects.

Concept of a connection in terms of the Electricity Act of 1998

Essent Netwerk Brabant B.V. (Essent) connected the electrical installation of Wuppermann Staal Nederland B.V. (WSN) to the grid managed by Essent. Essent provided, for instance, a connection cable (supply cable) with the length of 6 kilometres. A dispute has arisen between WSN and Essent as to whether the supply cable is part of the connection. If this is the case, Essent has the task of managing the supply cable and may therefore charge a connection tariff. WSN is of the opinion that this is not the case and has requested the Director of DTe to issue Essent with binding instructions.

A connection is defined in Section 1 of the Electricity Act of 1998 and comprises one or more connections between a grid and real estate, as referred to in Section 16 of the Real Estate (Valuation) Act *[Wet waardering onroerende zaken (Wet WOZ)]*. The connection includes the circuit breaker in the grid, the overload protection and the connection between these. The overload protector is the point of transfer to the installation of the party connected to the grid.

In the decision on the administrative appeal, the Director of DTe concluded that it followed from the definition of the concept of a connection that it was sufficient that the connection extended to the premises of the party connected to the grid. WSN argued that this was the case in this instance. It took the position that the supply cable, extended horizontally, has become part of its electrical installation and that this installation constitutes real estate, as referred to in Section 16 of the Real Estate (Valuation) Act. If this assertion is correct, the supply cable is not part of the connection, since overload protection facilities have also been installed before (at the start of) the supply cable.

The Director of DTe does not subscribe to WSN's position. Although installations do fall within the concept of constructed property, in accordance with Section 16 of the Real Estate (Valuation) Act, this does not imply a precise definition of an installation. In this regard, it is necessary to consider the law of property. The parliamentary proceedings in relation to Section 5:20 of the Netherlands Civil Code leave it to the Court to decide whether this applies to vertical or horizontal extensions of underground cables. The Netherlands Supreme Court has not ruled on this matter. The Courts have ruled in relation to joint antenna installations and water pipelines. Although in these rulings the Courts opted for horizontal extensions, this relates to horizontal extensions on the premises of the owners of these installations. Finally, WSN did not provide supporting evidence for its argument.

Overview of Decisions by NMa and DTe in 2002

Decisions on complaints

Decisions in respect of complaints pursuant to Section 6 of the Competition Act

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NO.	PARTIES	DATE	SECTOR
560	**Engelgeer vs Nederlandse Orde van Advocaten [Dutch Bar Association]**	**22-02-02**	**Liberal professions, healthcare and culture**
1287	Ronner vs KNMvD and Stichting Certiked	31-01-02	Liberal professions, healthcare and culture
2882	Kelders – Betting and Gaming Act [Wet op de kansspelen]	20-02-02	Liberal professions, healthcare and culture
2766	Wilhelmien Pierik vs Amicon II	01-04-02	Liberal professions, healthcare and culture
2912	Apotheek Buijs vs Resa Utrecht	12-04-02	Liberal professions, healthcare and culture
2929	Livit vs Fitek	08-04-02	Liberal professions, healthcare and culture
2542	De Vrije huisarts vs ZN	10-09-02	Liberal professions, healthcare and culture
2868	Landelijke huisartsen Vereniging [national association of general practitioners] vs Zorgverzekeraars Nederland	30-09-02	Liberal professions,healthcare and culture
3002	Formaat notarissen vs KNB	23-07-02	Liberal professions, healthcare and culture
3049	ABC Distrubution vs Publieke omroep	22-07-02	Liberal professions, healthcare and culture
3043	OZP vs Dordtse NVM-makelaars	09-10-02	Liberal professions, healthcare and culture
836	Euromedica vs MSD	11-10-02	Liberal professions, healthcare and culture
2884	Knol vs Kooistra, Walraven BV and Nevema	05-04-02	Trade
2952	Modecentrum Frans Thelen vs Happen Fashion	08-07-02	Trade
3019	Siemens - infraXS.com – liberalised market for metering	21-06-02	Basic and processing industry
85	Berkx Staalconstructie vs EnergieNed	03-09-02	Basic and processing industry
2049	Zaanse Schoothandel / white and brown goods - administrative appeal	24-08-02	Basic and processing industry
2056	Vos vs Energy companies	22-08-02	Basic and processing industry
2203	Hollandse Waterschappen en Diensten vs Parties to the Electricity Sector Protocal	10-09-02	Basic and processing industry
3000	Woonzorg Nederland – tender for the contruction of new homes	21-08-02	Basic and processing industry
1108	Autoschade De Fok vs directed stream of car repairs	22-04-02	Financial services and transport
1979	Klopper & Kramer vs Barbara-Dela Uitvaartverzorging	05-08-02	Financial services and transport
2886	Euronext Derivative Markets - de Optiebeurs [Options Exchange]	05-08-02	Financial services and transport
3015	Collewijn vs SIMN	05-08-02	Financial services and transport
3016	Van Dongen Berging vs SIMN	05-08-02	Financial services and transport

NO.	PARTIES	DATE	SECTOR
3099	Gear Chain Industrial vs ABN AMRO	22-8-02	Financial services and transport
3025	v.d. Boogaard vs SIMN	3-12-02	Financial services and transport
2902	v. Broekhuijze vs GIDI	16-12-02	Financial services and transport
3083	Von Quast-Juchter vs REKAM	5-9-02	Information and communication technology

Decisions in respect of complaints pursuant to Section 24 of the Competition Act

NO.	PARTIES	DATE	SECTOR
1270	Re/Max vs NVM	22-01-02	Liberal professions, healthcare and culture
1703	Dierenartspraktijk 'De Beek' vs KNMvD	31-01-02	Liberal professions, healthcare and culture
1802	VSCD vs BUMA	15-03-02	Liberal professions, healthcare and culture
560	Engelgeer vs Nederlandse Orde van Advocaten [Netherlands Bar Association]	28-02-02	Liberal professions, healthcare and culture
2455	Regionale instelling voor Jeugdtandzorg [Regional Institute for Youth Dental Care]	20-02-02	Liberal professions, healthcare and culture
2753	Record & Rehearse Society vs Popcentrum	29-01-02	Liberal professions, healthcare and culture
2775	Apotheek Stephenson vs Ziekenhuis and Politheek Hilversum	25-01-02	Liberal professions, healthcare and culture
2794	Van der Stam vs HAGRO	15-03-02	Liberal professions, healthcare and culture
2799	's-Gravenlandse Apotheek vs Ziekenhuis and Politheek Hilversum	25-01-02	Liberal professions, healthcare and culture
2811	Solleveld vs health insurers	16-01-02	Liberal professions, healthcare and culture
2831	Vink-Janse vs Zorgkantoor Amsterdam and VVPAO	14-01-02	Liberal professions, healthcare and culture
2844	Huub Kemper Makelaardij vs Esto	25-01-02	Liberal professions, healthcare and culture
2851	Wegener – surcharge for personnel advertisement internet	22-02-02	Liberal professions, healthcare on and culture
2853	DGT vs Relan Arbo	11-02-02	Liberal professions, healthcare and culture
2854	GW Productions/AAT Music vs BUMA Stemra	20-02-02	Liberal professions, healthcare and culture
2855	Politheek Explorer vs Amphia Ziekenhuis et al.	22-03-02	Liberal professions, healthcare and culture
2863	Apotheek Groep Apeldoorn vs Huisartsenvereniging Stedendriehoek	31-01-02	Liberal professions, healthcare and culture
2880	Ten Berge en Gips vs De Gelderlander	22-2-02	Liberal professions, healthcare and culture
2899	Meta Media vs Rotterdams Fonds voor de Film en Audiovisuele media [Rotterdam Film Fund & Commission]	26-03-02	Liberal professions, healthcare and culture
2905	Speksnijder vs HAGRO Rotterdam Zuid	28-02-02	Liberal professions, healthcare and culture
2932	v. Haaren vs Nuts	27-03-02	Liberal professions, healthcare and culture
2805	Raichberg en Gowen vs Nederlandse Golf Federatie [Netherlands Golf Union]	12-04-02	Liberal professions, healthcare and culture

NO.	PARTIES	DATE	SECTOR
2859	V. Leeuwen vs Apothekersen St. Automatisering Gezondheidszorg	12-04-02	Liberal professions, healthcare and culture
2887	Bongers Media Productie vs De Huiskrant	01-04-02	Liberal professions, healthcare and culture
2888	De Informatiefabriek vs De Huiskrant	01-04-02	Liberal professions, healthcare and culture
2897	Barendse vs Nederlands Instituut van Psychologen [Dutch Psychological Association NIP]	01-04-02	Liberal professions, healthcare and culture
2939	Best Alert vs Ecabo	19-04-02	Liberal professions, healthcare and culture
2900	Spoelstra vs Cameron Balloons cs	10-07-02	Liberal professions, healthcare and culture
2903	Nederlands Filmarchief vs Centraal Boekhuis	05-08-02	Liberal professions, healthcare and culture
2938	Best Alert vs Ecabo	05-08-02	Liberal professions, healthcare and culture
2959	Baumgarten vs KNMP	26-09-02	Liberal professions, healthcare and culture
2982	Jan Doets vs ANVR/VRO	23-07-02	Liberal professions, healthcare and culture
2997	OHRA vs IZA Nederland	30-09-02	Liberal professions, healthcare and culture
3063	Hoens & Souren vs Raad van Toezicht Orde van Advocaten [Supervisory Council, Netherlands Bar Association]	09-08-02	Liberal professions, healthcare and culture
3091	Dekker - van Weerdhuizen vs TRIAS	08-08-02	Liberal professions, healthcare and culture
2836	Zorgverzekeraars Nederland vs Landelijke Huisartsen Vereniging	07-10-02	Liberal professions, healthcare and culture
2664	Om de Haverklap vs Bizon/Plakker & Co	01-02-02	Trade
2706	Organisatiebureau Hensen Evenementenverzorging vs various municipalities	01-02-02	Trade
2751	De Marke vs Topografische Dienst [Topographical Service of the Netherlands]	11-03-02	Trade
2776	Veturo vs Liftinstituut	01-02-02	Trade
2849	Allibre vs Municipality of Breda	05-02-02	Trade
2895	Taminau vs RBC en Indutil	04-03-02	Trade
2898	SBM Olympia vs Mita	06-03-02	Trade
2917	Milieu Offensief vs Municipality of Harderwijk	22-03-02	Trade
2843	Teddybär & Puppenversand Scheithauer vs Bouman	22-05-02	Trade
2923	Medicprevent vs Medipreventiecentrum/Kettler	03-06-02	Trade
2953	Van Dijk Fietsen vs AGU	22-04-02	Trade
1226	Horlogerie Kleman vs Importers of watches	19-07-02	Trade
3073	Rashondenfederatie Nederland [RFN Kennel Club Federation] vs Raad van Beheer op Kynologisch gebied [The Kennel Club]	15-7-02	Trade
2872	Beldico vs Nutricia and Friese Vlag	11-10-02	Trade
2925	**Koninklijke Nederlandse Slagersorganisatie - branchebeschermingsovereenk. [Royal Dutch Association of Butchers]**	**18-12-02**	**Trade**
3222	Ferti Plus vs CR-Delta/RUW	16-12-02	Trade
3253	Horeca Nederland vs Municipality of Bergen/Getronics	19-12-02	Trade
1719	**Compass Energy vs Gasunie**	**29-03-02**	**Basic and processing industry**
1119	**Entrade vs Gasunie**	**29-03-02**	**Basic and processing industry**

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NO.	PARTIES	DATE	SECTOR
2677	Mulleners Vastgoed vs Municipality of Weert	22-05-02	Basic and processing industry
2810	Energyxs – period of notice, supply contracts	08-04-02	Basic and processing industry
2493	Vereniging Eigen Huis vs Municipality of Amsterdam	18-09-02	Basic and processing industry
2937	Inter Continental vs Ecolab	16-09-02	Basic and processing industry
3041	Dhr. Stoop vs NUON	09-08-02	Basis- en Verwerkende Industrie
2567	VPB and Vebon vs Essent	23-10-02	Basic and processing industry
3159	GB Westblaak vs Eneco	21-10-02	Basic and processing industry
1718	EL& Gas vs TenneT	25-11-02	Basic and processing industry
1728	Petroplus vs TenneT	25-11-02	Basic and processing industry
3240	Neeleman vs Eneco	05-12-02	Basic and processing industry
2069	Pechiney Nederland (PNL) vs TenneT and Sep	12-12-02	Basic and processing industry
1833	Eneco vs TenneT	28-11-02	Basic and processing industry
2583	Fairmont Marine vs Smitwijs / Global Towing Alliance	13-03-02	Financial services and transport
2829	Prontophot - Holland vs Geldnet	18-03-02	Financial services and transport
1779	Bergers vs Alarmeringsdiensten, Stichting IM and insurers	27-06-02	Financial services and transport
2893	BJA vs Centraal Beheer Achmea	02-04-02	Financial services and transport
2915	Vereniging Bergers Belangen et al. vs the State et al.	13-05-02	Financial services and transport
2919	Roeiers Eendracht Rotterdam	22-04-02	Financial services and transport
2926	Kompas R.A.S. Cargo vs Douane Rotterdam et al.	22-04-02	Financial services and transport
2954	Slijpen vs Connexxion	27-06-02	Financial services and transport
2962	v.d. Post – state financing of political parties	01-05-02	Financial services and transport
3050	Verweij vs Postbank	05-08-02	Financial services and transport
3051	SARC vs ABN AMRO c.s.	05-08-02	Financial services and transport
1986	OLON vs KPN Telecom	07-03-02	Information and communication technology
2832	Jansen Gration vs PTT Post	28-02-02	Information and communication technology
2856	MxStream – tariff increases	25-02-02	Information and communication technology
1858	Broadcast Newco Two vs Nozema	30-09-02	Information and communication technology
2762	Optim vs OCW and Roccade	20-12-02	Information and communication technology
2983	Municipality of Barendrecht vs Gemnet	22-11-02	Information and communication technology

Decisions in respect of complaints pursuant to Section 6 and Section 24 of the Competition Act

NO.	PARTIES	DATE	SECTOR
1627	Drost vs Nederlandse Orde van Advocaten [Netherlands Bar Association]	28-02-02	Liberal professions, healthcare and culture

Decisions on applications for exemption from the prohibition of cartels

Exemption granted

NO.	PARTIES	DATE	SECTOR
82	Bankgiro-centrale GIP *On behalf of its members, BankGiroCentrale applied for exemption from Article 6 of the decision on horizontal price fixing [besluit horizontale prijsbinding] for the GIP agreement. The exemption was granted for a period of five years.*	21-08-02	Financial services and transport

NO.	PARTIES	DATE	SECTOR
3142	Stibat *Stichting Batterijen (STIBAT) has applied for renewal of the exemption for the collective collection and waste disposal system for batteries, financed by a waste disposal levy. The exemption, pursuant to Section 22 (1) of the Competition Act, was renewed. The exemption ends on the date on which the approval granted by the Minister of Housing, Spatial Planning and the Environment for the Decision in relation to the Disposal of Batteries [Besluit verwijdering batterijen] lapses, but at the latest on 1 January 2008.*	03-12-02	Basic and processing industry
1946	Edon / Stivam *Edon N.V. and Stichting Contractpartners VAM submitted a joint application for exemption from the prohibition of cartels, as set out in Section 6 (1) of the Competition Act, for an agreement entered into by them. The application for exemption from the prohibition contained in Section 6 (1) of the Competition Act was rejected, since there was no infringement of the said subsection.*	24-03-02	Basic and processing industry
749	EnergieNed *Federatie van Energiebedrijven in Nederland [Federation of Energy Companies in the Netherlands] has submitted an application for exemption from the prohibition contained in Section 6 (1) of the Competition Act. The application for exemption relates to the Scheme for the Recognition and Certification of Gas Installers [Regeling voor de erkenning en certificering van gastechnische installateurs]. The application for exemption was rejected because the prohibition contained in Section 6 of the Competition Act was not infringed.*	07-08-02	Basic and processing industry
2839	Coöperatie Samenwerkende Fysiotherapiepraktijken IJmond-Noord	25-01-02	Liberal professions, healthcare and culture

Exemption partiality granted, partially dismissed

NO.	PARTIES	DATE	SECTOR
84	Bankgirocentrale SOGA *Decision of the Director-General of the Netherlands Competition Authority partially to grant and partially to reject the application for exemption, as referred to in Section 17 of the Competition Act.*	24-10-02	Financial services and transport
1003	NS Stations - Burger Station *On the application of Burger Station and NS Stations, NMa granted an exemption, pursuant to Section 17 of the Competition Act, for the remaining term of the agreement in question to the joint venture and in respect of the non-competition clause, in so far as this applied during the term of the GO agreement. For the longer term of the non-competition clause, an exemption was not granted, since not all the criteria for exemption contained in Section 17 of the Competition Act were met.*	31-05-02	Trade

Application for exemption dismissed

NO.	PARTIES	DATE	SECTOR
1919	**SAVI** *In accordance with the provisions of Section 17 of the Competition Act, Stichting Aanbestedingsvraagstukken Installatietechniek [Foundation for Tendering Issues in the Installation Sector] applied for an exemption from the prohibition of cartels, as set out in Section 6 (1) of the Competition Act for a scheme in relation to the reimbursement of subscription costs and the creation of a fund. NMa decided to reject the application for exemption.*	**03-09-02**	**Basic and processing industry**

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	NO.	PARTIES	DATE	SECTOR
Part 4 page 95 Summaries	728	**Vliegasunie BV**	20-11-02	Basic and processing industry
Part 4 page 98 Summaries	231	**Medicom-zes** *The application for exemption for the joint venture of Medicom Zes was rejected, since Section 6 (1) of the Competition Act was applicable and not all of the conditions for exemption were met, as set out in Section 17 of the Competition Act.*	20-12-02	Basic and processing industry
Part 4 page 96 Summaries	1994	**AstraZeneca et al. - hospital discounts on medicines** *AstraZeneca B.V. submitted an application for exemption from the prohibition contained in Section 6 of the Competition Act. The application related to all prescription drugs introduced onto the market to be supplied by Astra Zeneca. NMa decided to reject the application for exemption.*	09-07-02	Liberal professions, healthcare and culture
Part 4 page 96 Summaries	2605	**Zorgverzekeraars Nederland – admission charges** *NMa rejected the application by Zorgverzekeraars Nederland for an exemption, as referred to in Section 17 of the Competition Act, because it did not meet the applicable conditions for exemption.*	16-12-02	Liberal professions, healthcare and culture
Part 4 page 98 Summaries	18	**N.V. Eredivisie** *NMa decided to reject the application for exemption from the prohibition contained in Section 6 of the Competition Act, in relation to the notified scheme for the trading of broadcasting rights to live football matches of the Dutch Premier League. The joint exploitation of broadcasting rights for the production of an overview of summaries of Premier League football matches does not qualify for exemption under Section 17 of the Act, since that to which which the exemption was sought does not fall under the prohibition of Section 6 of the Competition Act.*	19-11-02	Liberal professions, healthcare and culture
Part 4 page 100 Summaries	2331	**ACM – fertiliser guarantee plan** *NMa decided to reject the application by Aan- en Verkoop Coöperatie Meppel b.a. for an exemption, as referred to in Section 17 of the Competition Act, since Section 6 (1) of the Competition Act had not been infringed.*	28-03-02	Trade
Part 4 page 99 Summaries	2435	**Batavia Stad** *NMa decided to reject the application by Stable International B.V. and V.O.F. Batavia Stad for an exemption, as referred to in Section 17 of the Competition Act, since Section 6 (1) of the Competition Act had not been infringed.*	01-02-02	Trade
	2091	Dekker Breeding BV	22-04-02	Trade
Part 4 page 99 Summaries	2036	**Heineken – agreements in the hospitality industry** *Decision of the Director-General of the Netherlands Competition Authority to reject the application for exemption by Heineken Nederland B.V. the application for exemption of four (standard) agreements, which Heineken has entered into with its customers in the hospitality industry since 1 April 2000. NMa decided to reject the application for an exemption, as referred to in Section 17 of the Competition Act, since Section 6 (1) of the Competition Act had not been infringed.*	03-06-02	Trade
Part 4 page 99 Summaries	2084	**Designer Outlet Centre Roermond** *BAA McArthurGlen Roermond B.V. applied to NMa for an exemption, in accordance with Section 17 of the Competition Act, from the prohibition contained in Section 6 (1) of the Competition Act for the agreements to be entered into between BAA McArthurGlen and the lessees, who set up businesses in the Designer Outlet Centre in Roermond. NMa decided to reject the application for an exemption, as referred to in Section 17 of the Competition Act, since the notified scheme did not infringe Section 6 (1) of the Competition Act.*	26-04-02	Trade

NO.	PARTIES	DATE	SECTOR
486	Stichting Kredietbeheer Betonindustrie *Decision of NMa to reject an application for exemption, as referred to in Section 17 of the Competition Act, since the scheme of which notification was given by SKB (the Credit Management Scheme which contains provisions with regard to joint credit management and debt collection for the participating undertakings) was not an infringement of Section 6 (1) of the Competition Act.*	24-05-02	Financial services and transport
378	FOCWA	06-12-02	Financial services and transport

No exemption required – no restriction on competition

NO.	PARTIES	DATE	SECTOR
355	Koninklijke Nederlandse Genootschap voor Fysiotherapie [association of physiotherapists] - regional agreements	22-03-02	Liberal professions, healthcare and culture
1534	KNGF [association of physiotherapists] - professional ethids	01-04-02	Liberal professions, healthcare and culture
2739	Eredivisie [Dutch Premier League] - Canal + NOS	08-11-02	Liberal professions, healthcare and culture
2101	PVV – Abattoir restructuring	14-02-02	Trade
503	BOVAG Vereniging	15-07-02	Trade
796	NS Stations b.v. - ETOS	24-07-02	Trade
191	EnergieNed	06-08-02	Basic and processing industry
538	Nederlandse Frees Maatschappij	22-08-02	Basic and processing industry
2334	Implementation schemes	19-07-02	Basic and processing industry
2564	Midwaste - joint venture	11-10-02	Basic and processing industry
648	Vereniging van handelaren in schaal en schelpdieren [association of traders in crustaceans and shellfish]	15-04-02	Financial services and transport
2991	Schiphol / NST - application for exemption	27-09-02	Financial services and transport
2680	Rotterdam Airport / Taxicentrale - concession agreement	01-11-02	Financial services and transport
2502	Barbara - Dela - joint venture *St. Barbara and Dela have entered into a joint venture agreement and have set up the funeral company Barbara-Dela for this. They have agreed that they will have funerals of their insured/members carried out by Barbara-Dela, unless the insured and/or surviving dependant express a desire to the contrary. As a funeral undertaking active in the region of Nijmegen, X complained that its turnover had fallen sharply and was of the opinion that competition on the funeral market is restricted by this joint venture. The application for exemption and the complaint were rejected, since Article 6(1) of the Competition Act had not been infringed.*	05-08-02	Financial services and transport
2816	**Dutchtone/Ben - UMTS radionetwork** *This relates to a joint venture involving Dutchtone N.V. and Ben Nederland B.V. for the rolling out of a UMTS network in the Netherlands. Decision of the Director-General of the Netherlands Competition Authority to reject an application for an exemption, as referred to in Section 17 of the Competition Act, since Section 6 (1) of the Competition Act had not been infringed.*	**11-10-02**	**Information and communication technology**

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NO.	PARTIES	DATE	SECTOR
3008	Ministry of Education, Culture and Science and PinkRoccade *Relates to an application by PinkRoccade Public B.V. and the Ministry of Education, Culture and Science for an exemption from the prohibition contained in Section 6 (1) of the Competition Act, pursuant to Section 17 of the Competition Act. The application for exemption relates to the agreement entered into by PinkRoccade Public B.V. and the Ministry of Education, Culture and Science, in which an exclusive license is granted to PinkRoccade for CASO software (salary administration). NMa decided:* *- to reject an application for exemption, as referred to in Section 17 of the Competition Act;* *- to reject an application to apply Section 56 (1) of the Competition Act*	20-12-02	Information and communication technology

Decisions in relation to concentrations

No licence required (Section 37 (1) of the Competition Act)

	NO.	PARTIES	DATE	SECTOR
	2770	VNU N.V. and Jaarbeurs Holding B.V.	14-02-02	Stock exchanges, magazines
	2785	N.V. Waterleidingbedrijf Europoort, N.V. Waterleidingbedrijf Brabantse Biesbosch and Delta Waterbedrijf B.V.	09-01-02	Laboratory services for water, industrial water and drinking water
Part 4 page 102 Summaries	**2786**	**DSM Agro B.V. and Brokking's Beheer B.V.**	**17-01-02**	**Raw materials for artificial fertiliser**
	2803	Brouwer Groep B.V. and Biegelaar Groep B.V.	24-01-02	Prepress services
	2818	LIDL Nederland GmbH and Laurus Nederland B.V.	03-04-02	Supermarkets
Part 4 page 102 Summaries	**2838**	**B.V. Sperwer Holding and Spar Holding B.V.**	**04-02-02**	**Supermarkets**
	2840	N.V. NUON Exploitatie Energiesystemen and Emmtec Services B.V.	01-02-02	Electricity, gas, water
	2858	General Electric Company and Interlogix, Inc.	05-02-02	Muliplexers
	2861	Van Neerbos Bouwmaten B.V. and Ter Steege Holding B.V.	14-02-02	Building materials
	2866	N.V. NUON Water, N.V. Waterbedrijf Gelderland and Waterleiding Maatschappij Overijssel N.V.	26-04-02	Water
Part 4 page 103 Summaries	**2877**	**Stichting Sint Antonius Ziekenhuis and Stichting Mesos Medisch Centrum**	**14-03-02**	**Hospital care**
Part 4 page 104 Summaries	**2879**	**Essent Milieu B.V. and N.V. Regionale Afvalverwerkingsmaatschappij Zuidoost-Brabant**	**30-09-02**	**Waste disposal and incineration of non-toxic waste, composting of organic waste, operation of land exchange facilities.**
	2890	Atos Origin IT Systems Management/Nederland B.V. and Workplace Services B.V.	20-03-02	IT
	2908	NeSBIC Buy Out Fund B.V. and Beter Bed Holding N.V.	13-03-02	Bedroom furniture/private equity company
	2913	Pallieter Holding B.V. and Van Laarhoven Holding B.V.	01-05-02	Automobile sector
	2943	My Travel Nederland B.V. and NBBS Reizen B.V.	25-07-02	Holiday travel
	2949	ING Lease Holding N.V. and TOP Lease B.V.	15-05-02	Leasing of motor vehicles
	2956	United Services Group N.V. and Start Holding B.V.	23-05-02	Temporary employment agency
	2957	ENCI Holding N.V. and Paes Bouwtoelevering B.V.	28-05-02	Liquid concrete and mortar, and surfacing materials
	2965	Volker Stevin Offshore B.V. and Kema Nederland B.V.	30-05-02	Industry
Part 4 page 104 Summaries	**2966**	**Rheinhold & Mahla AG and Honaert Beheer B.V.**	**29-08-02**	**Installation of insulation material, scaffolding construction**

	NO.	PARTIES	DATE	SECTOR
	2967	ABN AMRO Participaties B.V. and SRH Marine N.V., SRH Marine B.V., Radio Holland Marine B.V.	16-05-02	Equipment for communication at sea
	2974	Sligro Beheer B.V. and EM Té Supermarkten B.V.	08-05-02	Supermarkets
Part 4 page 105 Summaries	2977	RWE Gas Aktiengesellschaft and Obragas Holding N.V.	16-05-02	Gas and electricity
	2984	Brinkman & Germeraad B.V. and Holding Electro-Automatisering B.V.	23-05-02	Wholesaler in electronic products
Part 4 page 106 Summaries	2987	Koninklijke Volker Wessels Stevin N.V. and KPN Netwerkbouw B.V.	24-07-02	ICT infrastructure
	2995	Onroerend Goed Beheer- en Beleggingsmaatschappij A. van Herk B.V. and Nagron Nationaal Grondbezit N.V.	04-06-02	Real estate
Part 4 page 106 Summaries	3004	Vereniging Deloitte & Touche	12-06-02	Accountancy services and consultancy
	3005	GildeInvestment Management B.V. and Lips Textielservice Holding B.V.	07-06-02	Textile/laundry services
	3011	Heijmans N.V. and Proper-Stok Groep B.V.	01-07-02	Project development, home and utility construction
Part 4 page 110 Summaries	3018	Atos Origin Nederland B.V. and Telecom Software Solution B.V.	01-08-02	IT services
	3021	Atos Origin S.A. and NLC Holding B.V.	22-07-02	IT services
	3024	Woningstichting Patrimonium, Algemene Woningbouw Vereniging and Bouwvereniging Rochdale	26-08-02	Project development
Part 4 page 107 Summaries	3028	Euretco N.V. and Houdstermaatschappij Poelman Beheer Leek B.V.	21-08-02	Leisure clothing and sports articles
	3033	Voest-Alpine Bahnsysteme GmbH and Railpro B.V.	15-07-02	Railway infrastructure sector
Part 4 page 108 Summaries	3040	Stichting Nationale Postcode Loterij and Stichting Uitvoeringsorgaan Financiële Akties	15-08-02	Gambling and gaming
	3045	Stern Groep N.V. and Fassam Holding B.V.	17-07-02	Retail trade in motor vehicles, motor vehicle leasing
	3046	Interleasing UK Ltd. and SNS Automotive N.V.	22-07-02	Motor vehicle leasing, consumer credit
	3048	Amstelland N.V. and Multi Development Corporation N.V.	09-08-02	Project development
	3069	Plieger B.V. and Thermo-Noord B.V.	09-08-02	Wholesale trade in heating and waterheating equipment
	3070	Achmea Schadeverzekeringen N.V. and Aegon Schadeverzekeringen N.V.	29-07-02	Non-life insurance
Part 4 page 108 Summaries	3074	BAM NBM N.V. and Hollandsche Beton Groep N.V.	24-10-02	Earthworks, road and hydraulic engineering, civil engineering and utility construction, project development, asphalt
	3078	Koninklijke Coöperatie Cosun U.A. and Cebeco Food Holding B.V.	26-08-02	production and wholesale trade in fodder feeders and other single semi-moist feeders
	3082	Atag Heating Group B.V. and Atag Verwarming B.V.	21-08-02	Heating
	3085	Dura Vermeer Infra B.V. and B.V. Aannemingsbedrijf Dubbers-Malden	22-08-02	Civil and utility construction, earthworks, road and hydraulic engineering, project development, engineering services
	3108	Gilde Participaties B.V. and Röntgen Technische Dienst B.V.	17-09-02	Destructive and non-destructive research
	3114	Ericsson Telecommunicatie B.V. and O2 Netwerk	25-09-02	IT services
	3162	Umicore S.A./N.V., Rehol B.V. and Rezinal N.V.	24-10-02	Zinc metal works

NO.	PARTIES	DATE	SECTOR
3173	Wintershall Nederland B.V. and Clyde Netherlands B.V.	28-10-02	Exploration, production and sale of natural gas/petroleum
3174	Heijmans Infrastructuur en Milieu B.V. and Stork Infratechniek B.V.	31-10-02	Earthworks, road and hydraulic engineering, installation engineering
3186	Farmaceutisch Beheer B.V. and Viafarma B.V.	12-11-02	Pharmacy
3192	Hollandse Beton Groep N.V. and Ballast Ham Dredging B.V.	14-11-02	Dredging, earthworks
3198	ABN AMRO Participaties B.V. and Röntgen Technische Dienst B.V.	13-11-02	Destructive and non-destructive research
3199	N.V. Deli Universal and Willemstein's Industriële Ondernemingen B.V.	20-11-02	Wholesaler in building materials
3208	Kuwait Petroleum (Nederland) B.V., BP Nederland V.O.F., BP Nederland B.V., Fuelsco Nederland B.V. and Actomat B.V.	26-11-02	Petrol stations
3213	TBI Bouwgroep B.V. and Koopmans Bouwgroep B.V.	10-12-02	Civil and utility construction, project development, maintenance and renovation
3225	Sdu N.V.,Ten Hagen & Stam B.V. and Segment B.V.	23-12-02	Publishing of magazines and books
3227	WZG International S.A.R.L. and Welzorg Holding N.V.	05-12-02	Sale and rental of convalescence materials
3235	De Heus Brokking Koudijs B.V. and Sondag Voeders B.V.	10-12-02	Production and sale of compound feeders, wholesale activities in artificial fertilisers
3237	Woningstichting Eigen Haard and Woningstichting Olympus Groep	17-12-02	Social housing
3238	De Nederlandse Organisatie voor Toegepast Natuurwetenschappelijk Onderzoek TNO and Koninklijke KPN N.V.	23-12-02	IT services, commercial research
3245	Stern Groep N.V. and Pordon Beheer B.V.	19-12-02	Retail trade in motor vehicles, motor vehicle leasing
3247	Deltacom Holding B.V. and Het Openbaar Lichaam Afvalverwerking Zeeland	24-12-02	Waste processing
3248	Citadel Enterprises B.V. and Wynmalen & Hausmann B.V. and Van Wijk & Boerma Firepacks B.V.vehicles	23-12-02	Retailer in internal transport
3255	The Carlyle Group LLC & Providence Fondsengroep and Holding B.V.	23-12-02	RTV signals and Internet Casema (network) access services

Licence required (Section 37 (1) of the Competition Act)

NO.	PARTIES	DATE	SECTOR
3052	**Liberty Media Corporation and CasemaHolding B.V.**	**06-11-02**	**Radio and television**

Part 4 page 101
Summaries

Decisions to impose sanctions

NO.	PARTIES	DATE	SECTOR
2498	**Tango** *In the decision, fines were imposed of ff 25,000 on Vermeulen Neerboscheweg, ff 48,500 on Vermeulen Sint Anna, ff 46,500 on Sparu and ff 1,000,000 on Texaco for the infringement of Section 6 (1) of the Competition Act.*	**25-06-02**	**Petrol**

Part 2 page 38
Imposition of fines

	NO.	PARTIES	DATE	SECTOR
Part 2 page 38 Imposition of fines	**2422**	**AUV** *A fine was imposed on AUV and Aesculaap of ƒ 9.7 million and ƒ 750,000 respectively and an order subject to a penalty was imposed for the infringement of Section 6 (1) of the Competition Act.*	**29-08-02**	**Veterinarians**
Part 4 page 111 Summaries	**3075**	**Heijmans (3x)** *Infringement of the obligation to cooperate contained in Section 5:20 (1) of the General Administrative Law Act. Three times the maximum fine of ƒ 4,500 was imposed. An administrative appeal has been filed.*	**03-09-02**	**Construction**
Part 4 page 110 Summaries	**3152**	**Groenewoud en Sportrecreatie** *Infringement of the obligation to cooperate contained in Section 5:20 (1) of the General Administrative Law Act. Three times the maximum fine of ƒ 4,500 was imposed. An administrative appeal has been filed.*	**16-12-02**	**Construction**
	3153	**Rijnland** *Infringement of the obligation to cooperate contained in Section 5:20 (1) of the General Administrative Law Act. Three times the maximum fine of ƒ 4,500 was imposed. An administrative appeal has been filed.*	**16-12-02**	**Construction**
	3154	**KWS Utrecht** *Infringement of the obligation to cooperate contained in Section 5:20 (1) of the General Administrative Law Act. Three times the maximum fine of ƒ 4,500 was imposed. An administrative appeal has been filed.*	**16-12-02**	**Construction**
	3155	**KWS Zuid-Holland Noord** *Infringement of the obligation to cooperate contained in Section 5:20 (1) of the General Administrative Law Act. Three times the maximum fine of ƒ 4,500 was imposed. An administrative appeal has been filed.*	**16-12-02**	**Construction**
	3156	**KWS Friesland / Groningen** *Infringement of the obligation to cooperate contained in Section 5:20 (1) of the General Administrative Law Act. Three times the maximum fine of ƒ 4,500 was imposed. An administrative appeal has been filed.*	**16-12-02**	**Construction**
Part 2 page 49 Remedies in relation to concentrations	**3182**	**Purva** *Pursuant to Section 75 of the Competition Act, a fine of ƒ 22,500 was imposed on EDON Groep B.V. ('EDON') for not complying with the conditions subject to which a licence was issued*	**16-12-02**	**Energy**
Part 2 page 39 Imposition of fines	**2658**	**Mobiele Operators** *Fines were imposed on Ben Nederland B.V., Dutchtone N.V., KPN Mobile N.V., O2 (Netherlands) B.V. and Vodafone Libertel N.V. of ƒ 15,200,000, ƒ 11,500,000, ƒ 31,300,000, ƒ 6,000,000 and ƒ 24,000,000 respectively, due to the infringement of Section 6 (1) of the Competition Act. An administrative appeal has been filed.*	**30-12-02**	**Telephony**

Decisions on administrative appeal in relation to the Competition Act

NO.	PARTIES	DATE	SECTOR
2557	Reesink *The administrative appeal was withdrawn.*	14-01-02	Extraction of sand, gravel, clay etc.
29	Brandenbarg *The administrative appeal was withdrawn.*	14-02-02	Liberal professions, healthcare and culture
2553	De Schipper/Campina *The administrative appeal was withdrawn.*	14-02-02	Trade
2157	VNI *The new articles of association of VNI satisfy the criteria which a recognition scheme must meet. These schemes for company group regulations of the company group, Solar Energy and Sanitary Installers, do not meet the criteria of prior clarity and independence and contravene Section 6 of the Competition Act.*	15-02-02	Trade

NO.	PARTIES	DATE	SECTOR
2383	Kuipers *Friesche Vlag's refusal to supply occurred for an objective reason and does not constitute an abuse. It therefore does not infringe Section 24 of the Competition Act. The administrative appeal was declared unfounded.*	15-02-02	Trade
597	Stichting Schadegarant *The administrative appeal was withdrawn.*	28-02-02	Trade
2333	Modint *The administrative appeal was declared unfounded since it was not shown why the key conditions (maximum payment discount, del credere discount and turnover bonus) will result in an improvement in production or distribution. The exemption was rejected in the primary proceedings on the right grounds.*	18-03-02	Trade
1187	Van Duinen *The administrative appeal was withdrawn.*	19-03-02	
2322	KNGF *The administrative appeal was withdrawn.*	22-03-02	Liberal professions, healthcare and culture
2704	Pecos *The administrative appeal was submitted too late. No excusable reason for exceeding the term. The administrative appeal was declared inadmissible.*	28-03-02	Environmental services
2670	De Groot *The administrative appeal was submitted too late. No excusable reason for exceeding the term. The administrative appeal was declared inadmissible.*	26-04-02	Liberal professions, healthcare and culture
2374	NTC *The administrative appeal was declared unfounded since it was not shown why the key conditions (maximum payment discount, del credere discount and turnover bonus) will result in an improvement in production or distribution. The exemption was rejected in the primary proceedings on the right grounds.*	26-04-02	Trade
2712	Secon *Charging low sales prices was a unilateral act by Rhiwa. Rhiwa does not have a dominant position, Section 24 of the Competition Act was not contravened.*	03-05-02	Manufacturing of other metal products not stated elsewhere
2247	Griffioen *The administrative appeal was declared unfounded. The obligation to supply, included in the joint operating agreement, and the right to match, do not serve the purpose of restricting competition. Section 6 of the Competition Act was not contravened.*	06-05-02	Retail trade in foodstuffs and beverages general assortment
2849	Regres (Allibre) *The administrative appeal was declared unfounded. The refusal to grant a licence to place a billboard is a public duty of the Municipality of Breda, which is not an undertaking.*	08-05-02	Advertising agencies and the like
2651	Van Eert *The implementation of the 'kwartjesregeling', a discount scheme, by Campina did not constitute abuse and no evidence was given of discrimination by Campina. Section 24 of the Competition Act was not contravened.*	08-05-02	Retail trade in foodstuffs and beverages general assortment
2487	Kuwait Petroleum Europoort *Reference to a contractual condition with regard to the cessation of gas supplies by Gasunie cannot be equated with abuse. Section 24 of the Competition Act was not contravened. The administrative appeal was declared unfounded.*	16-05-02	Production and distribution of electricity, natural gas, electricity and hot water

NO.	PARTIES	DATE	SECTOR
2935	Dantuma *There is no behaviour by Endemol in respect of competitors on the market for the supply of goods and services. The administrative appeal was declared manifestly unfounded since the Competition Act is not applicable.*	16-05-02	Radio and television
2522	Dutchbird *The administrative appeal was withdrawn.*	27-05-02	
2745	Vill'ABB *Vill'ABB (childcare) is of the opinion that the Musicality of The Hague has placed it at a disadvantage. The municipality, however, acted as a public authority and not as an undertaking. In addition, Vill'ABB refers to the cooperation of three umbrella organisations subsidised by the municipality in the investigation of the municipal childcare supervisor amongst customers of Vill'ABB. It has been ascertained that the umbrella organisations did not coordinate their activities in any form whatsoever. The administrative appeal was declared unfounded.*	14-06-02	Childcare
2831	Vink-Janse *Vink-Janse ('Vink') is a psychiatrist-psychotherapist who does not agree with the age limit of 65 imposed by Zorgkantoor Amsterdam in agreement with Vereniging van Vrijgevestigde Psychiaters [association of independent psychiatrists] in Amsterdam, at which age the contract between Zorgkantoor Amsterdam and the psychiatrist expires. Administrative appeal was unfounded: the age of 65 is a criterion for which an objective justification is given. No abuse.*	05-07-02	Health insurers
11	**Comité Verlaging Vliegtarieven Suriname** *The administrative appeal of the said Committee against the tariffs charged by KLM and SLM on the route between Amsterdam and Paramaribo. The Committee's appeal was not admissible because it was not a legal entity and (also) had no constitution or regulations. The individual members of the Committee also had no personal differentiating interest.*	**11-07-02**	**Airline**
2962	**Van der Post** *Complaint against political parties in the Lower House of the Dutch Parliament which receive financial support pursuant to the Political Parties (Subsidies) Act [Wet Subsidiëring Politieke Parties]. The Act places political parties such as Leefbaar Nederland at a disadvantage. Van der Post's appeal was declared inadmissible as he is not an interested party. His interest is not distinguishable in law to irrelevant degree from that of a large numbers of other parties.*	**26-07-02**	**Political party**
2844	Huub Kemper *Esto B.V. refused to place an advertisement by Huub Kemper Makelaardij in Woongids voor Midden-Zeeland. The complaint was based on Section 24 of the Competition Act. In arrangement of Section 24, however, was declared to be implausible. Administrative appeal unfounded. Updating of priority policy by the Director-General of NMa.*	31-07-02	Real estate agent
1119	Entrade *The administrative appeal was withdrawn.*	08-08-02	Energy
1108	Cees Sikkema *Administrative appeal submitted too late. Not admissible due to the inexcusable exceeding of the term.*	16-08-02	Car repairs

Part 3 page 73
Position of the Consumer in Procedures

Part 3 page 73
Position of the Consumer in Procedures

NO.	PARTIES	DATE	SECTOR
2855	Politheek Explorer *Politheek Explorer offers a polyclinic public pharmacy. The complaint of Politheek Explorer is that Amphia Ziekenhuis and the city/village pharmacies in Oosterhout infringe the Competition Act by only allowing the latter to set up a polyclinic pharmacy at the hospital, Amphia Ziekenhuis, and not the complainant. In the primary decision the complaint was dismissed, partly because the data provided contained insufficient evidence of an infringement of the Competition Act. In the administrative appeal, Politheek Explorer repeated its complaint. The administrative appeal was declared unfounded on the grounds stated in the primary decision.*	16-08-02	Pharmacies
2036	Bavaria (Heineken) *The administrative appeal was withdrawn.*	19-08-02	Beer brewing
1957	Schuitema I *The administrative appeal was withdrawn.*	19-08-02	Retail trade
2146	Schuitema II *The administrative appeal was withdrawn.*	19-08-02	Retail trade
2198	Schuitema III *The administrative appeal was withdrawn.*	19-08-02	Retail trade
2554	Molenpad Health Services *In the primary decision, Molenpad's complaint was upheld, since there was neither an infringement of Section 6, nor of Section 24 of the Competition Act and partly because of insufficient priority. In the administrative appeal, Molenpad repeated its complaint. The administrative appeal was declared unfounded.*	03-09-02	Physiotherapy, healthcare
2751	De Marke *The complaint by De Marke was rejected on the grounds of priority, namely its limited economic importance and limited importance to consumers. In the administrative appeal, this decision was upheld on the basis of the authority to set priorities.*	06-09-02	Topographical maps
2912	Apotheek Buijs *Complaint on the abuse of a dominant position by RESA B.V. and Anova. Dismissed on the basis of priorities. The administrative appeal was unfounded. Limited possibility of establishing that an infringement had been committed.*	09-09-02	Pharmacies
1994	Ned. Vereniging van Ziekenhuizen and Ned. Ver. Van Ziekenhuisapotheker *The administrative appeal was withdrawn.*	16-09-02	Healthcare
1994	Astra Zeneca *The administrative appeal was withdrawn.*	30-09-02	Pharmacy
2814	Nederlandse Uitgeversbond (NUV) *The administrative appeal was withdrawn.*	25-09-02	Publisher
2026	Auto & Recycling Nederland II *Rejection of the application for exemption for the 'Automobile Disposal Levy Agreement for 2000' because it is not in conflict with Section 6 of the Competition Act. Administrative appeal submitted by various parties. In all cases, inadmissible due to the fact that the parties do not have an interest.*	24-09-02	Automobile recycling
2084	Theelen Detailhandelsgroep *Administrative appeal submitted too late. Not admissible due to the inexcusable exceeding of the term.*	24-09-02	Real estate
3116	Vodafone *The administrative appeal was withdrawn.*	01-10-02	

NO.	PARTIES	DATE	SECTOR
3019	Siemens Nederland *The administrative appeal was withdrawn.*	09-10-02	
2423	Stichting Federatie Autorecycling *The refusal by ARN to make resources available to Stichting Federatie Autorecycling (federation of automobile recycling companies) so that Stichting Federatie Autorecycling could develop a system for recycling cars to compete with ARN, cannot be deemed to be abuse in terms it Section Section 24 of the Competition Act. The administrative appeal was declared unfounded.*	17-10-02	Basic and processing industry
2915	Vereniging Bergers Belangen (VBB) *The administrative appeal against the rejection of the application to enforce the Competition Act, that is, to revoke the exemption for the Salvaging Scheme was declared unfounded. Supposed conflict with EC Services Directive cannot lead to the conclusion that the Competition Act has been breached. The other grounds for administrative appeal are also unfounded.*	24-10-02	Trade
1919	Savi *The administrative appeal was withdrawn.*	30-10-02	Trade
2556	NOLU *Conducting of a separate pricing policy by the publisher, Sanoma, in respect of resellers, on the one hand, and publishers of portfolios of magazines, on the other, does not constitute an abuse in terms of Section 24 of the Competition Act. The administrative appeal was declared unfounded.*	04-11-02	Services
3067	Lourdes Bedevaart *The appellant took action against a supposed infringement of Section 24 of the Competition Act which affected and airline company with which the appellant wished to do business. No direct interest involved. The administrative appeal was declared inadmissible.*	04-11-02	Financial services and transport
3051	**SARC** *As a (potential) client of credit providers, SARC does not have a personal interest in the disputed decision. The administrative appeal was declared unfounded.*	**07-11-02**	**Financial services and transport**
82	Gebruikers Platform Betalingsverkeer *The administrative appeal was declared inadmissible because it was submitted after the term for the filing of the administrative appeal had lapsed.*	18-11-02	Financial services and transport
2600	Ralet *It was not shown that CZ had entered into anticompetitive agreements with hospital laboratories. The administrative appeal against the decision of the Director-General of NMa not to investigate Ralet's complaint was declared unfounded.*	22-11-02	Liberal professions, healthcare and culture
2893	Bestuursjuridische Advisering (BJA) *NMa ascertained that there was no prima facie infringement of the Competition Act. The administrative appeal against the decision not to impose a provisional order subject to a penalty was declared unfounded.*	11-12-02	Liberal professions, healthcare and culture
2083	Bovag / Beta *The administrative appeal was withdrawn.*	16-12-02	Trade
3268	Vereniging Bergers Belangen (VBB) *The refusal by the Director-General of NMa to allow the inspection of a document in preparation of a decision based on Section 23 of the Competition Act was not a decision. The administrative appeal was declared inadmissible.*	18-12-02	Trade

Part 3 page 74
Position of the Consumer in Procedures

NO.	PARTIES	DATE	SECTOR
2960	Abegg / CZ *The refusal by CZ to enter into a contract with Mr Abegg cannot be characterised as abuse, in terms of Section 24 of the Competition Act. The administrative appeal was declared unfounded.*	18-12-02	Liberal professions, healthcare and culture
2836	LHV / ZN *LHV (the national association of general practitioners) did not submit the notice of administrative appeal in time and does not have an interest in the proceedings. The administrative appeal was declared inadmissible.*	18-12-02	Liberal professions, healthcare and culture
3073	Rashonden Federatie Nederland *The administrative appeal against the decision by the Director-General of NMa not to exercise its discretionary power to carry out a further investigation into RFN's complaint was declared unfounded.*	20-12-02	Other services
2805	Golfleraren / NGF *The demand made by Nederlandse Golf Federatie to [Netherlands Golf Union] that only recognised golf teachers may apply for GVB examinations is not in conflict with the Competition Act. The administrative appeal was declared unfounded.*	20-12-02	Liberal professions, healthcare and culture

Decisions and Advice Given by DTe

Decisions of the Director of DTe determining electricity tariffs for the year 2002/2003

Part 2 page 60
Implementation decisions

NO.	DECISION	DATE
101079	**Amendment of the repurchase tariff for the year 2002**	**28-06-02**
100880, 100882 to 100891 100893 to 100895, 100897	**Ex officio amendments to the determination of electricity supply tariffs 2003 for Eneco Netbeheer Weert N.V., Transportnet Zuid-Holland and TenneT B.V.**	**28-06-02**
101129, 101140, 101143	**Decisions on connection and transmission tariffs for the year Netbeheer Weert N.V., Transportnet Zuid-Holland en TenneT B.V.**	**20-12-02**
101256 to 101273	**Electricity supply tariffs for captive customers for the year 2003 (incl. repurchase tariff)**	**18-11-02 11-12-02**

Decisions of the Director of DTe to amend the Technical Conditions for electricity

Part 2 page 58
Method decisions

NO.	DECISION	DATE
100696	**Amendment of the Measurement Code in relation to the publication of metering data**	**19-03-02**
100757	**Amendment of the System Code in relation to the management and financing of consumer profiles**	**24-03-02**
100701	**Amendment of the Grid Code, System Code and the definitions in relation to the connection register, switching between suppliers and relocation**	**28-03-02**
100797	**Amendment of the Grid Code and the definitions in relation to the quality criteria applicable to the transmission service**	**01-05-02**
100794	**Rejection of the joint proposal by grid managers in relation to the authority of the grid manager to make changes to the metering installation of the connected party**	**30-05-02**
100871	**Amendment of the Measurement Code and the definitions in relation to the method for calculating consumer profiles**	**11-07-02**
100928	**Amendment of the System Code in relation to the extension of the possibilities for giving notice of amendments to programmes**	**11-07-02**
101042	**Amendment of the Grid Code in relation to the allocation of cross-border transmission capacity**	**04-10-2002**

Part 2 page 58
Method decisions

NO.	DECISION	DATE
101429	Amendment of the Grid Code in relation the daily auction regulations of APX	21-11-02
101161	Amendment of the Grid Code in relation to restrictions following the lifting of limitations on transmission	27-11-02
101162	Amendment of the System Code in relation to the Amendment of the management organisation of Edine	27-11-02
101163	Amendment of the System Code in relation to the annual settlement of imbalance	27-11-02
101042-35	Ex officio Amendment of Section 5.6.12.1 of the Grid Code	28-11-02
100950	Amendment of the Grid Code and the System Code in relation to making the imbalance market transparent	17-12-02

Decisions of the Director of DTe in relation to the granting of electricity licences

Part 2 page 61
Implementation decisions

NO.	DECISION	DATE
100739	Licence pursuant to Section 95 to Cogas Facilitair B.V.	22-03-02
100744	Licence pursuant to Section 95 to N.V. Nutsbedrijf Regio Eindhoven	22-03-02
100745	Licence pursuant to Section 95 to Shell Nederland Verkoopmaatschappij B.V.	22-03-02
100749	Licence pursuant to Section 95 to Obragas Energie Services B.V.	22-03-02
100750	Licence pursuant to Section 95 to Westland Energie Services B.V.	22-03-02
100758	Licence pursuant to Section 95 to Rendo Energielevering B.V.	22-03-02
100746	Licence pursuant to Section 95 to N.V. Nuon Groene Energie	12-04-02
100747	Licence pursuant to Section 95 to Remu Levering B.V.	12-04-02
100752	Licence pursuant to Section 95 to Vattenfall Nederland B.V.	12-04-02
100751	Licence pursuant to Section 95 to Enerservice Maastricht B.V.	07-05-02
100737	Licence pursuant to Section 95 to InfraXS Energy B.V.	17-05-02
100756	Licence pursuant to Section 95 to Energiebedrijf.com B.V.	17-05-02
100764	Licence pursuant to Section 95 to N.V. Delta Nutsbedrijven	22-05-02
100828	Licence pursuant to Section 95 to Intergas N.V.	22-05-02
100829	Licence pursuant to Section 95 to Essent Energie Brabant B.V.	14-06-02
100830	Licence pursuant to Section 95 to Essent Energie Friesland B.V.	14-06-02
100760	Licence pursuant to Section 95 to Echte Energie Nederland B.V.	13-08-02
101045	Licence pursuant to Section 95 to E.On Benelux Energy B.V.	29-08-02
100877	Licence pursuant to Section 95 to Essent Retail B.V.	12-09-02
100805	Licence pursuant to Section 95 to Essent Energie Verkoop Nederland B.V.	19-09-02
100870	Licence pursuant to Section 95 to Groene Energie Administratie	26-09-02
100741	Licence pursuant to Section 54 to Energie Combinatie Meerhoven B.V.	26-09-02
100841	Licence pursuant to Section 95 to N.V. ONS Energie	11-10-02
100665	Licence pursuant to Section 54 to Eneco Mixed Holding Consumenten B.V.	25-10-02
101044	Licence pursuant to Section 54 to Eneco Energiehandelsbedrijf B.V.	25-10-02
101093	Licence pursuant to Section 95 to Energielevering B.V.	29-10-02
100738	Decision, pursuant to Section 4:5 of the General Administrative Law Act, not to process further the licence application of Spark Energy N.V.	29-10-02
100742	Decision, pursuant to Section 4:5 of the General Administrative Law Act, not to process further the licence application of Caplare.	29-10-02
100842	Decision, pursuant to Section 4:5 of the General Administrative Law Act, not to process further the licence application of ONS Energy Services B.V.	29-10-02
100949	Decision, pursuant to Section 4:5 of the General Administrative Law Act, not to process further the licence application of Electrabel Nederland N.V.	29-10-02
100738/22	Licence pursuant to Section 95 to Spark Energy N.V.	15-11-02
101159	Licence pursuant to Section 95 to Energie Direct	21-11-02
100949	Licence pursuant to Section 95 to Electrabel Nederland N.V.	28-11-02
100796	Licence pursuant to Section 95 to Eneco Mixed Holding Consumenten B.V.	28-11-02
101039/16	Licence pursuant to Section 54 to Essent Retail Energie B.V.	13-12-02

	NO.	DECISION	DATE
Part 2 page 61 Implementation decisions	**100842**	**Licence pursuant to Section 95 to ONS Energy Services B.V.**	**18-12-02**

Decisions of the Director of DTe to issue binding instructions in relation to electricity

	NO.	DECISION	DATE
Part 2 page 63 Supervision of compliance	**100876 4 Decisions**	**Binding instructions in relation to an infringement of Section 31a of the Electricity Act of 1998 issued to Electrabel Nederland N.V., E.On Benelux Energy B.V., N.V. Nuon and Statkraft Energy Nederland B.V.**	**14-02-02**
	100876 11 Decisions	**Binding instructions in relation to an infringement of Section 5.6.12.1 of the Grid Code issued to Electrabel N.V., Endesa S.A., Essent Energy Trading B.V., N.V. Delta Nutsbedrijven, N.V. Remu, Reliant Energy Trading and Marketing B.V., RWE Energy Trading Ltd., Statkraft Energy Nederland B.V., Vattenfall AB, E.On Trading GmbH and N.V. Nuon**	**14-02-02**
	100793/5	**Binding instructions, pursuant to Section 5 (6) of the Electricity Act of 1998 issued to Essent Netwerk Brabant B.V. (petition of Remu Power Plus B.V. dismissed)**	**14-06-02**
	100840 3 Decisions	**Binding instructions in relation to an infringement of Section 7 of the Electricity Act of 1998 issued to Essent Energie Productie B.V., N.V. Electriciteits-Productiemaatschappij Zuid-Nederland, E.ON Benelux B.V. and E.On Generation Benelux N.V.**	**01-07-02**
	101164 3 Decisions	**Binding instructions in relation to the method of operation after switching issued to Continuon, Enet and ENN (petition of ANY-G)**	**29-11-02**
	101077	**Binding instructions in relation to an infringement of Section 23 (2) of the Electricity Act of 1998 issued to Essent Netwerk Brabant B.V.**	**10-12-02**

Decisions of the Director of DTe to issue an order subject to a penalty in relation to electricity

	NO.	DECISION	DATE
Part 2 page 63 Supervision of compliance	**100840**	**Decision on the order subject to a penalty issued to E.On Generation Benelux N.V. in relation to non-compliance with the binding instructions of 1 July 2002**	**17-12-02**

Decisions on administrative appeals by the Director of DTe in relation to electricity

NO.	DECISION	DATE
100110/15	Decision on the administrative appeals brought against the Decision of 18 September 2000, No. 00-031, setting the maximum tariffs which Essent Brabant may charge in 2000 for a connection to the grid managed by it.	07-03-02
100111/16	Decision on the administrative appeals brought against the Decision of 18 September 2000, No. 00-032 setting the maximum tariffs which Essent Friesland NW-ZO may charge in 2000 for a connection to the grid managed by it.	07-03-02
100112/15	Decision on the administrative appeals brought against the Decision of 18 September 2000, No. 00-033, setting the maximum tariffs which Essent Limburg may charge in 2000 for a connection to the grid managed by it.	07-03-02
100113/18	Decision on the administrative appeals brought against the Decision of 18 September 2000, No. 00-034, setting the maximum tariffs which Essent Noord may charge in 2000 for a connection to the grid managed by it.	07-03-02
100115/15	Decision on the administrative appeals brought against the Decision of 18 September 2000, No. 00-036, setting the maximum tariffs which InfraMosane may charge in 2000 for a connection to the grid managed by it.	07-03-02

NO.	DECISION	DATE
100102/10	Decision on the administrative appeals brought against the Decision of 18 September 2000, No. 00-024, setting the maximum tariffs which Netbeheerder Centraal Overijssel may charge in 2000 for a connection to the grid managed by it.	07-03-02
100106/10	Decision on the administrative appeals brought against the Decision of 18 September 2000, No. 00-045, setting the maximum tariffs which Westland Energie Infrastructuur may charge in 2000 for a connection to the grid managed by it.	07-03-02
100101/15	Decision on the administrative appeals brought against the Decision of 18 September 2000, No. 00-037, setting the maximum tariffs which Netbeheer Midden-Holland may charge in 2000 for a connection to the grid managed by it.	07-03-02
100117/13	Decision on the administrative appeals brought against the Decision of 18 September 2000, No. 00-038 setting the maximum tariffs which Netbeheer Nutsbedrijven Weert may charge in 2000 for a connection to the grid managed by it.	07-03-02
100133/13	Decision on the administrative appeals brought against the Decision of 18 September 2000, No. 00-027, setting the maximum tariffs which Edelnet Delfland may charge in 2000 for a connection to the grid managed by it.	07-03-02
100108/13	Decision on the administrative appeals brought against the Decision of 18 September 2000, No. 00-035, setting the maximum tariffs which EWR Netbeheer may charge in 2000 for a connection to the grid managed by it.	07-03-02
100132/12 100109/13	Decision on the administrative appeals brought against the Decision of 18 September 2000, No. 00-040, setting the maximum tariffs which Noord West Net may charge in 2000 for a connection to the grid managed by it.	07-03-02
100119/14	Decision on the administrative appeals brought against the Decision of 18 September 2000 No. 00-028, setting the maximum tariffs which Elektriciteitsnetbeheer Utrecht may charge in 2000 for a connection to the grid managed by it.	07-03-02
100118/12	Decision on the administrative appeals brought against the Decision of18 September 2000, No. 00-041, setting the maximum tariffs which ONS Netbeheer may charge in 2000 for a connection to the grid managed by it.	07-03-02
100096/13	Decision on the administrative appeals brought against the Decision of 18 September 2000, No. 00-042 setting the maximum tariffs which Rendo Netbeheer may charge in 2000 for a connection to the grid managed by it.	07-03-02
100092/10 100107/13	Decision on the administrative appeals brought against the Decision of 18 September 2000, No. 00-025, setting the maximum tariffs which Continuon Netbeheer may charge in 2000 for a connection to the grid managed by it.	14-03-02
100105/13	Decision on the administrative appeals brought against the Decision of 18 September 2000, No. 00-030 setting the maximum tariffs which ENET Eindhoven may charge in 2000 for a connection to the grid managed by it.	07-03-02
100090/11 100116/15	Decision on the administrative appeals brought against the Decision of 18 September 2000, No. 00-026, amended on 28 September by Decision No. 00-026a, setting the maximum tariffs which Delta Netwerkbedrijf may charge in 2000 for a connection to the grid managed by it.	07-03-02

	NO.	DECISION	DATE
	100697/25	Decision on the administrative appeal of Vereniging van Particuliere Windturbine Exploitanten (PAWEX) (the association of wind turbine generators) against the Decision of 27 December 2001 amending the conditions, pursuant to Section 31 (1) (b) of the Electricity Act of 1998 in relation to consumer profiles.	25-07-02
	100801/36 100097 100098 100099 100100 100127 100135 100155	Decisions on the administrative appeals against the Decisions of 22 September 2000 setting the x factor, as referred to in Section 41 of the Electricity Act of 1998, for Essent Noord, Essent Brabant, Essent Limburg, Essent Friesland NW-ZO and InfraMosane (Nos 00-050, 00-061, 00-057. 00-055, and 00-056) and against the Decisions amending the x factor of Essent Noord, Essent Brabant and Essent Limburg (Nos 00-079, 00-081 and 00-080).	23-08-02
Part 4 page 113 Summaries	100838/32	Decision on the administrative appeals brought by Eon Benelux Energy and Nederlands Elektriciteits Administratiekantoor against the Decision of 14 February 2002, reference number 100496/204, issuing binding instructions in respect of the application of Section 31a (1) of the Electricity Act of 1998	30-08-02
	100876/29	Decision on the administrative appeals brought by Electrabel against the Decision of 14 February 2002, No. 100496/205, issuing binding instructions in respect of the application of Section 5.6.12.1 of the Grid Code	30-08-02
	100876/28	Decision on the administrative appeals brought by Electrabel Nederland and Nederlands Elektriciteits Administratiekantoor against the Decision of 14 February 2002, reference number 100496/209 issuing binding instructions in respect of the application of Section 31a (1) of the Electricity Act of 1998	30-08-02
	100838/33	Decision on the administrative appeals brought by EON Trading GmbH against the Decision of 14 February 2002, reference number 100496/210, issuing binding instructions in respect of the application of Section 5.6.12.1 of the Grid Code	30-08-02
	100879/9	Decision on the administrative appeals brought by Essent Energy Trading against the Decision of 14 February 2002, reference number 100496/202, issuing binding instructions in respect of the application of Section 5.6.12.1 of the Grid Code	30-08-02
	100844/20	Decision on the administrative appeals brought by Reliant Energy Trading & Marketing against the Decision van 14 February 2002, No. 100496/200, issuing binding instructions in respect of the application of Section 5.6.12.1 of the Grid Code, alsmede op de administrative appeals van Reliant Energy Trading & Marketing ingebracht tegen de brief van 13 March 2002, No. 100496/245.F184	30-08-02
	100696/15	Decision on the administrative appeal of Federatie van Energiebedrijven in Nederland (EnergieNed) against the Decision of 19 March 2002 to amend the Measurement Code in relation to the publication of metering data	12-09-02
Part 4 page 114 Summaries	100319/36	Decision on the administrative appeal van Wuppermann Staal Nederland against the failure to take a decision in time on its application for the issuing of binding instructions to Essent Brabant and on the administrative appeal of Wuppermann Staal Nederland against his Decision of 18 December 2001, No. 100319/13, in respect of this application.	20-11-02

Decisions of the Director-General of the Netherlands Competition Authority on behalf of the Minister of Economic Affairs

NO.	DECISION	DATE
100896/14	Decision on the administrative appeal in relation to the setting of the electricity supply tariffs for captive customers for the year 2002 of RENDO	28-06-02
100892/13	Decision on the administrative appeal in relation to the setting of the electricity supply tariffs for captive customers for the year 2002 of Nutsbedrijf Regio Eindhoven	28-06-02
100881/19	Decision on the administrative appeal in relation to the setting of the electricity supply tariffs for captive customers for the year 2002 of DELTA Nutsbedrijven	28-06-02
100285/27 100336/30 100485/15 100517/17	Decision on the administrative appeals against the decisions in relation to the setting of maximum Electricity supply tariffs for captive customers for the first, second, third and fourth quarters of the year 2001 of Rendo	07-08-02
100695/16	Decision on the administrative appeal of the Coöperatieve vereniging tot collectief bezit van windmolens 'De Windvogel' against the letter of the Director of DTe of 25 January 2002, with reference number 100695/3 in relation to Decision number 100695/1 of 20 December 2001 setting the repurchase price for the first quarter of the year 2002, as referred to in Section 71 of the Electricity Act of 1998	04-11-02
100840/47	Decision on the administrative appeals against the Decision of 1 July 2002, in which binding instructions, as referred to in Section 5 (6) of the Electricity Act of 1998, were issued to E-ON Benelux Generations N.V. and E-ON Benelux B.V. The binding instructions provide for the provision of data, pursuant to Section 7 of the Electricity Act of 1998	17-12-02

Decisions of the Director of DTe setting the price caps for gas

NO.	DECISION	DATE
100801/ 10	Decision amending the Decision of 29 August 2001, reference number 100350/149 and 100350/150, in which the price cap to stimulate efficient operations on the part of gas network managers for the years 2002 and 2003 are set, pursuant to Section 80 Gas Act.	12-07-02

Decisions of the Director of DTe adopting the Guidelines for Gas for 2003

NO.	DECISION	DATE
100945	**Guidelines for Gas Transmission 2003**	**30-08-02**
100803	**Guidelines for Gas Storage 2003**	**30-08-02**

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Method decisions

Decisions of the Director of DTe setting gas tariffs for 2002/2003

NO.	DECISION	DATE
100704/2 to 100729/3	Decisions monitoring tariffs for the supply of gas to captive customers for the first quarter of 2002	08-02-02
100845/4 to 100869/4	Decisions monitoring tariffs for the supply of gas to captive customers for the second quarter of 2002	17-05-02
100768/35 to 100792/47	Decisions in relation to the separation of gas network managers and gas license holders	12-07-02 14-08-02
100768/73 to 100792/99	Amendment of the decisions setting the maximum consumption-related transmission tariffs and the regulated fixed charge component for gas for the year 2002	28-08-02
100768/75 to 100792/101	Amendment of the decisions setting the regulated maximum surcharge on the procurement costs of gas for the year 2002	28-08-02
101052/4 to 101076/3	Decisions monitoring tariffs for the supply of gas to captive customers for the third quarter of 2002	05-09-02

NO.	DECISION	DATE
101197 to 101221	Tariffs for the supply of gas to captive customers for the year 2003	21-11-02
101386/4 to 101410/5	Decisions monitoring tariffs for the supply of gas to captive customers for the fourth quarter of 2002	24-12-02

Decisions of the Director of DTe in relation to the granting of gas licences

NO.	DECISION	DATE
101044/12	Licence pursuant to Section 22 to Eneco Energiehandelsbedrijf B.V.	25-10-02
101043/12	Licence pursuant to Section 22 to Eneco Mixed Holding Consumenten B.V.	25-10-02
101040/15	Licence pursuant to Section 22 to Essent Retail Energie B.V.	13-12-02

Decisions of the Director of DTe issuing binding instructions in relation to gas

NO.	DECISION	DATE
100544/22	Decision amending the decision issuing binding instructions to Westland Energie Infrastructuur B.V. in relation to the indicative tariffs and conditions for 2002	17-01-02
100520/22	Decision amending 26 decisions issuing binding instructions to gas network managers gas in relation to the indicative tariffs and conditions for 2002	25-01-02
100554/31	Decision amending the binding instructions pursuant to Section 13 (3) issued to N.V. Nederlandse Gasunie	15-02-02
100547	Decision in respect of petitions by VEMW, VNCI, VOEG and FME-CWM for the issuing of binding instructions to NAM in respect of the gas storage facilities at Norg and Grijpskerk	25-03-02

Decisions of the Director of DTe to issue orders subject to a penalties in respect of gas

NO.	DECISION	DATE
100554	**Decision to issue an order subject to a penalty to Gasunie in relation to non-compliance with the Guidelines for Gas Transmission for 2002 (petition made by VEMW and PT dismissed)**	**17-09-02**

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Decisions on administrative appeals Director of DTe gas

NO.	DECISION	DATE
100249/52	Decision on the administrative appeals brought against the Decision of 23 May 2001, with reference number 100249/34, in respect of petitions for the issuing of binding instructions to Nederlandse Gasunie	27-03-02
100581/12	Decision on the administrative appeal brought against the Decision of 8 October 2001 with reference number 100581/3, in respect of a petition made by Nederlandse Gasunie for the provision of information, pursuant to the Government Information (Public Access) Act	09-04-02
100579/16 100580/15	Decision on the administrative appeals brought against the Decision of 8 October 2001 with reference number 100579/3 and 100580/3, in respect of a petition made by Nederlandse Gasunie for the provision of information, pursuant to the Government Information (Public Access) Act	07-06-02
100582/16	Decision on the administrative appeal brought against the Decision of 9 november 2001 with reference number 100582/3 in respect of a petition made by Nederlandse Gasunie for the provision of information, pursuant to the Government Information (Public Access) Act	27-06-02
100520/63	**Decision on the administrative appeals brought against the Decision of 19 December 2001, with reference number 100520/11, for the issuing of binding instructions, as referred to in Section 13 (3) of the Gas Act, to Netbeheer Centraal Overijssel and against the Decision of 25 January 2002 in respect of the amendment of the binding instructions issued on 19 December 2001**	**30-08-02**

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Summaries

NO.	DECISION	DATE
100521/47	Decision on the administrative appeals brought against the Decision of 19 December 2001 with reference number 100521/10 for the issuing of binding instructions, as referred to in Section 13 (3) of the Gas Act, to DELTA Netwerkbedrijf Gas and against the Decision of 25 January 2002 in respect of the amendment of the binding instructions issued on 19 December 2001	30-08-02
100540/47	Decision on the administrative appeals brought against the Decision of 19 December 2001, with reference number 100540/13, for the issuing of binding instructions, as referred to in Section 13 (3) of the Gas Act, to Obragas Net and against the Decision of 25 January 2002 in respect of the amendment of the binding instructions issued on 19 December 2001	30-08-02
100541/32	Decision on the administrative appeals brought against the Decision of 19 December 2001 with reference number 100541/7 for the issuing of binding instructions, as referred to in Section 13 (3) of the Gas Act, to ONS Netbeheer and against the Decision of 25 January 2002 in respect of the amendment of the binding instructions issued on 19 December 2001	30-08-02
100542/45	Decision on the administrative appeals brought against the Decision of 19 December 2001, with reference number 100542/16, for the issuing of binding instructions, as referred to in Section 13 (3) of the Gas Act, to Elektriciteitsnetbeheer Utrecht and against the Decision of 25 January 2002 in respect of the amendment of the binding instructions issued on 19 December 2001	30-08-02
100543/44	Decision on the administrative appeals brought against the Decision of 19 December 2001, with reference number 100543/8, for the issuing of binding instructions, as referred to in Section 13 (3) of the Gas Act, to Rendo Netbeheer and against the Decision of 25 January 2002 in respect of the amendment of the binding instructions issued on 19 December 2001	30-08-02
100544/79	Decision on the administrative appeals brought against the Decision of 19 December 2001, with reference number 100544/15 for the issuing of binding instructions, as referred to in Section 13 (3) of the Gas Act, to Westland Energie Infrastructuur against the Decision of 17 January 2002, with reference number 100544/22, in respect of the amendment to the binding instructions of 19 December 2001 and against the Decision of 25 January 2002 in respect of the amendment of the binding instructions issued on 19 December 2001	30-08-02
100554/93	Decision on the objections raised by Nederlandse Gasunie, Vereniging voor Energie, Milieu en Water, Vereniging Chemische Industrie, Vereniging Vrijhandels Organisatie Elektriciteit en Gas and Vereniging FME-CWM as well as Vereniging Land- en Tuinbouworganisatie Nederland and Productschap Tuinbouw [Horticulture Marketing Board] against the Decision of 20 December 2001, with reference number 100554/15, for the issuing of binding instructions, as referred to in Section 13 (3) of the Gas Act to Gasunie	30-08-02
100522/81 100523/82 100524/55 100525/62 100526/55 100527/55 100528/55 100529/56 100530/59	Decisions on the administrative appeals against the Decisions of 19 December 2001, with reference numbers 100522/16, 100523/16, 100524/16, 100525/20, 100526/16, 100527/16, 100528/16, 100529/17, 100530/16, for the issuing of binding instructions, as referred to in Section 13 (3) of the Gas Act, to Eneco Netbeheer Amstelland B.V. et al. and against the Decision of 25 January in respect of the amendment of the binding instructions issued on 19 December 2001	30-08-02

	NO.	DECISION	DATE
Part 4 page 112 Summaries	100531/87 100532/77 100533/83 100534/78 100537/50	Decisions on the administrative appeals against the Decisions of 19 December 2001, with reference numbers 100531/14, 100532/12, 100533/13, 100534/13, 100537/12 for the issuing of binding instructions, as referred to in Section 13 (3) of the Gas Act, to Essent Brabant, Essent Friesland NW-ZO, Essent Limburg, Essent Noord and InfraMosane and against the Decision of 25 January 2002 in respect of the amendment of the binding instructions issued on 19 December 2001	30-08-02
	100535/51	Decision on the administrative appeals brought against the Decision of 19 December 2001, with reference number 100535/12, for the issuing of binding instructions, as referred to in Section 13 (3) of the Gas Act, to Netbeheerder Haarlemmermeer and against the Decision of 25 January 2002 in respect of the amendment of the binding instructions issued on 19 December 2001	30-08-02
	100538/51	Decision on the administrative appeals brought against the Decision of 19 December 2001, with reference number 100538/10, for the issuing of binding instructions, as referred to in Section 13 (3) of the Gas Act, to GNET Eindhoven and against the Decision of 25 January 2002 in respect of the amendment of the binding instructions issued on 19 December 2001	30-08-02
	100539/76	Decision on the administrative appeals brought against the Decision of 19 December 2001 with reference number 100539/12, for the issuing of binding instructions, as referred to in Section 13 (3) of the Gas Act, to Continuon Netbeheer (and against the Decision of 25 January 2002 in respect of the amendment of the binding instructions issued on 19 December 2001)	30-08-02
	100536/42	Decision on the administrative appeals brought against the Decision of 19 December 2001, with reference number 100536/10, for the issuing of binding instructions, as referred to in Section 13 (3) of the Gas Act, to Intergas Netbeheer and against the Decision of 25 January 2002 in respect of the amendment of the binding instructions issued on 19 December 2001	30-08-02
	100674/8	Decision on the administrative appeals brought by Vereniging voor Energie, Milieu en Water, Vereniging voor Nederlandse Chemische Industrie, Vereniging Vrijhandels Organisatie Elektriciteit en Gas and Vereniging FME-CWM for the failure to take a decision in time on their application for the issuing of binding instructions to Nederlandse Gasunie	14-10-02

Decision of the Director-General of the Netherlands Competition Authority on behalf of the Minister of Economic Affairs

	NO.	DECISION	DATE
Part 4 page 112 Summaries	100637/87	Decision on the administrative appeals brought against the Decision of 27 augustus 2001, No. 100350/148, in respect of the xt factor 2002/2003, as referred to in Section 26 Gas Act for licence holders	18-09-02

Decision of the Minister of Economic Affairs

NO.	DECISION	DATE
(100673/17)	Cost Recovery Scheme for the Energy Sector for 2001- Gasunie	28-06-02

Decisions of the Director of DTe pursuant to Sections 11 and 82 Gas Act

NO.	DECISION	DATE
100388/163 to 100388/190	Decisions pursuant to Section 11 of the Gas Act in respect of the regional gas network managers	04-11-02
100934/13 to 100934/37	Decisions on the application of conditions, as referred to in Section 82 of the Gas Act in respect of the regional gas network managers	24-12-02 31-12-02

Advice given to the Minister by the Director of DTe

NO.	DECISION	DATE
	Exemptions pursuant to Section 15 of the Electricity Act of 1998	
100698	Tuinbouwcombinatie Harmelerwaard B.V.	07-05-02
100585	Industrial Park Vlissingen B.V.	15-05-02
100946	Nederlands Omroepproductie Bedrijf (no advice; application settled by letter)	22-05-02
100759	Air Products Nederland B.V.	28-05-02
100802	Leemberg Houdster Maatschappij B.V.	24-05-02
100833	D.E.S. Heijmans Malden B.V.	24-05-02
100839	Aquadelta Beheer B.V. II	28-05-02
100748	NS Railinfrabeheer	14-06-02
100872	De Groot Den Hoet B.V.	14-06-02
100951	PME Adviesbureau on behalf of Waterschap Hunze & Aa's (no advice; application settled by letter)	24-06-02
100549	Utrecht University	15-07-02
101041	Emmtec Services B.V. (no advice; application settled by letter)	12-08-02
101413	Utility Support Group	15-11-02
	Consent to the appointment of gas network managers	
100185	B.V. Netbeheer Haarlemmermeer	22-01-02
100937	Delta Netwerkbedrijf Gas B.V.	24-04-02
100170	Delta Gas Grid B.V.	24-04-02
	Privatisation of gas	
100753	Obragas B.V.	23-05-02 06-08-02
100927	Intergas (application dismissed)	04-10-02
	Price cap in relation to the supply of electricity	
100880	Second revised decision on the administrative appeal in relation to the X factor for the supply of electricity following the ruling of the Trade and Industry Appeals Tribunal in the case of N.V. Rendo of 6 February 2002.	28-06-02
	Audits of electricity grid and gas network managers	
100904/9	Interim report on the audits of electricity grid and gas network managers and recommendations	20-12-02

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Advice given to the Minister of Economic Affairs

Overview of Court Rulings in 2002

Court rulings in relation to the Competition Act

Rulings of the Administrative Court

COURT	DATE	CASE	NO.	SUBJECT
Rotterdam	06-02-02	Mayor and Aldermen of the Municipality of Roosendaal versus the Director-General of NMa with Mr J.A. Velenturf ex officio as a third party, Stichting Academie voor Kunstzinnige Vorming	MEDED 99/ 1506-SIMO	*Judicial appeal declared inadmissible; no interest (in the proceedings); no dispute in respect of a decision of an administrative body.*
Rotterdam	06-02-02	Mr J.A. Velenturf ex officio, Stichting Academie voor Kunstzinnige Vorming and Director-General of NMa with the Municipality of Rossendaal as a third party	MEDED 99/ 1488-SIMO	*Judicial appeal against the dismissal of the complaint against the Muziekschool [Music School] and the School voor Expressie [School for Expression] in Roosendaal; judicial appeal unfounded.*
Rotterdam	25-02-02	Snelcore versus Director-Generalof NMa with Vereniging Bloemenveilingen in Nederland [association of flower auctions in the Netherlands] as a third party	MEDED 00/ 2266-SIMO	*The administrative appeal brought by Snelcore was declared inadmissible in the judicial appeal since Snelcore was wrongfully deemed to be an interested party in the administrative appeal.*
Rotterdam	25-02-02	Schuitema N.V., Koninklijke Ahold N.V. versus Director-General of NMa	MEDED 00/ 1848-SIMO and MEDED 00/ 1849-SIMO	*The judicial appeals were declared inadmissible, since the plaintiffs do not have an interest (in the proceedings) in respect of the judicial appeals.*
Rotterdam	03-04-02	United Technologies Corporationand Director-General of NMa	MEDED 00/ 1850-SIMO	*Concentration control; sufficient concrete intention; option agreement; legally binding agreement; judicial appeal unfounded*
Rotterdam	10-04-02	Coöperatieve Verkoop- en Productievereniging van Aardappelmeel en Derivaten 'AVEBE' and the Director-Generalof NMa with Nederlands Elektriciteits Administratie-kantoor B.V. (legal successor of N.V. Samenwerkende elektriciteits-productiebedrijven) as a third party	MEDED 00/ 2052-SIMO and MEDED 00/ 2317-SIMO	*Judicial appeals against the ruling that the notices of administrative appeal against the dismissal of an application for exemption on the grounds that Section 6 of the Competition Act was not applicable and against the dismissal of a complaint against Nederlands Elektriciteits Administratiekantoor B.V. (the legal successor of N.V. Samenwerkende elektriciteitsproductiebedrijven) were inadmissible; judicial appeals unfounded.*
Rotterdam	17-05-02	J. Keizer and Director-General of NMa	AWB 02/86 BB	*Judicial appeal declared inadmissible, due to the failure of the party that submitted the notice of appeal to pay court levies*

COURT	DATE	CASE	NO.	SUBJECT
Rotterdam	29-05-02	X and Director-General of NMa	MEDED 01/179	*Judicial appeal declared inadmissible due to the absence of an interest in the proceedings.*
Rotterdam	05-06-02	W.E. van Benthem and Director-General of NMa with ABN-AMRO Holding N.V. as a third party.	MEDED 99/ 2786-SIMO	*Judicial appeal declared inadmissible, since the plaintiff is not an interested party.*
	04-07-02	VBBS	2414	*Judicial appeal withdrawn by the parties.*
	12-07-02	ONT (dental prostheses)	1947	*Judicial appeal withdrawn by the parties.*
Rotterdam	12-08-02	A.F. van Hecke and Director-General of NMa	AWB 02/15 T1	*Judicial appeal declared inadmissible, due to the failure of the party that submitted the notice of appeal to pay court levies.*
Rotterdam	06-09-02	Vodafone Libertel N.V. and the Director-General of NMa	VMEDED 02/ 2057-RIP	*Application for a preliminary injunction; the court that heard the application declared that it was not competent to deal with it due to the fact that no decision had been taken, in terms of Section 1:3 (1) of the General Administrative Law Act.*
Rotterdam	**11-09-02**	**Vodafone Libertel N.V. and Unipart Group Ltd. and Director-General of NMa**	**MEDED 00/ 2176-SIMO, MEDED 00/ 2177-SIMO and MEDED 00/ 2190-SIMO**	***Judicial appeal by Libertel against NMa's refusal to grant an exemption to Libertel for Articles 6 (7) and 16 (2) of the Service Provider Agreement; Libertel's appeal was declared well founded. Appeal by Unipart against the declaration that a notice of administrative appeal against the ruling of the Director-General of NMa that Articles 6 (4) and 16 (1) of the Service Provider Agreement were not in conflict with Section 6 of the Competition Act was inadmissible and the appeal against the declaration that a notice of administrative appeal against the refusal to process further a complaint against Libertel was inadmissible; judicial appeals by Unipart inadmissible due to a lack of interest in the proceedings.***
Rotterdam	23-10-02	X and the Executive Board of the Mondriaan Stichting	BELEI 01/ 1188-SIMO	*Article 3 (1), preamble and (g) of the EC Treaty, in conjunction with Article 10 of the EC Treaty, in conjunction with Article 82 of the EC Treaty; (joint) dominant position; relevant market; no reason to appoint an expert; judicial appeal unfounded.*
Rotterdam	13-11-02	Gilde Investment Management B.V. and Director-General of NMa	MEDED 01/ 1913-SIMO	*Judicial appeal against the ruling by the Director-General of NMa that the non-competition clause in the notification of the concentration cannot be regarded as a subsidiary restriction; judicial appeal unfounded.*

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Court Rulings

	COURT	DATE	CASE	NO.	SUBJECT
Part 3 page 76 Court Rulings	**Rotterdam**	**26-11-02**	**Nederlandse Elektriciteits Administratiekantoor B.V. as the legal successor of N.V. Samenwerkende elektriciteitsproductiebedrijven (SEP) and Director-General of NMa Norsk Hydro Energy B.V. and Hydro Agri B.V. as third parties**	**MEDED 00/ 1002-SIMO**	***Judicial appeal against a fine imposed by the Director-General of NMa on SEP due to an infringement of Section 24 (1) of the Competition Act; judicial appeal unfounded.***
Part 3 page 75 Court Rulings	**Rotterdam**	**11-12-02**	**Nederlandse Omroep Stichting (NOS), Holland Media Groep S.A. (HMG) and Director-General of NMa with N.V. Holding Maatschappij De Telegraaf as a third party**	**MEDED 01/ 2430-RIP MEDED 01/ 2474-RIP**	***Judicial appeals against the ruling by the Director-General of NMa that NOS and HMG abuse their dominant position; judicial appeal by the NOS are unfounded; judicial appeal by HMG well founded.***
	Rotterdam	24-12-02	Snitjer B.V. and BAM NBM Wegenbouw Noordoost B.V. and d-g NMa	VMEDED 02/ 3358-MES	*Application for a preliminary injunction; the court that heard the case is of the opinion that this was not a decision, in terms of Section 1:3 (1) of the General Administrative Law Act; the application for a preliminary injunction was dismissed.*

TRADE AND INDUSTRY APPEALS TRIBUNAL (CBB)	DATE	CASE	NO.	SUBJECT
CBb	30-01-02	Dutchtone versus the ruling of the Court of Rotterdam of 2 May 2000 in the proceedings between Dutchtone and the Secretary of State for Transport and Water Management	ÀWB 00/794	*No conflict with Article 86 (1) of the EC Treaty in conjunction with Article 82 of the EC Treaty; no conflict with Section 88 (3) of the EC Treaty in conjunction with Article 87 of the EC Treaty.*
CBb	27-02-02	N.B.A. Discoservices (trading under the name of Nederland F.M.) and Arrow Classics against the ruling of the Court of Rotterdam of 11 November 1999 in the proceedings between the appellants and the Secretary of State for Transport and Water Management	AWB 99/1039 and 99/1053	*Allocation of frequencies; decision on market division schemes.*
CBb	19-06-02	Van Vollenhoven Olie B.V., appellant on appeal against the ruling of the Court of Rotterdam of 1 August 2001 in proceedings between the appellant and the Director-General of NMa with Municipality of Venlo and Schreurs Oliemaatschappij B.V. as third parties	AWB 01/753	*Section 8:29 of the General Administrative Law Act; the restriction on disclosure of confidential documents sought by NMa is partially justified and partially not justified.*
CBb	26-06-02	J.A. Marion, appellant against the ruling of the Court of Rotterdam of 5 February 2002 against the appellant's opposition to the ruling of the Court of 11 September 2000.	AWB 02/131	*The judicial appeal was declared inadmissible, as the party that submitted the notice of judicial appeal failed to pay the Court levy.*

TRADE AND INDUSTRY APPEALS TRIBUNAL (CBB)	DATE	CASE	NO.	SUBJECT
CBb	03-07-02	F. Verlhuijsen trading in the name of 'Verkeersschool Cees Velthuijsen', appellant against the ruling of the Court of Rotterdam of 12 April 2000 in proceedings between appellant and the Director-General of NMa	AWB 00/429	*Concept of an undertaking; the Trade and Industry Appeals Tribunal upheld the ruling of the Court of Rotterdam of 12 April 2000 (MEDED 99/382-SCR and MEDED 99/459-SCR)*
CBb	17-09-02	Stichting Saneringsfonds Varkensslachterijen [foundationfor the restructuring of pig abbatoirs]	1906	*The judicial appeal was withdrawn by the parties.*
CBb	27-09-02	Essent Zuid B.V. and Edon Groep B.V., appellants against the ruling of the Court of Rotterdam of 21 June 2001 in proceedings between appellants and the Director-General of NMa	AWB 01/633	*The Trade and Industry Appeals Tribunalupheld the ruling of the Court of Rotterdam of 21 June 2001 (MEDED 99/2633-SIMO)*

ADMINISTRATIVE LAW DIVISION OF THE COUNCIL OF STATE	DATE	CASE	NO.	SUBJECT
Administrative Law Division of the Council of State	22-05-02	Appellant against the ruling of the Court of Rotterdam of 14 June 2001 in proceedings between the appellant and the Executive Board of the Mondriaan Stichting	200103900/1	*The ruling of the Court of Rotterdam of 14 June 2001 (BELEI 99/1218-SIMO) is upheld; the judicial appeal is declared unfounded.*

Rulings by the Civil Law Court

COURT	DATE	CASE	NO.	SUBJECT
The Hague	17-01-02	Aucon B.V. vs Stichting Centraal Bureau Rijvaardigheids-bewijzen	KG 01/1431	*Infringement of Section 24 of the Competition Act (abuse of a dominant position) is granted; undertaking (public/private task)*
Groningen	12-02-02	Bond van de Generieke Genees-middelen Industrie Nederland (BOGIN) et al. and OWM Geové RZG Zorgverzekeraar U.A.	61856 KGZA 02-430	*Employee contracts; refundable medical expenses.*
Utrecht	14-02-02	Coöperatieve Inkoopvereniging Superunie B.A. vs Interpay Beanet B.V. and Interpay Nederland B.V.	139811 / KG ZA 01-1304/RS	*Section 24 of the Competition Act; abuse of a dominant position; discriminatory discounts; further investigation required; no scope for such investigation in the proceedings.*
Leeuwarden	27-02-02	Kooistra Damwoude Beheer B.V. vs V.o.f. Fokkinga et al.	45937 / HA ZA 01-317	*Non-competition clause; restricts competition by nature; decision granting exemption for the branch protection agreement.*

COURT	DATE	CASE	NO.	SUBJECT
Zutphen	07-03-02	Plaintiff vs defendant et al.	29288 / HA ZA 99-1178	*Sections 6 and 24 of the Competition Act; Medicines (Supply) Act [Wet op de geneesmiddelenvoorziening]; abuse of a market position.*
Zutphen	28-03-02	Plaintiff vs defendant	29286 / HA ZA 99-1177	*Medicines (Supply) Act [Wet op de geneesmiddelenvoorziening]; abuse of a market position; unlawful acts.*
The Hague	03-04-02	Vereniging Bergers Belangen et al. vs State of the Netherlands et al.	KG 02/264	*Tendering of salvaging contracts; EC Services Directive does not apply.*
The Hague	24-04-02	Stichting Regionale Advies Commissie Regio 7 et al. vs Onderlinge Waarborg-maatschappij Nuts Zorg-verzekeraar U.A.	KG 02/380	*Section 6 of the Competition Act; collective agreements in the healthcare sector are on prices to be billed; prijsonderhandelingen. unimpeded price negotiations.*
The Hague	29-05-02	Algemene Service en Verkoop-maatschappij Arnhemse Poort vs B.P. Direct V.o.f. et al.	00/1417	*Non-competition clause; regulation lasting longer than five years; 2790/1999.*
Haarlem	11-06-02	Plaintiff vs the mutual insurance company Groene Land PWZ Zorgverzekeraar U.A. trading under the name of PWZ Achmea	82933 / KG ZA 02-227	*Sections 6, 16 and 24 of the Competition Act; care capacity; refusal to grant an employee contract; no abuse of a dominant position; NMa's Consultation Document Guidelines for the Healthcare Sector.*
Amsterdam	13-06-02	Grolsche Bierbrouwerij Nederland B.V. vs Stichting Onroerend Goed Lanx and Stichting Sociëteit Lanx'91	KG 02/905 P	*Section 6 of the Competition Act; vertical agreement; beer supply contract; purchase clause.*
's-Hertogen-bosch	10-09-02	Holland Security Group C.V. vs Veiligheidsdienst Noord-Brabant B.V. et al.	84068/KG ZA 02-518	*Section 6 of the Competition Act; non-competition clause.*
Arnhem	12-09-02	Houterman Lent B.V. vs Van de Coolwijk V.o.f.	81202 / HA ZA 01-2083	*Exclusive right to give assistance first to stranded motorists; no unlawful acts.*
Assen	19-09-02	B.J.A. Hobbelink and A.T.M. Oude Tijdhof vs Zuivelcoöperatoe De Zeven Provinciën U.A.	38327	*Section 6 of the Competition Act; discount on milk payments due to not having quality certification.*
The Hague	**01-10-02**	**Vodafone Libertel N.V. vs State of the Netherlands (Ministry of Economic Affairs or, alternatively, Director-General of NMa)**	**KG 02/1016**	***The petition for a provisional ruling against the publication of a report by the Director-General of NMa is granted.***
Rotterdam	28-11-02	Van Ommeren Agencies Rotterdam B.V. et al. vs the Municipality Rotterdam.	106848/98-3016/HA ZA	*Section 24 of the Competition Act and Article 82 of the EC Treaty; abusive pricing/excessive profits/discriminatory pricing; provisional judgement, the Court appoints experts.*

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COURT OF APPEAL	DATE	CASE	NO.	SUBJECT
Arnhem	12-03-02	Renault Nissan Nederland N.V. vs Autobedrijf X in Almelo	2002/52 KG	*Termination of a (car) dealership agreement in the case in question does not contravene the applicable EC Regulation (Reg. 1475/95) nor is it unreasonable or unfair.*

COURT OF APPEAL	DATE	CASE	NO.	SUBJECT
's-Hertogen-bosch	23-04-02	Brasserie de Bout V.o.f. et al. vs Discomat V.o.f. et al.	C0100013/HE	*Section 6 of the Competition Act; agreement for the trade of gaming machines; exclusivity clause; length of the period of notice.*
Arnhem	27-08-02	X et al. vs defendant (appeal in interlocutory proceedings against the ruling of the Presiding Judge of the Court of Arnhem of 28 August 2001)	2001/793 KG	*Exclusive right to give assistance first to stranded motorists; no unlawful infringement by X of an exclusive right granted to the defendant; the ruling of the Court of Arnhem of 28 August 2001 (74602/KG ZA 01-310) is reversed.*
The Hague	03-10-02	Vereniging Bergers Belangen et al. vs the State of the Netherlands et al.	02/497	*Tendering of salvaging contracts; EC Services Directive does not apply; initial salvaging and further transportation.*

SUPREME COURT	DATE	CASE	NO.	SUBJECT
Supreme Court	25-01-02	Etos B.V. vs Parfums Christian Dior S.A.	C00/131HR	*Benelux Trade Mark Act; Directive 89/104/EC; Article 81 of the EC Treaty; insufficient evidence and circumstances established to provide a basis for a possible application of onderzoek naar de mogelijke Article 81 of the EC Treaty.*
Supreme Court	15-02-02	Jack Daniel's Properties Inc. vs Kamstra International et al. B.V. e.a. Kamstra International B.V. Kamstra International B.V. cs Jack Daniel's Properties Inc. Willem Adriaan Blijdorp vs Jack Daniel's Properties Inc.	C00/136HR C00/151HR C00/151HR	*Benelux Trade Mark Act; Directive 89/104/EC; Article 81 EC Treaty; the exercising of a rights to a trademark which has not lapsed does not in itself lead to the conclusion of that action has been taken in conflict with Article 81 of the EC Treaty.*

Court rulings in relation to the Electricity Act of 1998 and the Gas Act

COURT	DATE	CASE	NO.	SUMMARY OF THE RULING
Zwolle (Civil)	02-01-02	Petroplus Power B.V. vs Edon Energie Contracten (trading under the name of Traedon) and Essent Energy Trading B.V.	55971 / HA ZA 00-447	*Price compression agreement in swing contract; no unlawful acts.*
Assen (Civil)	19-02-02	N.V. Nuon Energie-onderneming voor Gelderland, Friesland en Flevoland et al. vs Nederlandse Aardoliemaatschappij B.V.	27897	*Tariffs; Section 51 of the Electricity Act; the Court will allow NAM to inform NMa by deed whether it has or will make an application in respect of its complaint that Nuon et al. abused its dominant position.*
Almelo (Administrative Law Section)	16-07-02	N.V. Delta Nutsbedrijven vs Windpark Terneuzen (WPT)	51479 KG ZA 153	*Transfer of green certificates; on the basis of the nature and contents of the contract, as well as on the basis of the further considerations of reasonableness and fairness, WPT should issue its green certificates to Delta; Delta petition is granted.*

COURT	DATE	CASE	NO.	SUMMARY OF THE RULING
Assen (Civil)	06-08-02	N.V. Nuon Energie-onderneming voor Gelderland, Friesland en Flevoland and N.V. Continuon Netbeheer (formerly N.V. Nuon Transport) vs Nederlandse Aardoliemaatschappij B.V.	27897	*NAM stated that it had not approached NMA with its complaint. Consequently the Court cannot establish whether NMA's complaints in respect of the tariffs used by Nuon et al. are well founded.*
Leeuwarden (Administrative Law Section)	08-08-02	N.V. Nuon Duurzame Energie vs the partnership B. Bosma and 19 other parties (defendants)	520930 KG ZA 02-210	*The defendants are not obliged by the contract to supply sustainable energy to Nuon; Nuon's petition dismissed.*
's-Hertogen-bosch (Civil)	25-09-02 (interim ruling 21-09-01)	State of the Netherlands vs . N.V. Elektriciteitsproductie-maatschappij Zuid-Nederland (EPZ)	HA ZA 01-0125	*The State was not able to show that the State and SEP (EPZ) entered into an agreement under civil law in 1994, whereby it was agreed that KCB would finally be closed on 1 January 2004 at the latest. The petition was dismissed.*
Part 3 page 79 Court Rulings	**The Hague (Administrative Law Section)**	**10-10-02**	**Productschap Tuinbouw [Horticulture Marketing Board] and Director of DTe**	**AWB 01/ 3091 BESLU**	***Gas Act in relation to the Government Information (Public Access Act) [Wet openbaarheid bestuur]; judicial appeal well founded.***

TRADE AND INDUSTRY APPEALS TRIBUNAL (CBB)	DATE	CASE	NO.	SUBJECT
CBb	30-01-02	Enron Nederland B.V. vs TenneT	AWB 00/170 en 00/287	*Refusal of transmission capacity by TenneT is not a decision; Trade and Industry Appeals Tribunal declares itself incompetent to deal with this case.*
CBb	30-01-02	Frigem Leveringsbedrijf N.V. et al. vs the Minister of Economic Affairs	AWB 01/57, 01/70, 01/76 en 01/77	*Setting of tariffs for 2000; Protocol Agreement; remaining component does not as such result in an increasing costs; judicial appeals declared unfounded.*
Part 3 page 78 Court Rulings	**CBb**	**06-02-02**	**N.V. RENDO en RENDO Holding vs Minister of Economic Affairs**	**AWB 01/623**	***Judicial appeal against tariff decision, pursuant to Section 58 of the Electricity Act; judicial appeal partly inadmissible and partly unfounded.***
CBb	27-02-02	Vereniging van de Nederlandse Chemische Industrie vs Minister of Economic Affairs	AWB 99/914	*Setting of (maximum) the tariffs for 1999; Sections IV and V of the Act of 3 June 1999, 25-27 of the Electricity Act; Section 75a of the Electricity Act; judicial appeal unfounded.*
CBb	15-04-02	B.V. Netbeheer Haarlemmer-meer vs Director of DTe	AWB 02/220	*Section 8:84 (4) in conjunction with Section 8:75a (1) of the General Administrative Law Act; petition for the awarding of legal costs; petition granted.*
CBb	15-04-02	Obragas Net B.V. vs Director of DTe	AWB 02/209	*Section 8:84 (4) in conjunction with Section 8:75a (1) of the General Administrative Law Act; petition for the awarding of legal costs; petition granted.*

TRADE AND INDUSTRY APPEALS TRIBUNAL (CBB)	DATE	CASE	NO.	SUBJECT
CBb	15-04-02	Intergas Netbeheer B.V. vs Director of DTe	AWB 02/221	*Section 8:84 (4) in conjunction with Section8:75a (1) of the General Administrative Law Act; petition petition for the awarding of legal costs; petition granted.*
CBb	02-08-02	Electrabel et al. vs Minister of Economic Affairs	AWB 00/545	*The administrative appeal of Electrabel et al. is declared inadmissible in the judicial appeal since the decision of tariff bases is a generally applicable regulation against which it is not possible to lodge an administrative appeal/judicial appeal.*
CBb	02-08-02	Vereniging voor Energie, Milieu en Water vs Director of DTe	AWB 00/564	*Section 33 of the Electricity Act; consultation; Section 36 of the Electricity Act; in compensation for alleged disadvantage to decentralised producers is provided for by the possibility of deviating from the Tariff Code in individual cases; passing on the costs of a further high-voltage grid in the system services tariff is not in conflict with Section 16 (2) in conjunction with Section 3 (1) of the Electricity Act; judicial appeal unfounded.*
CBb	02-08-02	Productschap Tuinbouw [Horticulture Marketing Board] vs Director of DTe	AWB 00/635	*Section 33 of the Electricity Act; consultation; Section 36 of the Electricity Act; in compensation for alleged disadvantage to decentralised producers is provided for by the exemption of the National Uniform Producers' Tariff (LUP); judicial appeal unfounded.*
CBb	02-08-02	Shell Nederland Raffinaderij B.V. and Shell Nederland Chemie B.V. vs Director of DTe	AWB 00/640	*Section 33 of the Electricity Act; consultation; passing on the costs of a further high-voltage grid in the system services tariff is not in conflict with Section 16 (2) in conjunction with Section 3 (1) of the Electricity Act; judicial appeal unfounded.*
CBb	02-08-02	Electrabel Nederland N.V, et al. vs Director of DTe	AWB 00/641	*Tariff Code; producers' tariff; Section 27 of the Electricity Act; Articles 28 and 90 of the EC Treaty; Section 82 in conjunction with Article 86 EC Treaty; Articles 87 and 88 (3) of the EC Treaty; judicial appeal unfounded.*

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Court Rulings

	TRADE AND INDUSTRY APPEALS TRIBUNAL (CBB)	DATE	CASE	NO.	SUBJECT
Part 3 Page 79 Court Rulings	CBb	02-08-02	Nederlands Administratiekantoor B.V. vs directeur DTe	AWB 00/642	*The administrative appeal of Nederlands Administratiekantoor is declared inadmissible in the judicial appeal since Nederlands Administratiekantoor was wrongly deemed to be an interested party in the administrative appeal.*
	CBb	02-08-02	Essent N.V. et al. vs Director of DTe	AWB 00/644	*Section 3.10.2 Tariff Code includes elements which are not consistent with the CPI-x regulatory method contained in Section 41 of the Electricity Act; judicial appeal well founded.*
	CBb	02-08-02	Vereniging voor Energie, Milieu en Water vs Director of DTe	AWB 00/772	*It is possible to file a judicial appeal against a generally applicable regulation by appealing against the implementation decision; lack of motivation; judicial appeal well founded.*
	CBb	02-08-02	Electrabel Nederland N.V. vs Director of DTe	AWB 00/803	*It is possible to file a judicial appeal against a generally applicable regulation by appealing against the implementation decision; judicial appeal unfounded.*
	CBb	02-08-02	Nederlands Administratiekantoor B.V. vs Director of DTe	AWB 00/804	*It is possible to file a judicial appeal against a generally applicable regulation by appealing against the implementation decision; judicial appeal unfounded.*
Part 3 Page 78 Court Rulings	CBb	04-09-02	Vereniging voor Energie, Milieu en Water vs Director of DTe	AWB 00/698a	*Conditions in relation to programme management; judicial appeal unfounded insofar as this relates to enforcement of Section 3.2.11 of the System Code by the contested decision, unfounded*
	CBb	04-09-02	Vereniging Particuliere Windturbine Exploitanten and Connexion Project B.V. vs Director of DTe	AWB 00/681 and 00/682	*Introduction of the system of programme management for wind energy producers; judicial appeals unfounded.*
	CBb	04-09-02	Vereniging voor Energie, Milieu en Water vs Director of DTe	AWB 01/400	*Section 33 of the Electricity Act; Section 6.2 of the Grid Code, Sections 4.2.1, 4.2.2 and 4.2.3 of the System Code and Section 4.3 of the Measurement Code in conflict with Section 31 in conjunction with Section 36 of the Electricity Act; judicial appeal well founded.*

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Court Rulings

TRADE AND INDUSTRY APPEALS TRIBUNAL (CBB)	DATE	CASE	NO.	SUBJECT
CBb	**04-09-02**	**EnergieNed, Federatie van Energiebedrijven in Nederland and Westland Energie Infrastructuur B.V. vs Director of DTe**	**AWB 01/412**	***Investigation was reopened with the application of Section 19 of the Administrative Justice (Trade and Industrial Bodies) Act [Wet bestuursrechtspraak bedrijfsorganisatie] in conjunction with Section 8:68 of the General Administrative Law Act.***
CBb	**04-09-02**	**Electrabel Nederland B.V. vs Director of DTe**	**AWB 01/413**	***Various parts of the of the Electricity Act, Grid Code and System Code; judicial appeal well founded and the contested decision is partially reversed.***
CBb	**04-09-02**	**B.V. Nederlands Elektriciteit Administratiekantoor vs Director of DTe**	**AWB 00/712**	***Section 7 of the Electricity Act; Section 5.6.5 (e) of the Grid Code; no exception to the requirement of confidentiality contained in Section 79 of the Electricity Act beyond the provision for this in Electricity Act itself; judicial appeal unfounded.***
CBb	02-10-02	N.V. REMU Houtstermaatschappij and N.V. REMUHoutstermaatschappij Gasbedrijf Centraal Nederland vs the Minister of Economic Affairs	AWB 02/344	*The Minister withheld his consent to the sale and transfer of shares in REMU N.V. to Endesa S..A.; the 'Policy Rules for the Privatisation of Energy Distribution Companies' ['Beleidsregels privatisering energiedistributiebedrijven'] are binding and there are no grounds for deviating from the policy rules; judicial appeal unfounded.*
CBb	18-10-02	Vereniging van Energie, Milieu en Water vs Director of DTe	AWB 01/818	*Section 5.6.1.4 Grid Code; Section 31 (3) of the Electricity Act; Section 32 (2) of the Electricity Act; Amendment of the Grid Code is necessary; Section 5.6.9.4 of the Grid Code does not provide a basis for drawing up safety regulations; judicial appeal well founded.*
CBb	25-10-02	TenneT B.V. and EnergieNed, Federatie van Energiebedrijven in Nederland vs de Director of DTe	AWB 00/724 and 00/725	*Debt collection risk of the system service tariffs; reversed on the grounds of a lack of justification; legal consequences not left intact because there was sufficient research into the debt collection and administration costs.*

	TRADE AND INDUSTRY APPEALS TRIBUNAL (CBB)	DATE	CASE	NO.	SUBJECT
	CBb	13-11-02	Vereniging voor Energie, Milieu en Water, Amsterdam Power Exchange Spotmarket B.V. and N.V. Eneco vs Director of DTe, with Nederlands Elektriciteit Administratiekantoor (NEA) as a third party with an interest in the proceedings	AWB 00/698B, 00/709 and 00/710	*Chapter 5.6 of the Grid Code; Trade and Industry Appeals Tribunal requests the Court of Justice of the EC for a preliminary decision on the applicability of Article 86 (2) of the EC Treaty in relation to the settlement of SEP's obligations and the explanation of Article 7 (5) of the Electricity Director of in relation to making a distinction in granting access to the grid by means of technical regulations; a decision was deferred.*
Part 3 Page 78 Court Rulings	**CBb**	**13-11-02**	**Netbeheer Centraal Overijssel B.V., ONS Netbeheer B.V., Elektriciteitsnetbeheer Utrecht B.V., ENET Eindhoven B.V., Eneco Netbeheer B.V., Eneco Edelnet Delfland B.V., Eneco Netbeheer Midden-Holland B.V., B.V. Netbeheer Zuid-Kennemerland, N.V. Rendo Holding and Rendo Netbeheer B.V., Delta Netwerkbedrijf B.V., N.V. NuonNet (in formation), EWR Netbeheer B.V., N.V. Continuon Netbeheer B.V., Noord West Net N.V. vs the Director of DTe**	**AWB 01/841, 01/847 to 853, 01/955, 01/956**	***Section 41 of the Electricity Act 1998 only allows for the setting of a generic x factor; judicial appeal is partially inadmissible, partially well founded.***

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Relocation
In the spring of 2002, NMa moved to the Muzentoren in the centre of The Hague. The Legal Department of NMa moved into the Zurichtoren earlier. As a result of the continuing growth of NMa, it was necessary to occupy an additional floor of the Zurichtoren during 2002, which now accommodates the Merger control Department.