2001

Annual Report of NMa and DTe for 2001

Netherlands Competition Authority

NMa

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Foreword

This is the Annual Report for 2001 of the Netherlands Competition Authority *(Nederlandse Mededingingsautoriteit, NMa)* and the Office for Energy Regulation *(Dienst uitvoering en toezicht Energie, DTe)*, which operates as a chamber of NMa.

NMa fulfils a special task within the economic life of the country. The regulation of market processes gives expression to the fact that the *mandate of the market* is limited. Market players are able to exercise freedom in taking many decisions. The freedom enjoyed by entrepreneurs does not go so far, however, that companies may eliminate competition or exploit an absence of competition. The law in relation to market regulation sets boundaries in this regard. It focuses on situations characterised by centralisation of economic decision-making power. This involves companies with a monopoly or a dominant position, oligopolistic market relationships which have anti-competitive effects and agreements that restrain competition. It is not 'a mere trifle' but involves actual combating of the emergence of economic power. In concrete terms, the improved operation of market forces means greater freedom of choice, better products and favourable pricing for consumers. Where the market does not yet function, or does not function effectively, and where sector-specific regulations are in force, NMa and DTe strive to put into effect a fair method of simulating the market.

The processing of applications for exemption for agreements that restrain competition developed as planned in 2001. In various sectors, this involves challenging barriers to entry and removing other restraints on competition. There is now more room for actually investigating and instituting proceedings against hardcore cartels. The investigation into price formation on the petrol market in the Netherlands was the overture to this new stage in the life of NMa. DTe has implemented the Gas Act programme, a comprehensive package of tasks which sets out the rules of play on the gas market and has further clarified the rules for access to the electricity market. With regard to concentration control, companies increasingly make their own estimate of the likelihood that they will receive approval before notifying NMa of their intentions. This requires more proactive studies and provision of information by NMa.

This annual report gives insight into the way NMa, as a whole, strives to focus on the demands made on it and its priorities as an effective and professional organisation. The capacity that has been freed up is used to develop further methods for planned investigations into unacceptable competition practices. The supervision of compliance with the energy laws has been given a new impetus by developments in California and the liberalisation of the market for medium-sized customers. With the publication of the *Guidelines for Setting Fines*, NMa's sanctions policy has been clarified. A start has been made with the development of a leniency programme by starting a consultation procedure. Companies which provide NMa of their own accord with information on a cartel in which they participate may be granted fine immunity or a reduction in the fine subject to certain conditions.

NMa's relationship to citizens takes various forms. As taxpayers they may expect NMa to utilise the funds put at its disposal efficiently and effectively. In the case of consumers, NMa's activities may be expected to have a noticeable and positive effect on the way the markets for goods and services function. For entrepreneurs, NMa's activities have a variety of facets. On the one hand, the law imposes clear limitations on their freedom of action, insofar as this has a negative effect on competition or adversely affects the interests of customers. On the other hand, competition law promotes the accessibility of markets and prevents certain types of unfair competition which may be of considerable disadvantage to companies. The energy laws are a special extension of this. The specific cases dealt with often involve a variety of aspects. In the year under review, for instance, NMa has taken action against anti-competitive practices aimed at Tango, a newcomer to the petrol market. The action taken focused on a coordinated price campaign which offered consumers advantages in the short term. In the longer-term, the effects of these practices, against which NMa took action, would sooner have had the opposite effect, namely a less accessible market, fewer opportunities for the development of new methods of distribution and, partly as a result, higher prices and less choice for consumers.

Citizens not only express their interests and preferences through the market. It would therefore be naive to assume that the prosperity of our society only depends on the proper functioning of the market. The realisation that this is not the case is expressed in the call for competition policy to take into account so-called non-economic interests. Indeed, competition regulation may involve social interests which are not served by maximum freedom of competition. The Competition Act provides room to take these interests into account. It is therefore also an important challenge for competition policy to take into account adequately social values which are not expressed, or not expressed adequately, through the spontaneous interaction of market forces. In 2001, NMa once again demonstrated that it was aware of this responsibility.

With regard to investigations and the imposition of sanctions, the expectations society has of NMa are sometimes too great. Cartel investigations are often complicated and require endurance. To be effective, both

well-considered priorities, based partly on an assessment of the likelihood of a positive outcome to an investigation, and consistently pursuing a course of action that has been commenced are essential. Ad hoc policy changes and oversensitivity to the 'issue of the day' may detract from the effectiveness of the policy in both the short and the long term. On the other hand, where necessary, a regulator must take into account current developments. In the year under review, for instance, it appeared that there was serious cause for a far-reaching and sufficiently promising investigation into cartel agreements in the construction sector. With the targeting of ample funds, this investigation is now at full speed. To the extent that the suspicions may be substantiated with evidence, NMa's investigation may contribute to achieving the objective of the parliamentary commission of inquiry, namely, to end these practices.

For the effective supervision of compliance, balanced combinations of incentives are of considerable importance. Identifying infringements, issuing binding instructions and imposing a fine or a periodic penalty are not aims in themselves. These are instruments. The effective use of these instruments determines to a considerable extent the risks incurred by companies if they do not comply with the rules. The guidelines in relation to fines also contribute to the clarification and awareness of the risks. The leniency programme, which will be introduced in 2002, should also be viewed in this light. The investigation of infringements may be promoted by this and it may be possible to increase the risk of infringements to potential offenders. Together these instruments strengthen the preventive effect of our regulatory activities. In this way, we hope to promote compliance as effectively as possible through the optimal targeting of the relatively limited funds at our disposal.

The diversity of competition law is expressed, for instance, in the fact that, in principle, it embraces all sectors of the economy. In this regard, it appears that issues relating to competition can be derived from general principles, however exceptional some sectors may appear to be. This is the strength of generic competition law. In particular, it is the general cross-sector approach which avoids a situation where the regulator allows itself to be led too often by the 'exceptional' nature of the particular interests of the sector in question. This general approach is also of considerable importance in areas involving sector-specific regulations. As a rule, these are markets in transition in which – as in the case of networked industries – there are natural or *de facto* monopolies which require a permanent form of regulation. Precisely due to the combination of NMa, as the organisation with overall responsibility for the implementation of the Competition Act, and DTe, as the organisation specifically responsible for implementing the energy laws (and, in time, an Netherlands Transport Regulatory Authority for the various laws in relation to transport), good synergy can be achieved. As a result, on the one hand, regulatory capture on the part of a sector-specific regulator can be avoided and, on the other hand, the adage "where possible the market, regulation where necessary" can be put to practical effect in relation to sector-specific regulations. This does not detract from the fact that sector-specific supervision must again determine its position in relation to market players in each stage of the transitional process and find a suitable form for this.

This annual report concentrates on the experience of 2001, but sometimes also places recent experience in a broader framework by reflecting on what has, in fact, been achieved in the Dutch economy since 1998. This gives rise, as it were, to reference points which may play a role in accounting for the social contribution and the organisational effectiveness of NMa, which will also take place during the evaluations of the Competition Act, the Electricity Act of 1998 and the Gas Act planned for 2002.

A thorough and objective evaluation of this legislation is of considerable importance. After all, these are complex laws with far-reaching effects on society. Furthermore, it is important that the quality of their implementation is assessed. NMa has an effect on the market and society and has to keep its eyes open for developments in both the private and the public sector. We will therefore once again have to consider how we can best give form to our contacts with the relevant actors in society. The Bill granting NMa the status of an independent public authority regulates NMa's formal position in relation to Parliament and the ministers involved. In addition, informal contacts of various types are important in enabling us to know what society expects of us.

The visibility and relevance of NMa's work have helped NMa to position itself on the labour market as an attractive employer. It is gratifying and significant that NMa is able to recruit talented people who make a conscious choice for "work that is relevant and visible".

A.W. Kist
Director-General of the Netherlands Competition Authority

J.J. de Jong
Director of the Office for Energy Regulation

1 Central issues in 2001

1.1 Introduction

In 2001 NMa developed further as a proactive competition authority which investigates and combats restraints on competition. The processing of applications for transitional exemptions, which has almost been completed, provided NMa with a further opportunity to do so in 2001. In the year under review, DTe also took a proactive approach to stimulating the operation of market forces on the energy markets.

NMa's Mission

On the basis of the applicable legislation, NMa regulates the proper functioning of all markets for goods and services. NMa promotes competitive relationships which are ultimately to the advantage of customers and – partly for this purpose – of companies which, for example, are confronted with restraints on competition on entering the market.

DTe's Mission

DTe implements the Electricity Act of 1998 and the Gas Act. This chamber within NMa has as its specific mission the promotion of competition on the electricity and gas markets. This includes protecting customers from abuse of dominant positions. Even where the market cannot function without regulation (for instance, due to natural monopolies), DTe ensures the operation of market forces in these networked sectors.

1.2 Activities in 2001

1.2.1 *Important activities*

Naturally it is important for NMa to prioritise its activities. In this regard, within the framework of the Competition Act, as was indicated in the Annual Report for 2000, the following criteria were applied in 2001:
- economic importance
- importance to consumers
- the likelihood of proving that an infringement has occurred
- effectiveness in taking action
- seriousness of the suspected infringement.

A number of important activities carried out by NMa in 2001 will be discussed in this paragraph.

One of the most striking activities is the investigation into the way the **petroleum market functions**. In December 2001, NMa concluded that the price of fuel was artificially high as a result of the system of agreements between large petrol companies and independent filling station operators. The lack of competition between filling station operators means that consumers pay higher prices than necessary and that entry to the market for new market players is obstructed. As a rule, certain vertical agreements, such as those between producers and retailers, are exempted from the prohibition on cartels in accordance with the applicable European block exemption. Since the cumulative effect of the agreements on the Dutch market restrains competition to a considerable degree, NMa has expressed its intention to declare the exemption inoperative in relation to these agreements. As a result, the agreements would still be subject to the prohibition on cartels and, if the agreements remain in effect, this would constitute an infringement of the prohibition on cartels, for which NMa could impose a fine or some other sanction. After the parties involved have given their opinions, NMa will take its final decision. This decision will be taken in 2002.

Due to the thwarting of a newcomer, Tango, in the region of Nijmegen, NMa drew up a report on Texaco. Through a coordinated discount campaign involving four filling stations, Texaco tried to undermine Tango's position. In 2002, the Director-General of NMa will take a final decision on whether an infringement was committed and, if so, whether he should impose a fine or some other sanction. Since Texaco refused to offer its full cooperation during NMa's investigation, the maximum fine of EUR 4,545.50 (NLG 10,000) was imposed.

NMa has also started investigations into alleged cartel formation and the abuse of dominant positions in other areas. For instance, NMa started an investigation into the **mobile telephone branch**. When it was announced that most of the mobile telephone operators would further reduce their subsidies for the purchase of a telephone when customers take out a subscription, NMa initiated an investigation into the activities of the five mobile telephone companies, namely Libertel, Vodafone, KPN Mobile, Dutchtone, Telfort and Ben. NMa suspected that companies in the branch had entered into agreements with each other with regard to the level of these subsidies, which constitutes an infringement of the Competition Act. This is tantamount to price increases without incurring commercial risk. In 2002, NMa will conclude its investigation into this suspected infringement of the Competition Act. If it is established that an infringement did occur, the Director-General of NMa may impose a fine on the companies involved.

At the end of 2001, NMa started an investigation into possible cartel agreements in the **construction sector** in relation to tenders. NMa regarded and continues to regard the construction sector as one of the sectors requiring additional attention. The investigation started immediately after NMa obtained the so-called 'Bos parallel accounts'. With regard to tendering schemes in the painting sector, NMa once again decided at the end of 2001 that these schemes, including an anti-peddling scheme, restrained competition and were therefore prohibited.

The **financial market** was another area of attention to which NMa gave priority. The banking sector is of interest to NMa from the perspective of competition partly because of its high degree of concentration. A special project team has now been set up to investigate the possible abuse of a dominant position by Interpay, which was set up by the most important banks in the Netherlands to facilitate payments traffic. In 2001, NMa started dealing with a complaint by MKB-Nederland, the association of small and medium-sized enterprises, against Interpay in relation to the conversion of PIN terminals during the introduction of the euro.

After carrying out an investigation, NMa concluded that the exchange of information between banks in settling the cost of processing giro collection forms through Interpay may adversely affect competition since, by doing so, banks could coordinate their market behaviour. The banks have removed the clause in question from the agreements. In assessing the applications for exemption, submitted by Interpay in relation to debit authorisations and guest use of ATMs, NMa has adhered to the same policy.

NMa's other activities involved, for instance, the transition from the guilder to the euro. The banks promised the National Forum for the Introduction of the Euro *[Nationaal Forum voor de Introductie van de Euro]* that the networked banks, in fact, would not charge for deposits of guilder banknotes. This commitment-in-principle is a horizontal agreement between competitors with regard to the supply of services and the prices charged for these. In NMa's opinion, in this specific case it was not necessary to apply for an exemption. The agreement had a one-off character and bore a strong relation to a unique event, namely the introduction of the euro. The scheme was intended as a contribution to the smooth introduction of euro banknotes and coins and was to the advantage of business customers in the small and medium enterprise sector.

In relation to **concentration regulation**, in 2001 NMa assessed whether mergers and acquisitions would lead to dominant positions that restrained competition. At the beginning of 2001, NMa announced a far-reaching investigation into the consequences of the proposed merger between the supermarket organisations, Schuitema and Sperwer. Ahold, the parent company of Albert Heijn, is a majority shareholder of Schuitema. In the analysis, Ahold and Schuitema were regarded as a single entity. After an initial investigation, it appeared that a dominant position may arise as a result of the merger. After the announcement that NMa would start a so-called second-stage investigation, the companies decided against applying for a licence and the merger was abandoned.

NMa conducted an extensive investigation into the sale of part of the activities in the Netherlands of AGA Gas to Air Products. After the investigation, it appeared that a dominant position would not arise in the area of industrial gases and a licence was granted for the concentration.

After the plans for the merging of the activities of Center Parcs and Gran Dorado had been amended, in consultation with NMa, by selling off 33 holiday parks, NMa granted its approval without requiring an extensive second-stage investigation.

In the area of **energy markets**, DTe was intensively involved in 2001 with the implementation of the Gas Act Programme, a comprehensive package of tasks which determine the rules of play for the gas market. The *Guidelines for Gas Transmission and Storage* are an important part of these rules of play.

Discussions on the power failures in California and the privatisation of energy companies have resulted in an extension and deepening of DTe's tasks. DTe has advised the Minister of Economic Affairs in this regard and NMa/DTe have set up a Market Surveillance Committee (MSC). MSC analyses the way the liberalised electricity market in the Netherlands operates and gives advice on improving the operation of market forces.

The year 2001 was also testimony to the fact that the deregulation of a second group of energy users, namely small and medium-sized enterprises, did not proceed without its problems. The need for timely preparation for entering the liberalised energy market, on the part of both the energy companies and consumers, proved to be essential. The international work carried out by DTe also increased considerably. The European Commission presented proposals for the accelerated liberalisation of energy markets,

including the unbundling of network management and transmission in the case of gas and the regulation of international trade in the case of electricity. CEER (Council of European Energy Regulators), the European umbrella organisation of energy regulators, increased in importance due to this palette of international topics in the field of energy.

1.2.2 *Tailor-made interventions*

NMa's work is tailor-made. Each assessment occurs within the context of the individual case and relates to existing regulations in a specific area, the market structure, market trends and the market position of the company in question. NMa, including DTe, intervenes when necessary through regulation and through supervision based on general competition rules. Due to the extent of this task, NMa naturally has to make choices based on priorities. In 2001, NMa endeavoured to make tailor-made interventions. It made use of its powers to employ various instruments for intervention. The legislation provides NMa with the possibility of carrying out investigations, resolving disputes and intervening in the event of an infringement of legal rules (through imposing sanctions or orders subject to penalties). In addition, it is possible to promote compliance with the rules by means other than formal decision-making procedures or by pre-empting such procedures, for instance by means of orientations (prior to a formal complaint or application for exemption) and pre-notification discussions (prior to notification of a concentration). NMa may also advise the Minister. Where possible, NMa cooperates with other regulators, such as OPTA, the Independent Post and Telecommunications Authority *[Onafhankelijke Post- en Telecommunicatie Autoriteit]*, and the Dutch Media Authority *[Commissariaat voor de Media]*.

In April 2001, NMa took action against the so-called 'milk levy' *[melkdubbeltje]*. Supermarkets wished to coordinate the milk price by increasing it by 10 cents. NMa initiated an investigation into the milk levy, partly as a result of external reports, including a complaint from *Consumentenbond*, the Dutch Consumers' Association. NMa notified Albert Heijn, Laurus, Schuitema, Dirk van den Broek and Nettorama that it would consider imposing an order subject to a penalty if they maintained their 'milk levy'. The supermarket chains subsequently announced that they would not continue with the price increase which they had jointly introduced. The aim of this agreed increase in the milk price was to support dairy farmers who were suffering a loss of income due to the foot-and-mouth crisis.

NMa did not intervene because the Competition Act prohibits passing on a higher procurement price in the retail price, nor because NMa was opposed to any form of support for the farmers affected by the foot-and-mouth crisis. NMa opposed this campaign because it was not permissible to organise the campaign in a way that contravened the Competition Act. After all, competitors are prohibited from agreeing price increases and agreeing to pass these on to consumers without incurring risk.

The action taken by NMa in the case of the Rotterdam taxis and the tariffs of hairdressers (ANKO), resulted in the termination of practices that restrained competition. In these cases, a report was drawn up as NMa suspected that the Competition Act had been infringed. It was subsequently decided not to impose a fine or an order subject to a penalty.

Activities in the area of concentration supervision do not always find expression in formal decisions. It is possible, for instance, that pre-notification discussions result in parties deciding against a concentration because they expect to experience difficulties in obtaining NMa's approval. In a number of cases, NMa also noted that companies abandoned their concentration plans after making their own analysis of the likelihood that NMa would grant its approval.

For NMa, the Wegener case was also relevant in 2001. The conditions subject to which NMa granted Wegener a licence to acquire VNU's regional daily newspapers still have to be implemented, according to the decision of the Trade and Industry Appeals Tribunal *[College van Beroep voor het Bedrijfsleven]* on appeal. NMa filed this appeal against a ruling by the Court of Rotterdam, which had earlier declared the limitations and regulations to be null and void. The implementation of some of these remedies gave rise to problems since Wegener had already merged *Arnhemse Courant*, the newspaper which Wegener was required to sell, with *De Gelderlander*. NMa monitored Wegener's implementation of the court ruling, in the light of the special circumstances applicable in this case.

DTe's interventions were also varied. Decisions on tariffs resulted in cost savings for consumers, even though the savings were less visible as a result of an increase in VAT and the regulatory energy tax in 2001. In addition, in an open letter at the end of 2001 DTe provided market players and consumers with clarity with regard to a number of conditions applicable to the second stage of the liberalisation of the energy markets. DTe made use of

its law-enforcement instruments by issuing binding instructions to a large number of gas transmission companies at the end of the year.

1.2.3 Guidelines

Through issuing guidelines, NMa and DTe have provided clarity with regard to what companies may or may not do under the applicable legislation. On the basis of the Electricity Act of 1998 and the Gas Act, DTe approved a number of guidelines. By issuing guidelines, NMa has also clarified how it will act if companies contravene the Competition Act. The *Guidelines in Relation to Cooperation between Companies [Richtsnoeren samenwerking bedrijven]* have provided small and medium-sized enterprises with more clarity as to what is and what is not permitted. The *Guidelines for the Setting of Fines [Richtsnoeren Boete-meting]* state the rules NMa applies in imposing a fine for an ascertained infringement of the Competition Act.

In cooperation with OPTA, NMa published *Price Squeeze Guidelines [Richtsnoeren pricesqueeze]*, which clarify the criteria that KPN's tariffs must meet in order to ensure that other suppliers can compete with KPN (due to a small difference between KPN's consumer tariffs and the tariffs KPN charges these competitors for the use of its network (interconnection tariffs)).

After an extensive consultation round and various technical studies, DTe determined the *Guidelines for Gas Transmission and Gas Storage for the Year 2002*. The Guidelines set out the principles that Dutch gas transmission and gas storage companies have to take into account in determining their tariffs and conditions for free customers in 2002. Free customers can negotiate access to the gas transmission networks and gas storage networks with gas companies on the basis of these tariffs and conditions. In drawing up the guidelines, DTe gave consideration primarily to ways of stimulating trade on the gas market. In doing so, DTe has ensured, for instance, that the supply of gas to households is guaranteed by the guidelines. In other areas, DTe explicitly sought to consult and enter into discussions with market players, for instance after a number of sharp price fluctuations on the electricity spot market, the APX.

1.2.4 Emphasis on communication

NMa cannot be effective without communicating with the outside world. For NMa, communication involves two-way traffic, from the inside to the outside and from the outside to the inside.

The provision of information is essential. Companies and citizens must know what is permitted and what is not permitted. In 2001, considerable effort was invested in explaining decisions and the other activities of NMa to the parties involved and to the press and the general public. For this purpose, for instance, the guidelines referred to above were drawn up as part of the introduction of statutory norms. At the end of 2001, in an open letter, DTe provided market players and consumers with clarity on a number of conditions applicable to the second stage of the liberalisation of the energy markets.

The Queen's visit

On 28 March 2001, Queen Beatrix paid a working visit to NMa. In three sessions, the Queen was informed of NMa/DTe's mission, organisation and work. Minister Jorritsma was present during the visit. Staff members of NMa explained day-to-day practice, including cooperation with the European Commission and other competition authorities and regulators.

Acquiring information is equally important. In forming its opinions, NMa requires the input of players on the market (for instance, branch and consumer organisations). In addition, it is important that NMa obtains information on alleged restraints on competition.

In 2001, NMa took further measures following the customer satisfaction survey carried out in 2000. These measures include giving additional attention to communication. In 2001, DTe carried out a customer satisfaction survey. DTe has already taken concrete action in relation to the points for improvement contained in the final report based on this survey. For instance, steps have been taken to improve communication with the energy sector, for example through the publication of the '*EnergieFocus*' newsletter.

The NMa/DTe Information Line, which was set up in October 2001, illustrates the two directional flow of information in NMa's communication policy. Through the Information Line, which can be reached by telephone and e-mail, public information staff provide information on

the activities of NMa/DTe. This information includes explaining the Acts and regulations implemented by NMa. If necessary, the inquirer is referred elsewhere. Whistleblowers can also give notification of alleged infringements of the legislation, such as in the construction industry, using the same information line.

In 2001, a Complaints Officer was appointed to whom complaints may be submitted with regard to the way NMa carries out its activities. In the first instance, this officer tries to find a solution together with the complainant through consultation, mediation or by other means. The Decree in Respect of the Complaints Officer of NMa/DTe *[Besluit klachtenfunctionaris NMa/DTe]* is in line with the General Administrative Law Act *[Algemeen wet bestuursrecht]*.

1.2.5 *Attention to non-economic interests*

In 2001 NMa also paid considerable attention to the importance of competition and consumers, but in doing so was not oblivious to non-economic interests. It is not a rare occurence that companies make agreements which also affect non-economic interests, such as the conditions of employment of employees, culture, healthcare, housing or the way waste is processed.

Frameworks

The interest of competition is an economic interest: competition results in efficient, innovative and qualitatively good production and lower prices. Agreements and practices which restrain or eliminate competition are therefore prohibited. Politicians provide the framework for the operation of market forces and, in doing so, NMa's area of work. NMa operates within these frameworks and is obliged to enforce the Competition Act. It is the legislator that decides to exclude certain sectors from the operation of market forces. It is also the legislator that decides how the interest of competition and other interests relate to each other. The applicable legislation is a given for NMa. For instance, in applying the Competition Act NMa may never render ineffective the application of other Acts (such as the Environmental Management Act [Wet milieubeheer]. NMa is obliged to apply the Competition Act within the legal frameworks provided by other legislation.

In practice, NMa continued its policy with regard to non-economic interests. For instance, NMa has determined that in accordance with European case law the prohibition on cartels does not apply to collective labour agreements which relate to employment opportunities and conditions of employment. In the healthcare sector it has been made clear that agreements with regard to the quality of care are permitted, but that agreements with regard to tariffs and the division of markets are not permissible. With regard to their subsidised activities, NMa has concluded that under the present legislation and regulations, universities of professional education have too little freedom for their activities to be regarded as economic activities. Concentration supervision did not apply to a merger of a number of universities of professional education because the turnover thresholds (applicable to their economic activities) were not exceeded. DTe is also frequently confronted by non-economic interests, such as the interests of the environment. On the initiative of DTe, further consideration was given to the question of whether a separate provision could be created, within the context of the statutory rules, for small-scale cogeneration plants.

1.2.6 *Strengthening of European cooperation*

European competition authorities and regulators strengthened their cooperation in 2001. The energy regulators were already united in CEER (Council of European Energy Regulators) and the association of competition authorities, ECA (European Competition Authorities), had already been established. In April 2001, NMa organised the first ECA meeting in Amsterdam. The European national authorities together with the European Commission aim to strengthen their cooperation further through informal contacts. In 2001, for instance, guidelines were approved for the relationship between national leniency programmes.

The proposals made by the European Commission for the modernisation of European competition law (the amendment of Directive 17) will result in the strengthening of cooperation between national competition authorities. In accordance with these proposals, a network of cooperative competition authorities will be set up.

The cooperation between energy regulators, within the framework of CEER, continued in 2001. The proposals have already been made for the further institutional strengthening of the position of energy regulators within the European context.

1.2.7 *Task-oriented organisation*

NMa's organisation must aim to respond to new developments in order to carry out its statutory duties.

In 2001, NMa strengthened its organisation across the board. It welcomed 81 new members of staff and followed an active recruitment policy. This effort was necessary as discussions in the Lower House of Parliament with regard to the privatisation of energy companies resulted in an extension of its tasks, which in turn had an effect on the number of employees required by NMa/DTe. In 2001, a number of changes were also made to the organisation, such as the setting up of a Strategy & Communication Department and the formation of two clusters within the Legal Department for energy and competition affairs.

Relocation

In the second half of 2001, NMa invested a considerable amount of energy in preparing for the relocation to the Muzentoren in the centre of The Hague in January 2002. The growth of the organisation, however, was such that a second relocation proved to be necessary. In 2001, NMa's Legal Department moved to the Zurichtoren, in the immediate vicinity of the Muzentoren.

Cooperation within NMa is essential for the effective fulfilment of its duties and in order to optimise the so-called chamber model. Within NMa, DTe already existed as a chamber for the supervision of electricity and gas legislation. The Netherlands Transport Regulatory Authority is presently being set up.

The chamber model in practice

- *A chamber is an organisational unit within NMa, which carries out statutory duties specific to a sector. In practice, the chamber model has various (synergy) advantages:*
- *The combination of missions, in other words, promoting competition on behalf of consumers and a climate of entrepreneurship:*
- *Combining powers and customised interventions: a choice of instruments based on the various Acts:*
- *Consistency in the interpretation of Acts and concepts, so that no forum shopping occurs between regulators:*
- *Combining expertise: within the statutory frameworks it is possible to make use of each other's knowledge, information and expertise:*
- *Combining funds: the chamber model makes it possible for the organisation to make use of a single operations staff and consequently reduces overheads.*

To optimise the effectiveness of available instruments provided by the Electricity Act of 1998 and the Competition Act, the Market Surveillance Committee (MSC) was set up. This advisory committee, which includes internationally renowned experts, continuously monitors developments on the electricity market and the behaviour of players on this market. MSC reports to the Director of DTe and the Director-General of NMa on relevant developments and gives advice on the possible use of both the instruments provided by the Electricity Act of 1998 and the instruments provided by the Competition Act.
On 1 September 2001, the project to prepare the way for the Netherlands Transport Regulatory Authority was initiated. This chamber is now responsible for sector-specific regulation within the framework of the Passenger Transport Act of 2000 *[Wet personenvervoer 2000]*.
Proposals to assign the Netherlands Transport Regulatory Authority duties within the framework of the Aviation Act *[Luchtvaartwet]*[1] and the Railways Act *[Spoorwegwet]*[2] are still before Parliament.

1.3 Outlook

1.3.1 *Development of activities*

Within the approved criteria in relation to the priority of cases, NMa emphasises the consumer and the advantages to the consumer of action taken by NMa.
An improvement in the operation of market forces ensures that there is a varied, qualitatively good supply of products and services at low prices for customers. The interests of consumers is one of the important factors in determining NMa's priorities.

The questions and complaints of consumers may be a reason to initiate law-enforcement activities. NMa provides consumers with consumer-focused information through the 'Consumer Desk' *[consumentenloket]*.
This Consumer Desk will be made accessible through NMa's website in 2002 (www.nma-org.nl).

1 *Lower House of Parliament, Parliamentary Proceedings 2001-2002, 28074.*
2 *Lower House of Parliament, Parliamentary Proceedings 2000-2001, 27482.*

To increase the likelihood of detecting cartels, NMa has set up a Leniency Office. NMa also published a consultation document with draft leniency guidelines. In doing so, NMa has provided clarity with regard to the rules that apply to the non-imposition or reduction of fines if companies inform NMa of cartels in which they participate or have participated. By doing so, NMa has taken an important step towards the quick and effective detection of secret and damaging cartels, which have direct consequences for customers and consumers.

Of course, precisely in the interests of investigations, NMa cannot give insight into all its priorities. Nevertheless, it is possible to mention a number of priorities for the year 2002, namely in relation to petrol, construction and banking.
In 2002 NMa will take further steps with regard to the petrol market. At the end of 2001, NMa expressed its intention to apply the prohibition on cartels to vertical agreements between oil companies and filling station operators. This intention means that the application of the European block exemption for vertical agreements will be declared inoperative to allow the necessary measures to be taken to improve the competitive situation on the petrol market. NMa has set up a special Construction Industry Taskforce. NMa is investigating the 'parallel accounts' and other leads in its investigation of infringements of the prohibition on cartels in this sector. The focus of these activities is to ensure that the initial results are made available as soon as possible.
In addition, NMa will endeavour to have preventive measures introduced to combat infringements of competition rules in the construction sector. The banking sector is also receiving NMa's attention. The investigation into the market position and practices of Interpay, which was set up by the major banks in the Netherlands to facilitate payments, was extended at the beginning of 2002. A decision was taken to do this on the basis of a preliminary investigation which NMa carried out and information which NMa has received from the market. The tariffs Interpay charges for debit-card payment facilities are part of the area covered by this investigation.

The supervision of compliance with the statutory rules applicable to the energy market is a theme that will receive additional attention in 2002, after a number of years in which the focus was on the regulation of these markets. This means that instruments will be used such as binding instructions and orders subject to penalties.
In addition, NMa/DTe is authorised to resolve disputes in terms of the Electricity Act of 1998 and the Gas Act. In 2002, dispute resolution may occur more frequently than was previously the case. Further announcements will be made in this regard in 2002.

NMa has considered the extent to which the assessment of mergers and acquisitions in the energy sector will have to change due to changes in market conditions. In the case of concentration control, greater emphasis is placed on monitoring compliance with the notification requirements. In addition, an analysis of the energy sector has been started and a framework for remedies is being drawn up.

NMa has taken up its duties, pursuant to the Passenger Transport Act of 2000. The Netherlands Transport Regulatory Authority, which is currently being set up, will be responsible for the activities in this area.
The Passenger Transport Act of 2000 provides for the unbundling of municipal transport companies, on the one hand, and public transport activities and non-public transport activities, on the other hand. To prevent cross subsidisation, the Passenger Transport Act of 2000 contains regulations with regard to the financial relationship between municipal transport companies and subsidiaries/participations. Public transport companies are required to have an annual statement drawn up by an independent expert. Since the beginning of 2002, the Competition Act has also stipulated criteria with regard to the administration of so-called public undertakings, as part of the implementation of the European 'Transparency Directive'. Public undertakings are companies with a special or exclusive right, granted by a public authority, or companies responsible for managing basic services in the public economic interest and which receive some form of government support for this. If they also undertake commercial activities (which may adversely affect trade between Member States) they are required to maintain a separate administration for these activities. In addition, they are required to retain the data pertaining to this administration for five years. If the European Commission requests data from an administration, the undertaking in question is obliged to provide the Director-General of NMa with these data. He will pass these data on to the Commission. The Director-General is also responsible for enforcing these obligations. In the event of an infringement, he may impose a fine of at most EUR 22,500 or an order subject to a penalty with a view to reversing the infringement or preventing a further infringement or a recurrence of the infringement.

In 2002, NMa will continue to make use of the various opportunities for intervention and other measures at its disposal. Through varied and effective use of these

instruments, NMa wishes to fulfil its task as effectively and efficiently as possible. Such targeting of the instruments at its disposal means that investigations may vary with regard to their intensity and duration from mild to intensive and from short to long. This approach makes it possible to match the investment of resources to specific markets and market conditions. In 2002, in addition to taking decisions, NMa will increasing carry out other activities aimed at promoting sound competitive relationships, such as giving informal opinions, issuing warnings, and publishing consultation documents, guidelines and reports.

1.3.2 *Consultation and accountability*

NMa wishes to maintain an open relationship with the outside world, including consumers, companies and politicians. Through consultation, NMa organises the input of the opinions of others in relation to proposed activities. In 2002, consultation documents with regard to the so-called leniency programme and the application of the Competition Act in the healthcare sector were published, for instance on the website. NMa is also holding consultations on 'remedies' in relation to concentrations, measures which companies themselves can undertake to ensure that a merger or acquisition complies with the Competition Act. NMa is also preparing a more general method of consultation to be used in setting its priorities. NMa wishes to consult its environment with regard to desirable activities, and wishes to do so, of course, without losing sight of its statutory duties, independence and the interest of investigations. Politicians, of course, give important signals with regard to the desired direction of NMa's activities. For instance, the Lower House of Parliament has called on NMa to be more active in carrying out its regulatory activities.[3]

Through its Information Line, citizens and companies can notify NMa/DTe of alleged infringements of legislation. An SME Desk (for small and medium-sized companies and accessible through NMa's website) has also been set up, where SME companies can give notification of the practices of other (large) companies that restrain competition. An SME Coordinator has been appointed to provide SME companies with low-threshold access to NMa.

NMa wishes to account for the choices it makes and its activities, even beyond the annual report. Public accountability is also appropriate in the light of the independent status which NMa is expected to be granted formally in 2002. Accountability also means explaining how NMa deals with signals from the outside world, such as those received during a consultation process. Within defined boundaries (for instance, those of confidentiality), NMa intends to be as transparent as possible with regard to the process and content of its activities. This means giving insight into its plans and into what may and what may not be expected of it, for instance through NMa's website.

With regard to decisions and other activities, NMa has an active communication policy and, for instance, makes use of press releases. In 2002, NMa will introduce a magazine for external communication *(Markant)*. NMa wishes to use this to keep the environment informed of developments with regard to decision-making, consultation and investigations. The newsletter *EnergieFocus* has already been introduced to keep the energy sector well-informed of the activities of NMa/DTe. NMa/DTe's websites will be further optimised to improve public information and communication. In 2002 NMa will set up a Consumer Desk with information targeted at consumers.

NMa will carry out further work to develop a tool to measure and report on the effect of its activities. With a view to the efficient structuring of its internal work processes, but also with a view to external reporting, NMa will start applying the 'Balanced Scorecard'. This method identifies a number of critical success factors from four perspectives, namely the 'customer' (political bodies and society), the 'owner' (the central government), the 'internal organisation' (personnel) and the 'customers' (those who have an interest in decisions). It is NMa's ambition to report on the 'Balanced Scorecard' in the forthcoming annual reports.

1.3.3 *Development of the organisation*

NMa will continue to develop as an organisation. Where possible, the work processes within NMa will be accelerated further. Standard response periods will be approved (within the margins of the currently applicable statutory terms) for the handling of complaints and other signals, which may also be received through the Information Line.

3 *See the Bolhuis/Ten Hoopen motion in relation to a more active policy on the part of NMa (Parliamentary Proceedings II, 28000-XII, No 11).*

NMa will continue to prepare itself for its expected new tasks, for instance in relation to regulation of the railways and Schiphol Airport by the Netherlands Transport Regulatory Authority. The Cabinet has indicated that it wishes to include sector-specific regulation of the telecommunications and postal services market as a chamber of NMa, as an independent public authority, in 2005. In doing so, the Cabinet has accepted that NMa, as an independent public authority, will implement the Competition Act properly and that the chamber model functions well. Up until 2005, the Cabinet is keen to strengthen the cooperative relationship between NMa and OPTA, the Independent Post and Telecommunications Authority. *(Parliamentary Proceedings* II 2000/2001, 21 693, No. 56).

NMa is preparing itself for its status as an independent public authority. The Bill granting increased autonomy to NMa has been approved by the Lower House and is now before the Upper House of the Parliament. The Bill means that the Minister of Economic Affairs may no longer issue instructions in individual cases. A further important change is that the head of NMa will no longer be a Director-General, but a Management Board with a chairman and two members.

1.3.4 Evaluation of the Competition Act, Electricity Act of 1998 and the Gas Act

In 2002, the Competition Act, the Electricity Act of 1998 and the Gas Act will be evaluated. The evaluation studies carried out by the Minister of Economic Affairs will relate to the economic, legal and efficiency aspects of the Act. Amendments are expected to be made on the basis of the resulting recommendations, which will affect the activities of NMa and DTe.

On the Visible Contours of the Competition Act and NMa

Did the introduction of the new competition regime in 1998 herald the end to the Netherlands as a paradise for cartels? Have investigations and law-enforcement activities resulted in the strengthening of competition on the Dutch market? Has the increase in prosperity for citizens and companies expected of the new Act and the regulators in fact occurred?

These questions play an important role in the discussion within society with regard to the strengthening and, where necessary, introduction of market forces. Blind trust in the operation of market forces is not wise. The central question cannot be whether markets can and should be left to themselves unconditionally; well-designed and effective regulation always seems to require more than this. The central question at this juncture is whether there are indications that the Dutch economy has experienced positive effects as a result of the new competition regime.

To be able to answer the second question, it is important to outline a framework within which the effects of the changes introduced in 1998 can be analysed. In this regard, it is important that the Competition Act and its application are identified conceptually at three levels at which effects can be identified:

- spontaneous compliance (citizens and companies understand the Act and act in accordance with it);
- compliance required under civil law (citizens and companies initiate civil proceedings on the basis of a supposed infringement of the Competition Act);
- compliance required under administrative law (the investigative and law-enforcement activities of the competition authorities).

Spontaneous compliance, in particular, is important with regard to the effect of the competition regime. As a result of spontaneous compliance, effective competition on the most cost efficient basis is achieved. The enforcement of compliance under civil law is a potentially important determinant of the effect of the competition regime. Although a slight increase in the number of civil law proceedings occurred in 2001, the number is still small (Figure 1).

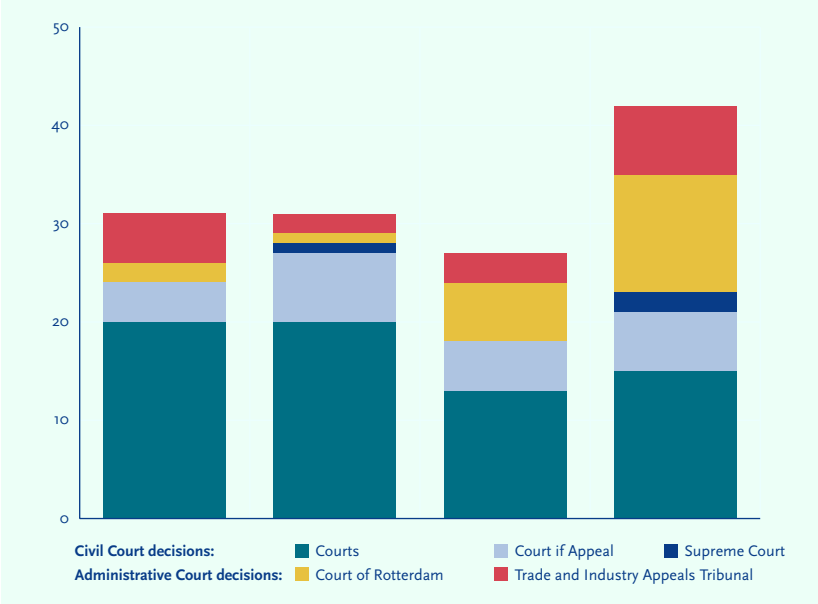


Figure 1 Development in the number of legal proceedings in the Netherlands in relation to competition law

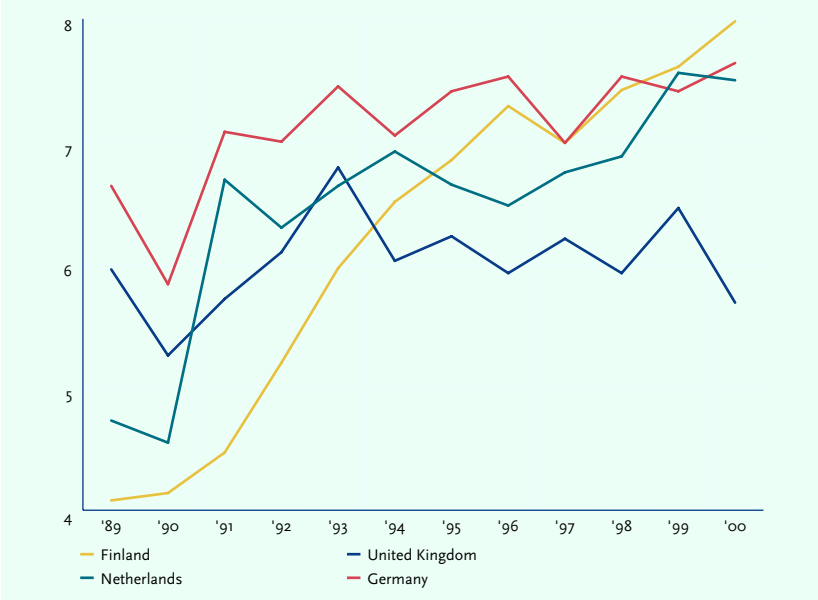


Figure 2 The extent to which senior managers are of the opinion that the competition regime promotes competition (1989-2000)

In the case of the administrative enforcement of compliance, society has to make investments (investigation and law-enforcement). The economic benefits lie not so much special prevention (termination of an infringement of competition in a particular case, possibly including sanctions) but, in particular, in the strengthening general prevention, that is preventing future infringements of the Act.

Spontaneous compliance is therefore a derivative of compliance enforced under administrative law. The scope of enforcement of this sort is therefore broader than the specific infringement against which action is taken.[4] In order to analyse the scope of this form of enforcement, it is useful first to establish how the competition regime is perceived. After all, the more effective the public considers the competition regime to be, the stronger will be spontaneous compliance with it. Figure 2 gives the scores for the Netherlands, Germany, United Kingdom and Finland of a survey held annually for the *World Competitiveness Yearbook* amongst several thousand senior managers of internationally operating companies in 50 countries. These managers gave a score for the extent to which competition policy, in their opinion, promotes competition in their markets.

A remarkable feature of this graph is the strong increase in the value attached to Finnish competition policy (even attracting the highest score in the last two years). In addition, the correspondence between the scores for the Netherlands and Germany is also remarkable. The significant improvement for the Netherlands may be traced to the lead up to and the introduction of the new Dutch competition regime. This graph is also an incentive, because it also shows that there is still room for improvement.

Tentative calculations on the basis of research carried out by the World Bank indicate that a strong competition policy may translate in time into a strengthening of structural growth by 0.2 to 0.4 percentage points.[5] This estimate is comparable to the findings of recent research by EIM into the macroeconomic effect of improvements in the operation of market forces in the period 1987-1999.[6] EIM has also forecast the consequences of a further strengthening of competition on the Dutch market in the period 2001-2005. Industrial production, according to EIM, may turn out to be approximately 3 percent higher than would have been the case if competition on the Dutch market had remained at its level of 1988 (for consumers, this resulted in price levels that were roughly three to four percent lower). The magnitude of these effects is comparable to predictions for the Netherlands economy given in studies in the mid-90s.[7]

The positive macroeconomic effects associated with improvements in the operation of market forces since the beginning of the Nineties, do not herald the actual end of the cartel paradise. There is still evidence of illegal and secret cartel agreements. Such information is obtained, for instance, from tips and complaints received by NMa. In addition, on the basis of economic research, it is possible to determine that the scope of markets characterised by a higher degree of risk of market failure is still substantial. To illustrate this, Figure 3 summarises publicly available information in relation to 100 product groups researched within the framework of the *Scorecard of Market Failure Risk*.[8] This research was commissioned by the Ministry of Economic Affairs. The graph contrasts the risk profile (normalised on the basis of the reference group studied of 105 consumer products and services) with the estimated turnover at the distribution level of 1999. In the case of products and services within the first 10 percent of the graph, the market failure risk factor was amongst the highest 10 percent. The turnover involved in the sectors is estimated to total EUR 34 billion. The more than 30 sectors with a clear above-average risk of market failure achieved an estimated turnover of EUR 90 billion.[9] Other public sources also show that monitoring market developments continues to be necessary. For instance, one in ten branch organisations continued to issue their members with recommended prices in 2000.[10] A recent study by the European Central Bank concluded that interest rates for consumer credit (and mortgages) in the Netherlands were 100 basis points (240 basis points respectively) higher, due to the higher degree of market concentration, than might be expected in a less concentrated market.[11]

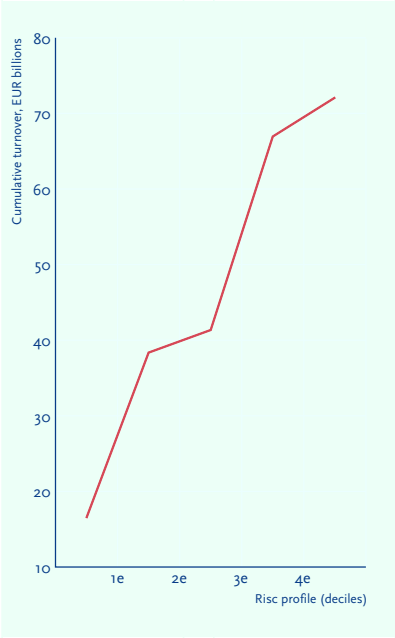


Figure 3 Turnover and risk profile 1999

Making the more concrete effects of investigations and law-enforcement activities of market regulators visible is also a challenge for international academic disciplines. NMa carried out a comparative study in 2001 into empirical methods used in international academic research to measure the possible effects of changes in competition legislation or alternatively, interventions by competition authorities. This research identified a number of possible relevant methods, varying from econometric studies to general balance-sheet analyses. The research experience of a number of countries (for instance, Australia, Belgium, Ireland, United Kingdom and United States) with a large num-

ber of product groups was analysed. This is a useful methodological basis for the further development of suitable measurement tools. The available studies indicate that, in general, a considerable period elapses between using an instrument and the moment at which the effect of this on market practices and the structure of the market can be identified.[12] A period of at least two years is sooner the rule than the exception. On the basis of pragmatic and theoretical grounds, the academic literature also gives no reason to expect that a workable composite indicator can be developed to identify unambiguously every infringement or every intervention quickly and for every market, nor whether and to what extent the operation of market forces has improved or deteriorated.

It was therefore decided to develop a forward-looking instrument with which NMa could analyse the expected effects of its interventions. After a time it will be possible to evaluate whether these expected effects have, in fact, occurred in certain markets, sectors or individual cases.

This instrument therefore serves two aims. Firstly, feedback can be obtained on the economic consequences of the Competition Act and its application, and the benefits and costs of action taken by NMa can be made explicit. Secondly, the instrument may assist in setting policy priorities in relation to investigations and law-enforcement. In essence, the instrument, which has been used in a number of cases, gives a prospective quantitative indication of the direct and indirect social cost of possible infringements of the Competition Act. This information, together with legal and technical investigative factors and information from other competition authorities, provides the basis for deciding whether to initiate an investigation process.

On the basis of experience already obtained it is probable that at least aggregate data for the development of the working supply can be reported on a regular basis as of the commencement of the next report period without jeopardising current investigations. NMa will also be in a better position to decide on the areas in which available human resources will result in the greatest contribution to society in terms of cost-benefit considerations.

With regard to setting priorities for law-enforcement, it is important that sound and up-to-date insight exists into sectors with an increased risk of activities that restrain competition. A response that is too reactive, will incur the risk that sectors in relation to which no tips or complaints are received may be 'forgotten'. Within this framework, regular and consistent monitoring of markets on the basis of a number of structural characteristics is an essential part of effective law-enforcement.

4 *In relation to concentration supervision, spontaneous ex ante compliance with regulations is important. In choosing merger partners, it is possible to anticipate whether objections may be raised by the competition authorities.*

5 *Dutz, M.A. and A. Hayri.* Does More Intense Competition Lead to Higher Growth? *World Bank, 2000.*

6 *Nieuwenhuijsen, H.R. and J. Nijkamp.* Competition and Economic Performance. *Zoetermeer: EIM, 2001.*

7 *OECD.* Report on Regulatory Reform Vol. II Thematic Studies. *Paris: OECD, 1997.*

8 *J.P.J. de Jong and R.J.M. Vogels.* Scorekaart risico's op marktfalen: een methodiek ter identificatie van risicovolle productgroepen. *EIM, August 2000. This research evaluates indicators for various aspects of the operation of market forces, including the degree of concentration, the importance of barriers to entry, the degree of cooperation, developments in business demographics and complaints by consumers.*

9 *In the case of four of the ten product groups with the highest risk, investigations of medium intensity have been completed or initiated.*

10 *P.M.M.M. Beusmans.* Mededingingswet versus brancheorganisaties: een spannende relatie! *Amsterdam: ESI-VU, November 2000.*

11 *Corvoisier, S. and R. Gropp.* Bank Concentration and Retail Interest Rates. *ECB Working Paper No. 72, 2001.*

12 *See, for instance, Clarke, R., et al.* Monopoly Policy in the UK: Assessing the Evidence. *Edward Elgar, 1998.*

2 General Competition Regulation

2.1 Introduction

The foundations on which the Competition Act rests are the prohibition on the abuse of a dominant position, the prohibition on cartels and control of the merging of companies, referred to in competition law as 'concentrations'. In assessing the consequences of the practices of undertakings, various interests are involved. NMa may impose sanctions for infringements of the rules set out in the Act in the form a fines and orders subject to penalties. It is possible to file administrative appeals and judicial appeals (as well as appeals to the Supreme Court) against decisions taken by NMa.

This chapter will discuss these various aspects of NMa's activities. In 2001, considerable attention was given to investigations, both into abuses of dominant positions and into prohibited agreements that restrain competition. Various aspects of concentration control and the regulation of markets took a clearer form.

In the year under review, NMa settled a large number of cases in which it was not always necessary to apply the instruments provided by the Act and in which relatively mild intervention was sufficient. For instance, complaints were received from smaller companies in various sectors which complained that they no longer received supplies from their suppliers because they did not adhere to the sales price recommended by the supplier. After intervention by NMa, supplies were resumed soon afterwards and the recommended sales price, which in practice was a prescribed price, ceased to apply. After these interventions, the complainants withdrew their complaints. The remaining applications for transitional exemptions were also almost all concluded in the year 2001 and a large number were settled informally.

2.2 Dominant positions

In 2001 NMa gave further substance to the concept of a dominant position. In the research report into the tariffs applied by Schiphol Airport, it was concluded that the failure to maintain transparent accounts may be considered to be an abuse of a dominant position by an undertaking. In the *Price Squeeze Guidelines [Richtsnoeren Prijssqueeze]* the question of when abuse occurs if unreasonable prices are charged by companies with a (quasi) monopoly position was dealt with in more detail. The recommendations with regard to the 'Access to the Cable' Bill advocated a consistent assessment of dominant positions on the basis of competition law.

Within the framework of concentration control, the assessment of joint dominant positions was discussed. In addition, greater clarity was given with regard to various aspects which put the apparently strong position of companies into perspective.

Dominant position and abuse

Section 1(i)

Dominant position: the position of one or more undertakings which enables them to obstruct the maintenance of de facto *competition on the Dutch market, or a part thereof, by allowing them to behave in a manner independent of their competitors, their suppliers, their customers or the end users in important respects.*

Section 24

1. Undertakings are prohibited from abusing a dominant position.

The Director-General of NMa, for instance, ruled in Case 1 Telegraaf versus NOS/HMG *that NOS and HMG had abused their dominant position by refusing to supply programme listings.*

2.2.1 *Report on Schiphol's tariffs*

On the basis of an investigation carried out by NMa on the instructions of the Ministry of Transport, Public Works and Water Management into the tariffs charged by Schiphol, NMa reached the conclusion that if Schiphol were to be subject in all respects to the Competition Act, the airport would be deemed to abuse a dominant position. From the investigation it emerged that Schiphol's accounting and cost allocation system was not sufficiently transparent to make it possible to determine whether the airport tariffs were sufficiently cost oriented.

With a view to the intended privatisation of Schiphol, the Ministry requested NMa to assess Schiphol's airport tariffs against the principles of general competition law. At present, the approval regime set out in the Aviation Act still applies to Schiphol. After privatisation, NMa will have to assess the airport tariffs on the basis of the Competition Act. In carrying out its investigation, NMa considered the basic services (take-off, landing, apron services and ground services) which Schiphol offers airline companies.

The principle on which NMa's conclusion is based is that cross subsidies by an undertaking with a dominant position may result in abuse of that position. For this reason, the accounting systems must provide sufficient insight in this regard. On the basis of this, abuse of a dominant position may already exist simply by virtue of the fact that the accounting systems of an undertaking with a dominant position do not meet this requirement.

2.2.2 *Advice with regard to the Access to the Cable Bill [Wetsvoorstel Toegang tot de kabel]*

The Ministry of Transport, Public Works and Water Management wishes to improve the scheme under which access is provided to the cable networks. Cable companies may have dominant positions as network providers on certain markets. At the beginning of February 2001, the Ministry asked NMa for advice with regard to the proposals set out in the draft Bill.

With regard to dynamic and innovative markets, such as the market for Internet access, competition regulation ought to ensure that there are sufficient incentives for entrepreneurs to invest in new technologies and innovative products. The aim is to ensure that the market operates better. NMa therefore indicated that it was in favour of the approach adopted by the Ministry of Transport, Public Works and Water Management. On the one hand, a link to general competition law has been sought in the Bill, but, on the other hand, a flexible system of ex ante obligations has been added to this. This combination creates the possibility of enforcing access without this automatically resulting in an obligation on the part of the cable network operators to grant access to Internet Service Providers (ISP's).

If a link is made to the conceptual framework of general competition law, NMa considers it to be of major importance that these concepts are used consistently. No differences may exist between the way these concepts are used in implementing a sector-specific Act and the way these concepts are applied in implementing the Competition Act.

On the basis of the proposed draft Bill, OPTA would be given the authority to define general concepts of competition law. This could result in OPTA's deciding after carrying out an analysis that an undertaking has a dominant position, while according to NMa this is not the case, or vice versa. For market players the predictability and clarity of regulation will be reduced, also in the area of administrative and civil law. NMa is therefore in favour of a law enforcement model in which it takes the lead in defining and analysing the relevant markets and determining dominant positions.

2.2.3 *Joint dominant position*

In the case of concentration control in the past, attention was given to the probability that a dominant position would arise. Mergers and acquisitions, however, may also result in joint dominant positions held by a number of companies. In the year 2001, a further deepening of insight took place in relation to the assessment of such joint dominant positions.

Undertakings which are active on markets characterised by a limited number of players will take into account the responses of other undertakings to their market behaviour. The effect of this may be that undertakings tacitly coordinate their market behaviour, in other words without consultation. If a merger or acquisition results in the emergence or strengthening of such tacit coordination, this is usually referred to as a joint dominant position.

The simple fact that only a small number of players are active on the market to be investigated is in itself not sufficient reason to conclude that a joint dominant position will arise or be strengthened. The question that has to be answered is whether the structure of the market is or becomes such that (tacit) coordination of behaviour on the relevant market is or becomes possible. Circumstances which make a joint dominant position more probable include: (i) a high degree of concentration, (ii) a transparent market, (iii) a homogenous product, (iv) symmetry between large players with regard to their market share and cost structure, (v) high barriers to entry, (vi) a saturated market, (vii) multiple relationships between the most important players and (viii) the fact that these players encounter each other in numerous markets.

A list of circumstances such as this must be used with care. The specific circumstances of the relevant market(s) must be examined carefully in each case to determine whether the market structure is such that (tacit) coordination of market behaviour on these market(s) is a serious risk. In this regard, the characteristics referred to above are considered individually, but also in relation to each other.

In 2001, NMa gave attention on a number of occasions to the possibility that a joint dominant position would arise

or be strengthened. Case 2285/Kalmar Industries – NHC, with two major players, involved heterogeneous products, little transparency and an unstable growth market or unstable growth markets. Case 2473/Holland – Flora involved non-symmetric cost structures, low barriers to entry and a unstable market. Case 2184/Air Products – AGA Transfer, which related to concentrated markets and high barriers to entry, relatively homogenous products, symmetry in market shares and 'multi-market contracts', pointed to a possible joint dominant position. Due to the large differences in prices and discounts, however, it was not possible for players to predict the final sales prices of their competitors accurately. If the behaviour of competitors cannot be observed with sufficient certainty, a player on the market cannot assess what the optimal responses are to the behaviour of its competitor. This lack of transparency on the market means that there is less likelihood that a joint dominant position will arise. In addition, the competitive pressure of the small players, observed past competition and the possible countervailing pressure of customers also play a role.

2.2.4 *High market shares from a different perspective*

In 2001, in a number of cases in which players acquired a considerable joint market share, in some cases exceeding 50 percent, a licence was not required. This demonstrates that concentration control is not a 'rigid' analysis, which only takes into consideration (present) market shares. There are many factors which are important in assessing the positions of players. A number of these factors are discussed below.

In a number of cases, the countervailing pressure of competitors is an important factor which throws a different light on high market shares. For instance, in the decision in relation to granting a licence in case 2184/Air Products - AGA Transfer the possibility of a dominant position was excluded, partly on the basis of the conclusion that a competitor of comparable size was a strong opponent.

The presence of one or more strong competitors also played an important role in the cases 2285/Kalmar Industries - NHC, 2473/Holland - Flora and 2779/Rijnvallei - Verbeek's Pluimvee. A further example is the assessment of case 2427/NCD - Fernhout, in which both parties control concrete mixing plants. The concrete mixing plants hire transport and production capacity from competitors. NMa derived from this that the parties are to a certain degree dependent on competitors.

Another important factor is the (procurement) power of customers. In numerous decisions taken in 2001 this was one of the reasons to assume that the concentration in question would not result in the emergence or strengthening of a dominant position (for instance, in cases 2328/Dumeco - Sturkomeat, 2427/NCD - Fernhout and 2666/Stork - RTD). In addition, the possibility of resorting to other measures also plays a role. For instance, in case 2427/NCD - Fernhout it was decided that it could be assumed that customers would make use of other concrete mixing plants, partly due to the high concentration of concrete mixing plants in the Netherlands. The possibility that customers will avoid other plants if one concrete mixing plant imposes unreasonable conditions might also affect the competitive position of both parties.

In a number of decisions, NMa took into account the markets and/or prices in the respective industries (for instance in case 2285/Kalmar Industries - NHC and 2579/Brouwer - Van Ginneken & Mostaard). In this case, both the past and the future were taken into account. In case 2579/Brouwer - Van Ginneken & Mostaard, both of which are active in the market for prepress services, it was established, for instance, that in addition to the printers, their customers had also started offering prepress services. This has resulted in overcapacity with the result that significant pressure has been exerted on prices. It is therefore plausible that the parties are not only disciplined by competitors, but also by the possibilities open to customers and printers to provide their own prepress services. In case 2425/UPC - Primacom, in which both parties are active in the area of providing Internet access services, both the past and the future were taken into account. In this case, NMa established that, in the light of the explosive growth in Internet access services and the continuous growth forecast in this area, the present position of UPC and Primacom should be viewed in a different light.

Finally, NMa decided in a number of cases that no licence was required, partly because of the low barriers to entry which would allow potential competitors relatively easy access to the market (case 2473/Holland - Flora and case 2639/Monuta - SCI). In case 2639/Monuta - SCI, in which both parties are active in the area of funeral services, the conclusion reached was that it was not plausible that a dominant position could arise despite very high local market shares. One of the factors in making this assessment is the fact that entry to the market is fairly easy. A licence is not required to establish a business, no specific qualifications or professional requirements apply

and little investment is needed to start a funeral service company. In addition, the market players indicated that if a particular company were to establish a strong position in a local market, this company would be disciplined by new entrants and/or other companies in the region.

2.3 Investigations into cartels

In 2001, NMa completed and initiated various investigations into infringements of the prohibition on cartels. The intensive investigation into the operation of the petrol market in the Netherlands resulted in a report at the end of 2001. In the area of telecommunications, an investigation was carried out into the events surrounding the auctioning of UMTS frequencies and an investigation was started into possible price agreements between mobile telephone operators with regard to mobile telephone subscription payments, which are paid out to boost sales. NMa decided that an appeal by ANKO, the branch association for hairdressers, to its members with the aim of ensuring that cost increases resulted in price increases was a restraint on competition. In November 2001, NMa deployed a large investigative team to investigate cartel agreements in the construction sector.

2.3.1 Investigation of the petrol market

2.3.1a Investigation of petrol companies

Due to the price level of motor fuels at filling stations in the Netherlands, in mid-2000 NMa started an investigation into agreements and practices involving oil companies which possibly restrain competition. In order to do so, a team of NMa's staff analysed the entire market. The investigation focused on the relationships between oil companies and the filling stations which purchased from them.

Approach to the investigation of petrol companies

In total, NMa's investigation took eighteen months. The team of NMa's staff involved in this investigation reached its maximum size in 2001. Apart from the investigation carried out by NMa itself, four external studies were commissioned by NMa. During the investigation, NMa requested information on various occasions from oil companies and other market players. This information was necessary for the further analysis of the market and involved large quantities of data. The market players which were required to supply these data therefore needed time to do so. Extensive legal, economic and econometric analyses were then made of the information obtained.

In addition, unannounced on-site inspections were carried out at the offices of regional managers and the head offices of the five oil companies involved in the investigation. Approximately thirty members of NMa's staff participated in this. During these on-site inspections, large quantities of documents (both hardcopy and electronic) were examined and, in so far as they were relevant, the documents were copied and the copies were seized.

Subsequently interviews were held with various market players, such as oil companies, 40 filling station operators, oil traders and branch organisations. All this information was processed and analysed. In addition, an analysis was made of the database files provided by the oil companies containing data relating to the application of the so-called Marginal Contribution System *[Marge Contributie Systeem]* over a number of years. Finally, consultation took place on a number of occasions with the Directorate-General for Competition of the European Commission. The total dossier consists of approximately 1500 documents (60 files with a total length of 7 metres).

Outcome of the investigation

NMa has established that the large oil companies (Shell, BP, Esso, TotalFina and Texaco) keep the price of petrol, diesel and LPG artificially high through a system of agreements with independent filling station operators. Since the oil companies apply an almost identical support system to filling station operators, the filling station operators have insufficient incentive to charge lower prices than the recommended national prices of their suppliers. This lack of competition between filling station operators results in higher prices for consumers and makes it difficult for other players to enter this market.

The above-mentioned agreements between oil companies and filling station operators are so-called vertical agreements. Such agreements are subject to the European directive granting a block exemption for vertical agreements.[13] Since European exemptions are

13 *EC Directive No. 2790/1999 of the Commission of 22 December 1999 in relation to the application of Article 81(3) of the Treaty to groups of vertical agreements and concerted de facto practices. In accordance with the Competition Act (section 13(2)), NMa may declare this block exemption to be inoperative on the grounds stated in the Act, as a result of which the prohibition on cartels contained in section 6 of the Competition Act is revived.*

implemented in the Competition Act, the individual agreements which the oil companies enter into with the filling station operators are in themselves not prohibited. As the cumulative effect of these agreements exerts a considerable restraint on competition on the Dutch market, NMa has informed the oil companies that it intends to make use of the possibility of declaring the European exemption to be inoperative in the case in question. As a result, these agreements will be subject to the prohibition on cartels and, if continued, will constitute an infringement of the prohibition on cartels, for which NMa may impose a fine or sanction.

Market

The Netherlands market is characterised by an intricate system of petrol stations on the motorways, and provincial and local roads. Petrol (which is understood to include Euro95, diesel and LPG) is a homogenous product, as a result of which the parties cannot differentiate on the basis of their brands. In addition, petrol is not sensitive to price changes: demand remains stable if prices increase.

The market share of the market leader, Shell, is much higher in the Netherlands than that of market leaders in the surrounding countries. The difference between Shell and the company with the second largest market share (BP) is much greater in the Netherlands. New entrants have limited access to this market due to the scarcity of new locations and strict environmental requirements.

Price formation on the fuel market is very transparent. All oil companies base their procurement prices on the same international quotation. The differences between the recommended prices of the various oil companies are marginal. Shell publishes the recommended prices through its website.

The large oil companies, Shell, BP, Esso, TotalFina and Texaco have most of the filling stations. A distinction may be made between three types of filling stations: stations which are owned and operated by the oil company; filling stations which are owned by the oil company and are operated by an independent filling station operator; filling stations which are owned and operated by a filling station operator. NMa's investigation focused on the last two types, which together account for 41% of total sales of petrol and diesel in the Netherlands.

Support system

The oil companies enter into exclusive procurement contracts with the independent filling station owners. Consequently filling station operators are bound to their suppliers for a lengthy period. In addition, the oil company issues a recommended price for the sale of Euro95, diesel and LPG. Standard margins are agreed for filling station operators for every litre sold. As a result, the portion that goes to the filling station operator and the portion that goes to the oil company is fixed.
The margin for the oil company is higher than that of the filling station operator. Additional discounts have been agreed with some filling station operators. In comparison with other countries, these margins on petrol prices appear to be the highest in the Netherlands. This higher gross margin may only be explained partially by higher costs in the Netherlands, such as environmental and wage costs.

All the oil companies have a support system. Through a system of support discounts, the oil company makes it possible for filling station operators to follow the price reductions of competitors. This support system is specified in the contract that the oil company enters into with the filling station operator. The investigation, however, revealed that support is not granted in cases in which the filling station operator takes the initiative to reduce sales prices. Support is granted if the filling station operator informs the oil company that a filling station in the neighbourhood has reduced its prices, threatening a reduction in the filling station operator's turnover. The oil company grants support for the duration of the competitor's campaign on condition that the filling station operator passes the discount on to his customers. As soon as the competitor ceases its campaign, the support is terminated. In NMa's opinion, this means in practice that not a single filling station operator will reduce his prices of his own accord.

Furthermore the investigation showed that such support campaigns occur frequently and for long periods. The oil companies have centralised the granting of support. As a result, in NMa's opinion, on the one hand, the oil companies have a strong grip on the prices charged by filling station operators and, on the other hand, the filling station operators have no incentive to reduce their prices. After all, filling station operators know that they will not increase their turnover as a result, as they may assume that surrounding filling stations may and will follow their price reductions. In this way, oil companies protect their own filling stations. In the case of new entrants, this system is a further barrier in addition to the existing high barriers. This means that consumers have had to pay considerably more for petrol as a result of these agreements in the past than would have been the case under normal competitive conditions.

Some filling station operators, which operate filling stations owned by an oil company, have a contract in which the oil company guarantees a fixed income from the business. If the turnover is lower than estimated, the oil company makes up the difference. If the turnover is higher, most of the profit is creamed off. Consequently the incentive to deviate from the recommended price is even smaller.

As a result of the combined effect of the support system in use, the transparency of the market, the small number of players, the characteristics of the product (petrol) and the high barriers to entry for new entrants, the effect of the agreements between the oil companies and filling station operators is such that NMa is of the opinion that competition on the Dutch market is severely restrained.

Procedure

It is possible for the Director-General of NMa to declare that the European exemption will not apply to the prohibition on cartels in the Netherlands. He informed the parties involved of his intention to do so and the reasons for this on 18 December 2001. The report underlying this intention and the dossier on which this report is based will be available for inspection by the parties. In addition, the parties will be given the opportunity to give their opinion of this intention, both in writing and verbally. The Director-General of NMa will take these opinions into account in forming his opinion and will subsequently take a final decision. In the interim, NMa will monitor developments on this market closely.

2.3.1b Report on Texaco in the case involving Tango

NMa has drawn up a report on Texaco and a number of Texaco filling stations in the region of Nijmegen. According to Tango, Texaco coordinated a discount campaign involving four Texaco filling stations in the neighbourhood of a Tango filling station to prevent this newcomer from establishing itself in this region.

The Tango filling stations are unmanned and are operated on a fully self-service basis. This concept is translated into lower consumer prices, as a result of which Tango promotes price competition. Four Texaco filling stations in the neighbourhood of the Tango filling station together reduced their prices, taking Tango's prices as the basis for this. The cost of this campaign was borne by Texaco.

Although the consumer benefits from these discount campaigns in the short term, the effect of these in the long term may be that Tango will disappear from the market and that price competition on the market will be reduced.

In April 2001, NMa drew up a report on Texaco Nederland BV due to its refusal to cooperate fully in the investigation initiated by NMa. NMa had asked to be allowed to interview a member of staff involved in the discount campaign. Despite repeated requests, Texaco refused to cooperate. Texaco gave as its reason for this the fact that the parliamentary proceedings and case law in relation to the Act provided no grounds on which to compel Texaco to consent to having a member of its staff interviewed. According to Texaco, only the members of staff authorised to represent the company may be obliged to do so.

NMa, however, is of the opinion that Section 5(20) of the Administrative Law Act *[Algemene wet bestuursrecht]* stipulates that all persons are obliged to cooperate with the regulator if, within reason, the regulator requires this in exercising its authority. This obligation to cooperate ensures that regulators can, in fact, exercise their authority (including obtaining information). Texaco did not comply with this obligation to cooperate. NMa subsequently drew up a report in relation to the refusal to cooperate. The maximum fine of NLG 10,000 (EUR 4,500) was imposed on Texaco. NMa declared unfounded Texaco's objection that the right of the company to remain silent was undermined as a result. [14]

2.3.2 UMTS auction

In 2001, NMa completed an investigation into whether Versatel and Telfort had entered into an agreement which restrained competition or were involved in a concerted practice in relation to the auction of UMTS frequencies. The reason for this investigation was an announcement by Telfort during a hearing on 1 November 2000 at the Ministry of Transport, Public Works and Water Management. Telfort stated that on 6 July 2000, the day on which the auction began, a discussion had taken place between Versatel and Telfort. At that moment, it was already known that there were six remaining candidates for the five UMTS licences. Versatel and Telfort were therefore possibly in a position jointly to affect the auction process, without the cooperation of other participants.

14 See also the summary on page 108.

On Friday, 3 November 2000, two days after the hearing, members of NMa's staff paid an unannounced visit to the offices of Versatel and Telfort and a large number of documents were seized. After thorough analysis of this material, NMa took statements from staff of both companies directly involved in the auction.
It emerged from the investigation that there was face-to-face and telephone contact between the parties on a number of occasions in the period prior to and during the auction. From the material and statements collected by NMa, however, it could not be established that the purpose of the contact was to influence the behaviour of the parties at the auction.

In February, NMa therefore concluded that no evidence had been found that Versatel and Telfort had contravened the Competition Act.

2.3.3 Hairdressers

In June 2001 NMa drew up a report on ANKO, the branch association of hairdressers, because it had recommended that its members should increase their prices by five percent, due to the average increase in costs within the branch. By doing so, ANKO coordinated the pricing behaviour of its members at the expense of consumers. After this had been ascertained, ANKO disclosed how it informed its members in relation to tariffs. From this, it appeared that in its communication with its members ANKO also presented profit margin percentages and a calculation model. These practices restrain competition as they remove the incentive for hairdressers to compete with each other by setting lower prices or profit margins.

In the decision taken in December, it was decided that ANKO should cease these practices immediately and that it would advise hairdressers explicitly to determine their prices and profit margins individually on the basis of their own costs. The Competition Act must be taken into account strictly with regard to the information that ANKO provides its members. NMa decided not to impose a fine. The decision clarifies both to ANKO and other branches what information branch organisations may issue to their members without infringing the Competition Act.

2.3.4 Construction sector

In November last year, under the heading of 'construction fraud', various signals were given of irregularities in the construction sector. For instance, in a television broadcast of the programme Zembla on 9 November attention was given to the 'parallel accounts' of the company Koop Tjuchem. Subsequently these accounts were also made available to NMa.
NMa's investigation under administrative law focuses on the restraints on competition which NMa may encounter in these dossiers. NMa's investigation is different to the criminal law investigation and the parliamentary commission of inquiry into the construction sector. In accordance with the Competition Act, NMa is authorised (under administrative law) to take action against the formation of cartels. This case specifically involves practices subsequent to 1 January 1998. The Competition Act has been in force since this date. In this regard, there is no overlap with the investigation carried out by the Public Prosecution Service. On the other hand, NMa has no role in relation to criminal prosecution for fraud and corruption. The Public Prosecution Service and NMa have entered into a covenant to coordinate their activities.

The primary task of the parliamentary commission of inquiry is to investigate the structural characteristics of the construction industry, the extent to which this structure corresponds to the irregularities in the sector which have been signalled and the attitude and methods of operation of the various parties in general. NMa will also enter into an agreement with the parliamentary commission of inquiry to avoid any disadvantageous interference with the investigations.

Infringements of the Competition Act

NMa's investigation into the construction sector involves tenders for construction work of considerable social and financial importance. NMa will carry out its investigation with the help of evidence provided in the above-mentioned 'parallel accounts'. It is prohibited, for instance, for companies to agree, prior to or during a tender, which company will receive the contract and at which subscription price. In addition, agreements not to bid below a certain price or to refrain from subscribing (subject to payment of an amount in money or in exchange for contracts) are prohibited. After all, as a result the customer does not determine which contractor receives the contract, but rather the companies themselves. The Competition Act also prohibits companies that subscribe to a tender from organising a so-called 'advance tender'. In the case of an 'advance tender', it is agreed that all subscribers will receive a certain amount to cover the 'costs incurred' and the amount of the lowest tender will be increased by the total amount of all the payments to the companies involved in the tender.

The above-mentioned price and market distribution agreements between contractors are a serious restraint on competition and constitute an infringement of the prohibition on cartels set out in the Competition Act. In the construction sector, companies may be aware of the fact that certain agreements are prohibited. For instance, in the decision of the European Commission of 5 February 1992, a clear statement is given of the fact that the schemes of the umbrella organisation representing companies in the construction industry, *Samenwerkende Prijsregelende Organisaties in de Bouwnijverheid (SPO)* [Association of Price-Regulating Organisations in the Construction Industry], had the effect of restraining competition. This involved, for instance, schemes which made it obligatory to notify SPO of an intention to offer a price, meetings of various competing companies and the settlement of agreed price increases.[15] NMa has prohibited tender schemes along these lines and has not granted exemptions. NMa announced this ruling as long ago as 1998. Various applications for exemption from companies in the construction sector were subsequently withdrawn. Since a scheme from the painting industry was not withdrawn, this resulted in a decision prohibiting the scheme in question in February 2001. This decision was upheld in the administrative appeal proceedings at the end of 2001.[16]

Construction Industry Taskforce

After the initial analysis of the parallel accounts referred to earlier, NMa concluded that carrying out an investigation into possible infringements in the construction sector was not possible within the existing organisation. For this reason, a taskforce was assembled which will grow to include approximately 35 people (investigators, lawyers, economists and accountants). The main task of the taskforce will be to investigate infringements of the Competition Act in the construction industry. In addition, the members of staff will obtain knowledge on preventive measures and an analysis will be made of the competitive conditions in the industry.

Information gathering

Since the Construction Industry Taskforce will require a considerable amount of information, NMa/DTe's Information Line has been open since December explicitly for tips and complaints regarding irregularities in the construction sector. Tips and signals which are received through this channel will be investigated by the taskforce.

In addition, NMa is keen to receive notifications of irregularities from tendering services. The reason for this is that NMa receives few notifications that contractors perhaps infringe the Competition Act during a tender, while it is precisely public authorities which commission the development of large-scale construction projects. The instructions drawn up with regard to this facility include examples of infringements that may occur in relation to tenders. In addition, the instructions deal with circumstances which may provide indications of such infringements. NMa hopes that this will stimulate public authorities to give notice of suspected infringements. The more indications NMa receives, the more and the better the investigations will be and the more evidence will be revealed.

The initial results of this investigation will be discernible in 2002.

2.4 Assessment of applications for exemption

In the year under review, the processing of transitional applications for exemption has been almost completed. Although the stream of applications for exemption from the prohibition on cartels was smaller than in the first year of NMa's existence (1998), applications for exemption were still received. The applications for exemption dealt with in the year covered by this report related mainly to the insurance sector, the financial sector, the healthcare sector and the recycling industry.

2.4.1 Claims management

In the year under review, NMa considered the phenomenon of 'claims management', which occurs in the insurance sector amongst motor-vehicle insurers. Joint ventures of motor-vehicle insurers select car repair companies and try to encourage policyholders to make as much use of the repair companies as possible in the case of insured damage by giving financial and other incentives (for instance, discounts on the excess, free replacement transport and guaranteed quality). These joint ventures may be regarded as joint procurement agreements. In principle such joint ventures are viewed positively due to the economies of scale that may be achieved, on condition that the consumer enjoys the benefits of this.

15 The SPO investigation resulted in a judgment by CFI, case T-29/92, (1995), ECR II-289.

16 See case 2414/VBBS.

From the perspective of competition law, a relevant question is whether the joint venture involving the insurers in relation the procurement of repair services results in such a degree of harmonisation of costs that the room for competition between the insurance companies on the motor-vehicle insurance market is reduced. With regard to the market to which the joint venture relates directly, namely the car repair market, it is important to consider, for instance, whether the selection takes place on an objective, transparent and non-discriminatory basis and whether those who are not selected are limited to a considerable degree in their sales opportunities.

In case 597/Schadegarant, NMa established that this joint venture may perhaps have the effect of limiting competition on the motor-vehicle insurance market, but granted an exemption for five years. The advantages arising from the system benefit consumers. They benefit from quicker settlement of the claim and an increase in the quality of the repairs, in addition to the above-mentioned reduction in the excess, free replacement transport etc. At the same time, there is sufficient competition on the insurance market and the car repair market.

2.4.2 Financial sector

Following an investigation into the *Gedragscode Hypothecaire Financieringen* [Code of Conduct in Relation to Mortgage Loans], a further investigation was carried out into the banking sector in the year under review. Firstly, in this regard an assessment was made of the interbank settlement system for the processing of giro collection forms. This assessment resulted in the amendment of the agreement aimed at preventing the exchange of commercial information between banks. The coordination of market behaviour in a concentrated market, such as the Dutch banking sector, must be prevented to ensure that competition benefits consumers as effectively as possible. This case contributed to an analysis of the risks in the banking sector, in general, from the perspective of competition law. It is also of importance to the Interpay investigation initiated by NMa based on complaints received from MKB Nederland, the association of small and medium-sized companies in the Netherlands.
This investigation focuses, in any event, on the question of whether a dominant position has been abused with regard to the tariffs charged for debit-card transactions. The cooperation between banks will also be considered in the light of section 6 of the Competition Act.

2.5 Competition and other interests

Non-economic interests may play a role at various levels in assessments. Firstly, this is the case in deciding whether a practice is subject to the Competition Act. For instance, the agreements between organisations representing employers and employees with regard to employment and the conditions of employment, set out in collective labour agreements, are not subject to the prohibition on cartels. This standpoint is based on case law of the Court of Justice of the European Communities.

If the Competition Act does apply to the behaviour of companies, the second question is whether the behaviour restrains competition. There is room for *de facto* competition on some relevant markets because the employer has considered specific legislation and regulations to be necessary in the sectors. In such cases, competition is not restrained, for instance by agreements or concentrations. In the concentration cases in relation to the merging of hospitals, the assessment to date has been that a dominant position has not been strengthened or maintained, since *de facto* competition in this sector has been excluded by the government through legislation and regulations. The situation may be different if the rules in this area allow more operation of market forces or if the actual situation changes.

In the event of an appreciable restraint on competition as a result of agreements that have been made, an investigation may be carried out at the request of the parties to establish whether an exemption from the prohibition on cartels is possible. Non-economic interests often appear to be linked to or coincide with economic interests. Advantages, for instance, in relation to the environment may also result in efficiency advantages, contribute to an improvement in production or distribution and may result in the promotion of economic and technological progress. The interest of the environment may therefore also be regarded as an economic interest and will therefore also play a role in the assessment in accordance with competition law. In all cases, however, it is necessary to comply with the criteria for exemption stipulated in section 17 of the Competition Act. This means that an exemption will not be granted if only non-economic interests are involved and there are no advantages resulting in improvements in production or distribution, or economic and technological progress. In addition, agreements are prohibited which impose greater restraints on competition than are strictly necessary in order to achieve the aim of efficiency improvements or technological progress.

2.5.1 Competition and healthcare

2.5.1a Contracts between healthcare providers and health insurance funds

In 2000 NMa clarified the way it deals with those parts of the healthcare sector in which the legislator has decided to introduce market forces. In this regard, it has been made clear that the existing traditional way that healthcare providers enter into contracts with health insurers in relation to the parameters of competition is in conflict with the Competition Act. This method of contracting is not only in conflict with section 6 of the Competition Act, but is also diametrically opposed to the legislator's intention in making changes to the system introduced in 1992. This is because by doing so healthcare providers cannot differentiate their services in relation to each other and the health insurers cannot realise the demand-driven system which the government desires. In general, collective agreements, however, which only relate to providing guarantees of qualitatively responsible care or which are limited to administrative procedures, are not prohibited.

In the year under review, the processing was completed of a large number of transitional applications for exemption in the healthcare sector which related largely to employee agreements between health insurance funds and independent healthcare providers. In the previous year, a decision had been announced with regard to the standard agreement, entered into between national insurance funds and the representatives at the regional level of the independent physiotherapists established in the respective region. After this, a further decision was taken in 2001 with regard to collective standard agreements between a national insurance fund and the regional representatives of pharmacists established in the respective region. This standard contract also contained agreements on tariffs and agreements with regard to the setting up and distribution of practices.

In April 2001, NMa also took a decision on the policy with regard to the setting up of practices and collective negotiations by *Landelijke Huisartsenvereningen (LHV)*, the national association of general practitioners. It was decided that agreements with regard to collective negotiations, for instance in relation to tariffs and agreements on the division of the market, contravened the Competition Act. LHV filed an administrative appeal against this decision, but this administrative appeal was declared unfounded in December. With a view to the difficult position confronting general practitioners, NMa decided to extend the transitional period to 1 April 2002.

After making clear in these decisions that the so-called collective negotiations between the representatives of healthcare providers and national health funds could not be reconciled with the Competition Act, the remaining contracts between healthcare providers and national health funds, of which NMa had been notified, were amended in such a way that they no longer contravened the Competition Act.

Although entering into collective contracts in relation to the parameters of competition is not permitted, it is not the case that negotiations in this regard must always be conducted at the individual level. Subject to certain conditions, small groups or joint ventures of general practitioners or other healthcare providers, for instance, may enter into joint negotiations with insurers. It is also possible to appoint an intermediary, so that every healthcare provider does not have to negotiate as an individual with every insurer. In 2002 NMa published a consultation document in relation to *Guidelines for the Healthcare Sector [Richtsnoeren voor de zorgsector]* which reflects NMa's practice and provides clarity on what is and what is not permitted in accordance with the Competition Act. This consultation document was published on the website. Market players were given the opportunity to give comments and make suggestions.

2.5.1b Formularies

Following an application for exemption, submitted by the health insurer Zilveren Kruis, NMa decided that Kennemerland Medicine Formulary *[Geneesmiddelen-formularium Kennemerland]* did not contravene the prohibition on cartels. A medicine formulary is a preferential list of medicines which are recommended for the treatment of various ailments. The aim is to achieve more efficient prescription practices and ultimately also lower costs. The Kennemerland Formulary was agreed to by the health insurer, a number of hospitals and hospital pharmacies, and the pharmacists and general practitioners in the region.

Under certain circumstances, a medicine formulary of this sort may have an exclusionary effect on the market for the procurement of medicines and may therefore restrain competition. In this case, however, there was no appreciable restraint on competition. The agreement involves less than five percent of Dutch policyholders.

In addition, the Kennemerland formulary only sets out which active substances the doctor should prescribe and not which brand, and the list is revised every two years.

2.5.2 *Competition and conditions of employment*

The policy with regard to the relationship between competition law and collective labour agreements, as indicated in the year 2000, was continued. In concrete terms, this means that agreements between employers and employees with regard to employment and the conditions of employment are not subject to competition regulation (see p. 13 of the Annual Report for 2000). NMa has sought to comply with European case law in this regard. Only in situations in which a collective labour agreement is used as a means of implementing cartel agreements is it possible that the Competition Act may apply.

2.5.3 *Competition and the environment*

In the past year, NMa dealt with a number of applications for exemption in relation to collective recycling schemes. These recycling schemes are financed from the payment of a recycling levy paid into a fund by the participating producers and importers, from which the cost of collection and processing of products is met in the waste disposal stage. In addition, a number of these systems assessed by NMa include the obligation to pass on the recycling contribution to the consumer and to charge for this separately.

Recycling schemes which only provide for the payment of a standard recycling contribution to a fund by producers and importers will generally be considered acceptable by NMa. The collection and recycling of products in the waste disposal stage and to the environmental advantages arising from this may be realised efficiently as a result and will consequently result in advantages which will often meet the exemption criteria contained in section 17 of the Competition Act. If the payment of the standard recycling contribution does not result in such a degree of harmonisation of costs amongst producers and importers that there is a risk of market coordination on the markets on which they offer their products, the recycling scheme will not be subject to the Competition Act.

Recycling schemes which include agreements requiring participants to pass on the recycling contribution and to charge this separately, however, are generally not acceptable. The obligatory charging and separate billing of the contribution on the invoice will generally not qualify for exemption, since no economic advantages arise from this and it is not essential to the functioning of the recycling scheme. An exemption may be granted for such schemes if the standard recycling contribution is paid to the fund by the producers and importers.

2.6 Concentration control

In the year under review, the activities in relation to concentration control, pursuant to the Competition Act, were broadened and deepened. Since the turnover thresholds for concentration control were increased, the number of notifications of concentrations declined, as was intended. Consequently there is more room for assigning priority to proactive activities. More attention has been paid, for instance, to monitoring compliance with the obligation to give notice. In addition, NMa endeavours to provide as much clarity is possible and to reduce uncertainty in the private sector as far as possible, for instance by drawing up consultation documents. The number of questions posed by advocates and companies with regard to the interpretation of concepts in the Act increased significantly, compared to 2000. In addition, an increasing number of complex and multifaceted questions are presented. This will be discussed in more detail under a number of headings which were dealt with in the year under review, in addition to the joint dominant position and mitigating factors in relation to high market share, which were mentioned earlier. This involves:
– increasing turnover thresholds;
– allocating market shares in the case of joint companies;
– monitoring remedies;
– amending notifications.

2.6.1 *Increasing turnover thresholds*

Previously NMa had to be notified of concentrations if the joint global turnover of the companies involved amounted to more than NLG 250 million and if at least two of them had an annual turnover in the Netherlands of the least NLG 30 million. As of 17 October 2001, the last-mentioned turnover threshold was increased from

17 *Decision of 28 September 2001 in relation to the increase in the turnover thresholds, as referred to in section 29(1) of the Competition Act with regard to the turnover realised in the Netherlands (Decision in Relation to the Increase in the Turnover Threshold for Concentration Regulation [Besluit verhoging nationale omzetdrempel concentratietoezicht], Netherlands Government Gazette 2001, No. 461, 16 October 2001.*

NLG 30 million to EUR 30 million.[17] The condition that the undertakings should have a joint annual turnover in excess of NLG 250 million (EUR 113.45 million) has not changed. The thresholds applicable to credit and financial institutions and insurers have remained unchanged.

The increase in the turnover thresholds was partly intended to bring about a reduction in the administrative burden for small and medium-sized enterprises. As a result of the increase in the annual turnover threshold, it is expected that 50 to 75 fewer notifications will have to be given. After the increase took effect in the year under review, a clearly noticeable reduction occurred in the number of notifications. At the moment that the increase in the turnover thresholds took place, it appeared that eight concentrations which were being processed at that moment were no longer obliged to give notice.
As intended, the increase in the threshold will result in better utilisation of the available capacity, so that concentration cases may be settled quicker. This capacity is also used for complex cases and structural projects, as a result of which the quality of the concentration regulation can be further improved. In the year under review, a number of new projects were initiated.
For instance, the active investigation of transactions of which NMa had not be notified was intensified. In doing so, various sources are studied for evidence of acquisitions of which NMa was not notified. This increased effort has already shown results. An analysis of the energy sector has also been started. In this regard, research was carried out to establish what developments were occurring and what their effect is on the definition of the market. Specific attention was given to the factors necessary for ensuring that markets extend beyond national borders. In addition, a framework was created for remedies, which indicates how NMa wishes to deal with these in the future on the basis of present experience with remedies. These initiatives provide increased clarity for companies, advocates and other parties involved, with regard to NMa's activities in the area of concentration regulation.

2.6.2 Attributing market shares to joint undertakings

During the year under review, the extent to which the activities of an undertaking, over which a number of parents companies exercise joint control, should be attributed to these parent companies has been raised for discussion on a number of occasions. In assessing the consequences of concentrations, NMa attributed the activities of the subsidiaries in full to each of the companies which exercised joint control. This therefore not only applied to the company which entered into the concentration. It also applied to its competitors, with which the company is a co-shareholder and which exercise joint control with the company directly involved in the concentration by virtue of their being shareholders.

In 2001, this issue was raised in cases 2427/NCD – Fernhout and 2708/Koninklijke Wegenbouw Steven – Gebr. Van Kessel Holding, both of which cases involved participation by the parties in cement or asphalt production plants respectively. By attributing the entire sales of the plant separately to each of the parent companies on the basis of control, the sum total of the sales percentages amounted to more than one hundred percent. The sales of the respective plants as a proportion of total sales is counted once. As a result, the sales percentages calculated in this way give a slightly distorted picture of the position of the various companies. Nevertheless, in the opinion of NMa, this method of calculating turnover provides the most objective indication of the position of companies and their competitors involved in a concentration, who are co-shareholders.

A further remarkable aspect of these cases is the use of models in analysing the position of the companies involved in the concentrations within the supply areas with a certain radius around the plants in question. In this regard, attention is not only given to the supply area of the plant(s), the control of which changes as a result of the proposed concentration, but also to the supply areas of the plants in which the companies involved in the concentration already exercise control and which overlap to a significant degree with the supply area of the plant, control of which is obtained through the concentration. After all, competition ceases between the plants, over which control is obtained in a certain supply area, on the one hand, and the other plants of the companies participating in the concentration in that area, on the other hand.

2.6.3 Remedies

Remedies are limitations or regulations which may be linked to a licence and which offer a solution to the problems in relation to competition arising from a concentration. The ultimate aim of concentration regulation is achieved through this solution, namely, that a dominant position does not emerge. The solutions often take the form of the obligatory sale of part of a company.

Monitoring remedies

Monitoring the implementation of remedies linked to licences for concentrations granted earlier was an important part of the activities in the area of concentration control in the year under review. This monitoring involves, for instance, assessing reports on the current situation. In addition, verification is carried out to ascertain whether the parts that are sold off are maintained and whether the competitive position and continuity of these parts of the company are guaranteed. These activities are generally carried out by an independent trustee, who reports to NMa. A trustee such as this is authorised to take or veto certain decisions to ensure the continuity of the undertaking. The buyers are sought primarily by the parties, but must be assessed by NMa. In doing so, an assessment is made of whether the buyer is independent and has sufficient expertise and financial resources to maintain the activities to be transferred as a going concern and as a competitor of the seller.

Case 1331/PNEM/MEGA – Edon is an example of a case in which verification of whether the parties had complied with the conditions stated in the licences played a role. In this case, Essent was required to sell its interest in a certain composting plant by the end of October 2001. This was not done. Essent applied to the Trade and Industry Appeals Tribunal *[College van Beroep voor het Bedrijfsleven]* for suspension of the obligation to sell the plant until the Tribunal had taken a final decision on the appeal. This application was dismissed as there was no evidence of serious and irreparable damage or disproportionate disadvantage. In accordance with the conditions, Essent subsequently instructed an investment bank to sell the interest. This sale was realised in the year under review.

Monitoring the maintenance of the parts of the company which are sold and ensuring that the competitive position and continuity of these parts is retained played an important role in cases 1528/Wegener – VNU and 1538/De Telegraaf – De Limburger. The cases involved, for instance, the sale of various house-to-house newspapers. By submitting reports, the parties informed NMa of the progress of the sale. The buyers selected by the parties were presented to NMa for assessment. In assessing the expertise and financial resources, attention was given, for instance, to their experience in the sector and to their solvency, liquidity and profitability throughout a number of years. A number of potential buyers were asked to present a business plan setting out their intentions and expectations or guarantees that the parent company would give its new subsidiary. Finally, on the basis of the data provided, it was possible to approve the proposed buyers. On the basis of the decision taken by the Trade and Industry Appeals Tribunal on appeal, Wegener was also required to realise the sale of *Arnhemse Courant* and a number of editions of *Gelders Dagblad* originally imposed. However, Wegener had already integrated these publications into *De Gelderlander*. In doing so, Wegener created the necessary problems for itself and will have to find a solution for these. NMa will monitor the implementation of the ruling.

Changes to notification

The Competition Act does not provide explicitly for the possibility of linking limitations and conditions to a decision in the notification phase. However, the parties may amend the notification in order to avoid the licensing phase. The realisation of the concentration in a form other than that stated in the notification (including the amendment) is prohibited, in terms of the Competition Act. In this case, a fine and/or an order subject to a penalty may be imposed to reverse the infringement. For this reason, it is necessary to record precisely what the amendment to the notification is and when this amendment will be implemented.

To obtain sufficient certainty regarding the implementation of the amendment to the notification, the party may be asked, for instance, to submit an irrevocable power of attorney issued to an independent third party to sell a certain company or part of a company. Only if the problem in relation to competition is very clear and the proposals made by the parties to amend the notification would without doubt solve the problem, may the amendment to the notification be accepted as the solution. It is in the interests of both parties and NMa to find a solution in the notification phase if the specific case permits. This may avoid a lengthy and intensive investigation in relation to the issuing of a licence.

In 2001 the amendment to the notification in case 2141/Rémy Cointreau – Bols, which had been accepted earlier, was implemented. This amendment involved the issuing of irrevocable instructions and an irrevocable power of attorney to an investment bank to sell (by auction) all the cognac-related activities of Bols, in so far as these were linked to the Joseph Guy brand. The sale and transfer was to take place within a certain, limited period. Prior to the sale and transfer, the investment bank was to ensure the independent sale of cognac under the Joseph Guy brand name in order to guarantee that 'Joseph Guy, the cognac company' could be sold as a

going concern. At the end of May 2001, 'Joseph Guy, the cognac company' was sold to UTO Nederland B.V.

In the year under review, on one occasion NMa accepted an amendment during the notification phase with the aim of avoiding the necessity of issuing a licence for the concentration. In the case 2209/Gran Dorado – Center Parcs, the parties amended their original notification after being informed of the provisional assessment of the consequences of the proposed concentration. They issued an independent third party with an irrevocable power of attorney and instructions to sell the management and rental agency agreements in relation to 33 parks owned by Gran Dorado. In the year under review this was implemented through the sale of Landal Greenparks.

Consultation document on remedies

A number of formal and substantive aspects play a role if a licence is granted subject to conditions or if an amendment to the notification is accepted. During the past four years, NMa has acquired experience in assessing and implementing 'remedies'. During the year under review, NMa started drawing up a consultation document based on its experience up until then. This document will be published in 2002. The consultation document will provide an overview of the substantive criteria which remedies and amendments to notifications must meet if they are to be accepted by NMa. In addition, the procedural aspects will also be discussed.
The consultation document should result in greater clarity for companies and lawyers. The result of the consultation is expected to improve the quality, effectiveness and efficiency of the remedies.

2.7 Sanctions

NMa is authorised by law to impose fines if a company contravenes the prohibition on cartels (section 6 of the Competition Act). The same applies if a company abuses a dominant position (section 24 of the Competition Act). In addition, NMa may also impose fines on companies that do not notify NMa of their merger or business acquisition in accordance with the rules or if people do not comply with their statutory obligation to cooperate.

2.7.1 Procedure

If NMa has reason to believe that a company has committed an offence and that an order or fine will be imposed, a report is drawn up. The report and the dossier on which it is based are handed over by the directorate in question to the Legal Department. The report, which forms the basis of the sanctions proceedings instituted by the Legal Department, includes, for instance, the facts and circumstances that serve as the basis determining that an infringement was committed. In addition, the name of the company involved and the name of the person or legal entity to whom NMa may attribute the infringement are stated. The Legal Department then invites interested parties to submit their opinions on the report in writing or verbally. It is possible to respond in writing and (afterwards) verbally. In 2001, companies involved in a number of sanctions cases decided against a verbal procedure. After the parties involved have made their opinions known, the Legal Department prepares a well-argued decision.

NMa gives high priority to proceedings in relation to sanctions. The Competition Act stipulates that NMa is required is to take a decision within 13 weeks after the report is drawn up, in the case of proceedings in relation to sanctions as a result of the failure to give (proper) notification of a concentration or a breach of the obligation to cooperate. Such a term does not apply to other cases involving sanctions. Although NMa aims to take decisions quickly also in these cases, in practice it has proved impossible to adhere to the same term. The cases are often very complex and the interests involved often conflict. Taking into account the requirement that it exercise due care, NMa operates in this area with the necessary speed without losing sight of the importance of due process and the need to substantiate its decisions.

Interested parties may submit an administrative appeal against a decision imposing a sanction. In cases involving infringements, for which the statutory fine amounts to EUR 22,000 (previously NLG 50,000) or more, NMa requests the advice of an external advisory committee before taking a decision on the administrative appeal. NMa makes this advice known at the same time as it announces its decision. Interested parties may lodge a judicial appeal with the Court of Rotterdam against a decision in relation to an administrative appeal. Finally it is possible to appeal against the decision on the judicial appeal to the Trade and Industry Appeals Tribunal.

In 2001 NMa took six decisions on the basis of a report. In the case of four decisions, a fine was imposed (see 2.7.2 below). In two cases, NMa decided not to impose a fine due to the circumstances of the case despite the fact that NMa had established that the undertaking in

question had committed an offence (case 2228, Taxi; case 2234, ANKO). NMa also settled five administrative appeals against earlier decisions to impose sanctions. In four cases, the administrative appeal was declared unfounded (case 2463 Texaco, case 1 NOS-HMG/ Telegraaf; case 757, Chilly-Basilicum/Secon and case 1774, Horn/Verkerk) and in one case NMa amended its earlier decision in a number of respects (case 2421/Agreements between notaries in Breda). [18]

In two cases, NMa had reason to deviate from the advice of the Advisory Committee (case 1, NOS - HMG/Telegraaf; case 757, Chilly - Basilicum/Secon). In one case, NMa decided to reduce fines imposed earlier following an administrative appeal and on the advice of the Advisory Committee (case 952, Notaries in Breda). In six cases, a judicial appeal was filed against an earlier decision by NMa imposing a sanction. In 2001 no judgments were made by the Court in these cases.

In the cases in which no administrative or judicial appeal was filed, the fines have to be paid within a period of 13 weeks (section 67 of the Competition Act). Where applicable, payment occurred after the amount was increased by the statutory interest. Fines are paid to the Treasury.

2.7.2 Fines

The fines that NMa may impose for infringements of the prohibition on cartels or the prohibition on the abuse of a dominant position amount to a maximum of EUR 450,000 (previously NLG 1 million) or, if this is greater, 10% of the annual turnover of the undertakings involved in the infringement. To give the parties insight into the way the level of the fine is determined, NMa approved and published policy rules in December 2001. *The Guidelines in Relation to the Setting of Fines*[19] will be discussed later in this chapter.

In the case of fines imposed for failing to give (proper) notification of a merger or acquisition or failure to comply with the obligation to cooperate, the statutory maximum is not a percentage of the annual turnover of the undertaking in question, but a fixed amount. NMa may impose a fine in such cases amounting to EUR 22,500 (previously NLG 50,000) or EUR 4,500 (previously NLG 10,000) respectively. The policy in relation to these fines is worked out in more detail in the *Guidelines in Relation to the Setting of Fines*, as set out in the Annual Report for 2000. NMa adheres to the policy that the maximum fine of EUR 22,500 or EUR 4,500 respectively will be imposed, except if there are special mitigating circumstances. In 2001, this policy was followed in case 2463 (Texaco), in which the maximum fine of NLG 10,000 (EUR 4,500) was imposed due to a breach of the obligation to cooperate, and in case 2034 (Deutsche Post), in which the undertaking provided incorrect data for the assessment of a concentration. In cases 2346 (Vinnolit) and 2727 (NN/ASR), the maximum fines were imposed for the realisation of a concentration without notifying NMa of this beforehand. In these cases, a fine of NLG 50,000 was imposed on each of the undertakings to which the infringement was attributed. In two other cases, the maximum fine of NLG 50,000 was reduced by NLG 10,000 because the parties of their own accord notified NMa of the concentration and gave their full cooperation in the investigation (case 2346, Advent-Vinnolit-Vintron and case 2727, NN/ASR-ArboDuo).

2.8 Guidelines

Through the publication of all important decisions, guidelines and reports on specific topics, NMa wishes to provide as much clarity and certainty as possible with regard to its law-enforcement practices. In 2001, a number of guidelines were published which contributed to increasing transparency. NMa is also able to give more insight into its opinions in other ways. In 2001, a memorandum with regard to UMTS and the Internet Access Report were published.

2.8.1 Guidelines for Cooperation between Companies

One of NMa's important activities in the year 2001 was the development of *Guidelines for Cooperation between Companies [Richtsnoeren Samenwerking Bedrijven]*. These guidelines are intended for companies and their branch associations. On the basis of these guidelines they can make a close estimate of our NMa assesses the various frequently occurring types of cooperation between small and medium-sized enterprises and their branch

18 Summaries of these decisions have been included in chapter 6 of this annual report.

19 Guidelines in Relation to the Setting of Fines [Richtsnoeren Boetetoemeting met betrekking tot het opleggen van boetes pursuant to section 57 of the Competition Act, Netherlands Government Gazette, No. 248 of 21 December 2001, also available from NMa's website.

associations. These guidelines were drawn up after consultation with MKB-Nederland and VNO/NCW, the organisations representing employers. After the publication of these guidelines in June 2001, the guidelines were explained verbally and a large number of questions were answered during specially organised theme meetings attended by the staff of a number of branch associations and umbrella organisations. This provided more clarity with regard to the consequences of the Competition Act for cooperation between companies and a number of prevalent misunderstandings could be removed. The description given in the guidelines of the way NMa assesses various types of cooperation is also reflected in a number of decisions taken in 2001. These include, for instance, decisions relating to quality chain schemes in the agribusiness sector. These decisions confirm that in general NMa would view quality chain schemes in a positive light because these generally result in quality improvements and greater choice for customers. With regard to general terms and conditions, the same applies. In general, these provide consumers with clarity, while good general terms and conditions need not contain restraints on competition.

2.8.2 Price Squeeze Guidelines

In 2001, NMa and OPTA jointly issued guidelines to enable (efficient) new entrants which provided telecommunications services to offer services in competition with KPN Telecom. The guidelines deal with the issue of when a dominant position is abused as a consequence of unfairly low end-user tariffs.

Since mid-2000, various providers of telecommunications services indicated that they were experiencing difficulty in offering subscribers a package of telecommunications services for fixed telephony which was competitive with that of KPN Telecom. Independent service providers, in particular, indicated that they experienced problems in offering local calls.

If the margin between the consumer tariffs charged by KPN Telecom and the procurement costs (interconnection tariff), which other providers have to pay KPN Telecom, is too great, the new entrants cannot offer their services profitably. This is referred to as a price squeeze.

In the guidelines, price squeeze tests have been defined for the various Telecom services (within the KPN local tariff area, trunk calls, Internet access calls, calls from fixed to mobile telephones). This allows KPN's minimum end-user tariffs for the services to be determined. The tariffs may not be lower than the costs an (efficient) entrant incurs for providing these services. In the case of fixed telephony, these costs consist, for instance, of the average interconnection tariff paid for obtaining access to KPN's network, multiplied by a margin to cover the costs, for instance, of marketing and invoicing. If KPN's tariffs are lower, KPN is abusing its dominant position.

2.8.3 Guidelines for the Setting of Fines

The *Guidelines for the Setting of Fines [Richtsnoeren Boetetoemeting]* are based on the principle that the level of fines should be such that they restrain offenders from offending again (specific prevention), as well as deterring potential offenders (general prevention).[20] In determining the fine, NMa in any event is required to take into account the seriousness and duration of the infringement, in accordance with section 57 of the Competition Act. The seriousness of the infringement, according to the guidelines, depends firstly on the type of infringement.

The guidelines refer to three types of infringements: very grave, grave and less grave infringements. Far-reaching horizontal restraints, such as price agreements, market distribution agreements and quota schemes are very grave infringements. Abuse of a dominant position of the type aimed at excluding or driving a company from a market fall into this category. The second category – grave infringements – results, for instance, in horizontal restraints which cannot be regarded as very grave infringements, individual vertical price maintenance, vertical prohibitions on sales to third parties and forms of abuse of a dominant position, such as discrimination and tied sales. The category of less grave infringements relates to schemes which only distort competition to a limited degree. These include, in particular, prohibited vertical schemes and branch schemes that restrain competition which do not relate to prices and sales opportunities. The seriousness of the infringement is then determined on the basis of the type of infringement *and* the economic context in which the infringement occurred. In this regard, the nature of the products and

20 Guidelines for the Setting of Fines [Richtsnoeren Boetetoemeting] in relation to the imposition of fines, pursuant to section 57 of the Competition Act, Netherlands Government Gazette, No. 248 of 21 December 2001. Also available from NMa's website.

services involved, the size of the market, the size of the company or companies involved and its or their (joint) market share, the structure of the market and applicable regulations play a role.

In principle, the fine is based on a fine base of 10 percent of the turnover involved of the undertaking in question. The turnover involved is equal to the value of all the transactions realised by the undertaking for the entire duration of the infringement through the sale of goods and/or services to which the infringement relates. If the information provided by the undertaking is inadequate, NMa may estimate the turnover involved. In certain cases, the turnover involved is difficult to determine because, for instance, it involves practices aimed at protecting a (dominant) position, which consists of not carrying out certain transactions or action aimed at excluding or eliminating a competitor. In the last case, the turnover involved is equal to the turnover of the undertaking during the period of the infringement on the market that was to be protected, subject to a minimum of one year.

The level of the fine is determined by multiplying the fine basis by a certain factor. This factor increases in proportion to the severity of the infringement, taking into account the economic context. With regard to less grave infringements and depending on the seriousness of the offence, this factor is set at a maximum of 1. In the case of grave infringements, the maximum factor is 2. In the case of very grave infringements, the factor is set at a value ranging from 1.5 to 3. The importance of the undertaking involved to the Dutch economy, expressed in terms of the annual turnover of the undertaking on the Dutch market may subsequently result in a situation where the resulting factor obtained has to be amended to have a deterrent effect. The fine may also be higher if aggravating circumstances give cause for an increase in the fine, such as previous infringements of competition rules. On the other hand, the amount of the fine may be lower in the event of mitigating circumstances, such as far-reaching cooperation.

It is only possible to deviate from the guidelines if the application of the guidelines would produce inequitable results. This will be the case, for instance, if the application results in the bankruptcy of the company in question. In addition, it is possible to deviate from the guidelines in special cases by imposing a symbolic fine.

By means of the *Guidelines for the Setting of Fines*, NMa has aimed to achieve a recognisable, transparent policy in relation to fines that results in fines which have a deterrent effect. In doing so, NMa aims to achieve a situation where undertakings refrain from committing offences. Due to the threat of a fine, undertakings will sooner be inclined to terminate their prohibited practices in exchange for fine immunity or a reduction in the fine and to provide NMa with information on the cartel agreements in which they are involved. As was indicated in the Annual Report for 2000,[21] NMa is willing to reduce the fine, relative to that of other offenders, in the case of and undertaking which, of its own accord, informs NMa of the infringement of the prohibition on cartels, in which it is involved, provides NMa with evidence of this cartel and fulfils certain conditions, for instance that it will give its full cooperation to NMa's investigation. A policy such as this, also referred to as a leniency policy, is also regarded by other competition authorities as an important law-enforcement instrument. With the aid of this, it is possible to detect, terminate and penalise infringements of the prohibition on cartels more efficiently. NMa is currently developing a more detailed policy along these lines and published a consultation document on Leniency Guidelines *[Richtsnoeren clementietoezegging]* in March 2002.[22]

2.8.4 Cooperation UMTS

In September 2001, NMa, OPTA and the Ministry of Transport, Public Works and Water Management published a joint memorandum in which they gave an extensive explanation of the opportunities for UMTS licence holders to cooperate in constructing UMTS networks. A draft memorandum on this had already been published in July, to which interested parties could respond.

NMa, OPTA and the Ministry of Transport, Public Works and Water Management are of the opinion that cooperation in the construction of UMTS networks may contribute to the quicker development of UMTS. Through cooperation, the operators, for instance, may reach a broader public quicker with a smaller investment, the loss-making lead period required for the development of the UMTS market may be reduced, as a result of which competition at the level of services will gain momentum quicker, and it will be possible to offer customers better services sooner with wider coverage and at lower prices. In addition, by cooperating the total number of antenna

21 Annual Report of NMa and DTe for 2000, page 52.

22 Available from NMa's website since March 2002.

stations required may be reduced. This will limit the regional planning and environmental objections to masts and antennas, which is in line with the objectives of the national antenna policy. On the other hand, cooperation in the construction and use of UMTS networks will result in a reduction in competition to a greater or lesser degree. For this reason, NMa, OPTA and the Ministry of Transport, Public Works and Water Management have set clear boundaries to cooperation to maintain competition between the UMTS licence holders.

The memorandum makes clear which organisations regulate which areas. NMa, for instance, will assess all the joint ventures which restrain competition and OPTA will monitor compliance with the conditions of the licences. These conditions stipulate, for instance, that the licence holders may not share frequencies and that each licence holder must have at least its own network by 1 January 2007, for instance, in all municipalities with more than 25,000 inhabitants.

In assessing a concrete joint venture which is worked out in detail, NMa will apply the important condition that there should be sufficient competition between UMTS licence holders in the area of both UMTS services and networks. The exchange of information should also remain limited to the central technical data. Cooperation should remain limited to the joint construction and use of the UMTS radio network (such as masts, antennas and network administration). In addition, it should continue to be possible for every operator to determine the quality of the network according to its own criteria. Joint use of the core network is not permitted.

In December, Ben and Dutchtone announced that they intend to cooperate in the construction of a UMTS network. They have applied for exemption from the prohibition contained in section 6 of the Competition Act for this cooperation.

2.9 Legal aspects

It is possible to file administrative or judicial appeals against NMa's decisions. Administrative appeals are processed by the Legal Department of NMa. The Court of Rotterdam is the institution with which interested parties may file judicial appeals. It is not necessary to first go through the administrative appeals procedure in cases involving concentration control. It is possible to appeal against rulings by the Administrative Court in Rotterdam to the Trade and Industry Appeals Tribunal.

2.9.1 Public access to information

Confidentiality is an aspect of almost every case dealt with by NMa. At various places in the Competition Act guarantees are given that confidential information will, in fact, be dealt with confidentially. Documents which are considered confidential may not be made available for inspection. On occasions, however, NMa is requested to provide certain information following an appeal to the Government Information (Public Access) Act *[Wet openbaarheid van bestuur]*.

The Government Information (Public Access) Act is a general measure governing public access to information, which is inoperative if special measures are included elsewhere in legislation or pursuant to legislation. Any special regulations are interpreted as closely as possible in accordance with the Government Information (Public Access) Act. The question as to whether the Competition Act is a special scheme which renders the Government Information (Public Access) Act inoperative was central to a number of cases. NMa answered this question in the affirmative (see case 1231 of 19 April 1999, case 882 of 24 April 1999 and case 2705 of 21 December 2001). The conclusion is that the Competition Act is a special regime that renders the Government Information (Public Access) Act inoperative.

In accordance with section 90 of the Competition Act, all information with regard to an undertaking, obtained during the implementation of the Competition Act, may only be used in the application of the Competition Act. Making Information publicly accessible outside of the cases stipulated in the Competition Act does not constitute the application of the Competition Act. The Competition Act does not make a distinction between data or information provided by undertakings themselves and data or information obtained from official investigations carried out by NMa. In addition, section 90 of the Competition Act does not make a distinction between confidential and non-confidential data or information. In addition, the phase in the decision-making process is not important with regard to the application of the Competition Act. This means that this provision applies during the preparation of a decision and after NMa has taken a decision. Section 90 of the Competition Act even applies irrespective of whether a decision is ultimately taken.

The above means that information may only be provided for the application of the Competition Act. A number of provisions have been included in the Competition Act

with regard to public access to information. This is the case, for instance, in relation to the preparation of a decision within the framework of an application for exemption and in relation to the decision-making process subsequent to an investigation report. With regard to concentration cases, with a view to protecting confidential data, it was consciously decided not to declare the public preparatory procedure to be applicable. As a result, the Act does not make it obligatory to make the data relating to the application for a licence available for inspection. In addition, the Competition Act still contains provisions with regard to announcements in the *Netherlands Government Gazette [Staatscourant]* and the availability for inspection of decisions at NMa's offices.

With regard to the provision that data and information may only be used for the application of the Competition Act, the Competition Act makes one exception. NMa is authorised to provide data or information to a foreign institution responsible for the application of competition law in its respective country. In addition, information and data may be provided to a public authority responsible for carrying out duties which (partially) relate to the application of provisions regarding competition, in accordance with statutory measures other than the Competition Act. NMa only provides data or information if secrecy is adequately guaranteed *and* if sufficient guarantees are given that the data or information will not be used for any purpose other than that for which it was provided. Not only are the statutory provisions in relation to secrecy of importance in this regard, but also the use of this data and information in practice.

2.9.2 *Administrative appeals*

Interested parties who are not in agreement with a decision may file an administrative appeal against it. Administrative appeals are not dealt with by the directorate or chamber which prepared the initial decision, but by the Legal Department of NMa. The aim of this is to implement the principle of review which underlies the administrative appeals procedure. The processing of the administrative appeal by the Legal Department is in line with the requirement of section 7(5) of the General Administrative Law Act, namely that the hearing should take place before (a majority of) people not involved in the preparation of the contested decision. The administrative appeals procedure contributes to the accountability of NMa for its actions. The decision on an administrative appeal may provide additional reasons for NMa's decisions or bring it in line with policy that has already been developed further. This makes not only individual decisions, but also NMa's policy as a whole, more transparent.

2.9.3 *Administrative appeals procedure under the Competition Act*

Before filing a judicial appeal with the Administrative Court, and administrative appeal must be filed with NMa in good time. Section 7(10) of the General Administrative Law Act stipulates that a decision on the administrative appeal must be taken within six weeks or, if an Advisory Committee is involved, within ten weeks of receiving the notice of appeal. The term within which the decision must be taken may be extended. NMa is aware of the interests served by quick processing of administrative appeals. Nevertheless, in practice it often takes some time before a decision is taken on the administrative appeal. This relates, for instance, to the nature of the proceedings, the purpose of the administrative appeals procedure (review), the subject matter involved in Competition cases and the principle of due care.

With regard to the nature of the proceedings, it has been shown in practice that administrative appeals are often submitted to safeguard the right to appeal. These administrative appeals do not state the grounds for the appeal (so-called *pro forma* administrative appeals). If these were not submitted, the period in which an appeal may be submitted would lapse. The parties therefore request a period within which the grounds on which the administrative appeal rests may be submitted. It occurs regularly that a further request is submitted to have the period extended in which the appeal may be submitted. This may be the case, for instance, if an economic investigation or a further investigation must be carried out which will take some time. Only after the grounds on which the administrative appeal rests have been supplemented does the period commence in which the decision must be made.

An administrative appeals procedure involves a review. The case is assessed during the appeals procedure on the basis of the facts and rules applicable at that moment. This means that the parties may introduce new facts and new arguments and that complicated matters relating to competition law and complex facts may (once again) be discussed. For a proper review, it is sometimes necessary to ask (one of) the parties involved additional questions. A reasonable period must be allowed for the questions to be answered (which may also be extended at the request of the party in question). It may also be the case that additional

information must be requested due to additional (factual) material (introduced by the parties). In some cases, the parties wish to have the opportunity during the administrative appeals procedure to amend their schemes and to present these to NMa for assessment. The effect of this is, in fact, to 'freeze' the administrative appeals procedure (if this is not in conflict with the interests of third parties).

Occasionally cases are so interwoven or so similar that a decision is taken to process them together. The result of this, however, is that one case may have to wait for the other. Sometimes parties also submit a notice of appeal and, in doing so, indicate that a parallel procedure has been initiated with a different public authority. In these cases it may be advisable due to the cost of the proceedings first to wait for the outcome of the latter proceedings.

In other cases, NMa may take a decision on an administrative appeal quickly, for instance in a case which is apparently inadmissible and if it decided not hear the appellant. An appeal may be apparently inadmissable if it is not absolutely clear from the notice of appeal that the administrative appeal is inadmissible and if there is no reason to doubt this conclusion, irrespective of what might be said at a hearing.

This might include, for instance, an administrative appeal against a decision which clearly cannot be contested in an administrative and/or judicial appeal, exceeding a period which is clearly not excusable and if the person filing the appeal is not an interested party, which is a requirement for filing an administrative appeal. In the past NMa has occasionally declared appeals to be admissible, while in retrospect it became clear that the appellants were not interested parties (see case 815, PTT Post, in relation to the post-office box introductory payments of 5 July 1999). In this regard, NMa has assumed a broad interpretation of the concept of an interested party in order to satisfy the desire that it should process as many complaints as possible. In this matter, the Court did not agree with NMa and ruled that there was no justification for such a broad interpretation of the concept of an interested party (see MEDED 99/1836-SIMO). In the year under review, NMa adhered to the Court's standpoint. In five cases, NMa concluded that they were clearly inadmissible because the appellant could not be deemed to be an interested party.

2.9.4 Court rulings

The growing number of decisions has resulted in an increase in the number of court proceedings. At the end of 2001, 23 competition cases were before the Court of Rotterdam. Four cases were on appeal before the Trade and Industry Appeals Tribunal. Judicial appeals are filed with the Court of Rotterdam against more than 35 percent of the decisions taken in the administrative appeals proceedings. In itself, this may be regarded as a high percentage. In the light of the interests involved and the relatively new nature of the legal area, the large number of appeals against decisions in judicial appeals is not surprising. The rulings of the judicial bodies also contribute to the development of the law in the area of competition law. Rulings may provide clarity with regard to the scope of testing by the courts or, inversely, NMa's freedom to determine its own policy, as well as the interpretation of the Competition Act. In the case of NMa, an increasing number of rulings will result in increased insight into testing by the Court, which may contribute to more effective action by NMa in current and future proceedings.

Through its Legal Department NMa is directly involved in judicial proceedings. In addition, in preparing defence statements and pleas, attention is given to the general consequences of judicial rulings for NMa (and its activities). The staff of the Legal Department have taken on the role of the legal representative of NMa in an increasing number of appeals proceedings, both in appeals proceedings before the Court and before the Trade and Industry Appeals Tribunal, and in proceedings following applications for preliminary injunctions.

In 2001, 12 appeals were completed. In seven cases, the appeal was declared to be inadmissible or unfounded. In four cases, the appeal was withdrawn. In one case, the appeal was declared to be valid, although the legal consequences of NMa's decision were upheld.[23] In 2001, five petitions or preliminary injunctions were filed. Two petitions were withdrawn. In the three other cases, the petitions for a preliminary injunction were dismissed, two by the Presiding Judge of the Court and one by the Presiding Judge of the Trade and Industry Appeals Tribunal. This related to the ruling on the appeal that NMa had filed against the ruling of the Court of 29-9-2000 in the Wegener case. The Trade and Industry Appeals Tribunal granted NMa's appeal.

From the point of view of the outcomes of the judicial rulings, the year under review may be considered successful. No rulings were passed down that required NMa to adjust its policy or method of work on any matters of principle.

23 Judgment, 01-08-2001, 183, Vollenhoven Olie B.V./ Gemeente Venlo and Scheurs Oliemaatschappij B.V

2.10 NMa in Europe

With regard to international competition affairs, a distinction may be made between the development of general European competition policy and the implementation of legal provisions in relation to competition (Articles 81 and 82 of the EC Treaty and Directive 4064/89 on concentration control). When competition policy in general is at issue, for instance in relation to the review of directives or notices, the Minister of Economic Affairs puts forward the standpoint of the Netherlands. She may be assisted in doing so by NMa due to its expertise in the area of competition law. In matters relating to the implementation of competition law – attending advisory committees – NMa puts forward the standpoint of the Netherlands.

2.10.1 *Modernisation: proposal for a Council directive*

As was stated in the annual reports for 1999 and 2000, the European Commission has submitted a proposal for a directive,[24] which should result in the amendment of the present Directive No. 17 of 1962 implementing Articles 81 and 82 of the EC Treaty.

If the amendments proposed by the European Commission in the proposal are implemented, a new law-enforcement system will be introduced. Under this system, both the prohibition clause contained in Article 81(1) of the EC Treaty and the exceptions contained in Article 81(3) of the EC Treaty may be applied directly, not only by the Commission, but also by national judicial bodies and by the national competition authorities. Agreements will be legally valid or null and void to the extent that they comply with the conditions stated in Article 81(3) of the EC Treaty. No decision granting approval is required to implement agreements which are fully in compliance with Article 81 of the EC Treaty. During the past year, regular meetings of working groups of the Council of the European Union were held to discuss the drafting of the new Directive 17 and possible amendments. The governments of the Member States of the European Union are represented in these working groups of the Council. With regard to competition policy, the responsibility for this lies with the Ministry of Economic Affairs, which is assisted by NMa. Under the Swedish chairmanship, the Council of Ministers briefly discussed the new implementation directive for the second time. In the month of June 2001, the Council mainly dealt with the Commission's original proposal, excluding the application of European competition law to cases with an appreciable interstate effect (Article 3 of the proposal). Numerous Member States were of the opinion that the Commission should amend this article so that national competition rules could be applied in parallel to such cases. This was proposed to avoid a premature discussion of the question of whether interstate effects exist. On the basis of these standpoints, a compromise proposal was worked out in which parallel application of European law and national law will be made possible.

A consequence of the proposal for the directive is that the national competition authorities of the EU will cooperate much more and more directly. This cooperation occurs in a so-called network of which the Commission is also a part. Within this network, the competition authorities raised matters with an appreciable interstate effect. In consultation with each other, they can then decide which authority is in the best position to handle the case in question. During the second part of 2001, under the Belgian chairmanship, a start was made at defining the way the network will operate. To promote this, the Netherlands, together with Germany, drew up a document (network paper) which describes the principles underlying the method of cooperation. During the Industrial Council of December 2001, it was decided, in particular, that quick completion of the directive, preferably before the end of 2002, was necessary, as was a decision in relation to the proper functioning of the network of competition authorities.

2.10.2 *Review of the Green Book on the Concentration Directive*

During the past year, NMa and the Ministry of Economic Affairs participated in an expert meeting and four working groups within the EU context to prepare the Green Book in Relation to the Revision of the Concentration Directive to be published by the Commission. During the meetings of the working group, the participants dealt with a number of topics in the Green Book, such as concentrations of which undertakings are required to give notice in numerous Member States (so-called multi-jurisdictional mergers). The working group also considered the level of the turnover thresholds contained

24 Proposal for a Council directive in relation to the implementation of competition rules contained in Articles 81 and 82 of the Treaty (...), Brussels, 2.7.9.2000, COM (2000) 582 final.

in Article 1(2) and, in particular, Article 1(3) of the Concentration Directive to assess whether these articles will operate well and the extent to which the articles should perhaps be adjusted to find solutions for multi-jurisdictional mergers. In addition, a meeting was held on the operation of Articles 9 and 22 of the Concentration Directive and on the terms for the submission of commitments, in other words, promises by the merging companies with regard to remedies which make the merger acceptable to the competition authorities. The members of the working group made use of the quantitative data obtained by the Commission through questionnaires sent to the Member States and to companies. The Commission published the Green Book on 11 December 2001, which was based partly on the information collected by the working groups. [25]

In the Green Book, proposals are made aimed at reducing the number of multi-jurisdictional concentration notifications and improving the division of work between the Commission and the Member States. In addition, the concept of a concentration was discussed and a discussion of assessment criteria – as to whether to take 'the emergence or strengthening of a dominant position' or 'substantial lessening of competition' as the criterion – was initiated. Furthermore proposals were made to improve the procedures in cases dealt with by the Commission, particularly with regard to the submission and amendment of proposed remedies.

2.10.3 De minimis

On 22 December 2001, a new Commission Notice took effect in relation to agreements of minor significance *(de minimis)*.[26] This notice replaces the earlier Commission Notice in relation to agreements of minor significance.[27] The most important amendment is that the market share thresholds have been increased. As a result, a larger group of agreements and practices are deemed not to restrain competition. In the case of horizontal agreements (agreements between competitors), if the joint market share of the parties to the agreement is not greater than 10 percent, the agreement is not deemed to be an appreciable restraint on competition. A market share of 15 percent applies in the case of vertical agreements. If there is a cumulative effect, a threshold of 5% will apply. A condition for the application of the notice is that the parties have not included 'hardcore' restrictions in the agreements, such as a division of the market or a price agreement. This notice only applies in cases involving European law, in other words agreements where the trade between two or more Member States is appreciably restrained.

2.10.4 Leniency Notice

On 19 February 2002, a new Commission Notice in relation to immunity from fines and the reduction of fines in cartel cases took effect.[28] This notice replaces the earlier notice in relation to the non-imposition or reduction of fines in cases relating to competition schemes from 1996 onwards.

The most important amendment is that the Commission, under certain conditions, may grant full fine immunity to companies. In addition, the procedure has been amended. As a result, companies will receive clarity, for instance, on the extent to which the fine will be reduced.

2.10.5 Block exemption for motor vehicles

Since the Block Exemption in Relation to Certain Categories of Motor Vehicle Distribution and Servicing Agreements (No. 1475/95)[29] will expire in mid-2002, the Commission carried out an evaluation in 2000 into the operation of the block exemption. It appeared from the evaluation that maintaining the present block exemption had not brought about the desired consequences under competition law. The block exemption had not resulted in the desired strengthening of competition and an increase in the independence of dealers. In addition, access by independent repair firms to technical information was not satisfactory. At the beginning of 2001, on the basis of this evaluation report on the block exemption for motor vehicles, a hearing was held and in mid-2001 the Commission consulted the advisory committee. At the beginning of December a final report was published. In 2002, the European Commission will present further proposals for the block exemption in relation to motor vehicles.

25 Green Book on the Revision of the Directive (EEC) No. 4064/89 of the Council, Brussels, 11.12.2001, COM (2001) 745 final.

26 OJEC 2001, C368/13.

27 OJEC 1997, C372.

28 OJEC 2002, C 45/3.

29 OJEC 1995, L 145/25.

2.10.6 Evaluation report on technology transfer

At the end of last year, the Commission published an evaluation report in relation to the block exemption for technology transfers (No. 240/96).[30] The evaluation report consists of an analysis of the present legal and the *de facto* situation. In addition, the report contains a number of proposals that should result in a simpler and possibly broader block exemption for technology licence agreements. This block exemption must be in line with the new competition regulations (for vertical and horizontal agreements) and other policy developments.

2.10.7 Contribution to the advisory committees for cartel and concentration cases

The Directorate-General for Competition of the European Commission assesses various cartels and concentration cases in close cooperation with the EU Member States. In addition, the European Commission is obliged to consult the Member States through advisory committees before it takes a final decision. Advisory committees have been set up for concentration cases and cartel cases and for the abuse of dominant positions. The Commission is not obliged to adopt the advice of the advisory committee, but does take this into account as far as possible in taking its decision. In addition, the advisory committee of the Commission may recommend publishing the advice in the Official Journal of the European Commission.

Representation by NMa

NMa represents the Netherlands in the advisory committees. In matters relating to transport, the representation of the Netherlands is supplemented by staff of the Ministry of Transport, Public Works and Water Management. In addition, NMa regularly consults with the other competition authorities to formulate joint standpoints on individual cases and other topics raised in the advisory committees.

In 2001, NMa contributed to advisory committees in relation to the following cases:

Concentrations

Case COMP/M.2033 – Metso/Svedala
Case COMP/M.2097 – SCA/Metsä Tissue
Case COMP/M.1853 – EDF/ENBW
Case COMP/M.1915 – The Post Office/TPG/SPPL
Case COMP/M.2139 – ADTranz/Bombardier
Case COMP/M.2201 – MAN/Auwärter
Case COMP/M.2314 – BASF/Pantochim/Eurodiol
Case COMP/M.2220 – GE/Honeywell
Case COMP/M.2434 – Hidrocantábrico
Case COMP/M.2283 – Schneider/Legrand
Case COMP/M.2187 – CVC/Lenzing
Case COMP/M.2416 – Tetra Lava/Sidel
Case COMP/M.2420 – Mitsui/CVRD/CAEMI
Case COMP/M.2499 – Norske Skog/Parenco Walsum
Case COMP/M.2498 – UPM-Kymmene/Haindl
Case COMP/M.2530 – Südzucker/Saint Louis Sucre
Case COMP/M.2389 – Shell/DEA
Case COMP/M.2533 – BP/E-ON

Abuse of a dominant position

Case COMP/34.493 – DSD
Case COMP/35.141-37.821 – Deutsche Post
Case COMP/36.490 – Graphic Electrodes
Case COMP/29.373 – VISA
Case COMP/34.950 – Eco Emballages
Case COMP/36.693 – Volkswagen
Case COMP/36.041 – Michelin
Case COMP/36.756 – Sodium Gluconate
Case COMP/36.264 – Mercedes
Case COMP/37.512 – Vitamins
Case COMP/37.614 – PO/Interbrew Alken Maes
Case COMP/37.800 – PO/Luxembourg Brewing
Case COMP/37.919 – Bank Charges Germany
Case COMP/37.859 – Hays/La Poste
Case COMP/36.604 – Citric Acid
Case COMP/37.037 – Zinc Phosphate
Case COMP/36.212 – Carbonless Paper

2.10.8 General committees and working groups

In 2001 NMa contributed to advisory committees for the revision of the Commission Decision on the mandate of the hearing officer and notices on ancillary restrictions. In addition, NMa participated in expert meetings on the export and petroleum industries.

2.10.9 Assistance for the Director-General for Competition and in relation to verifications involving Dutch companies

Council Directive 17[31] allows the Commission to carry out unannounced verifications (on-site inspections) on the premises of companies. If the Commission wishes to

30 OJEC 1996, L 31/2.
31 OJEC 1962, No. 13, p. 204.

carry out verifications in the Netherlands, it requests NMa's support. The Commission may also ask NMa to carry out the verifications on its behalf. During the past year, NMa assisted the Commission on various occasions in relation to verifications or carried out these verifications at the Commission's request.

2.10.10 Other European contacts

Conference of Directors-General

In 2001 two conferences of the Directors-General of institutions responsible for competition policy and its enforcement were held. During the conference of 28 February, the Directors-General considered the cooperation agreement between the European Union and Switzerland and the revision of concentration control. In addition, modernisation, sport and competition, and the Commission's investigation into the telecommunications market were discussed. During the second meeting on 28 November 2001, the definition of the relevant market, the concept of a joint dominant position, criminalisation (bringing infringements of the competition rules within the scope of criminal law) and technology transfer were discussed.

European Competition Authorities (ECA)

The European Competition Authorities (ECA), whose members met for the first time in April 2001, is an informal cooperative venture of European competition authorities. This cooperative venture focuses mainly on the application and enforcement of national and European competition rules. ECA operates as a forum within which the national authorities, the European Commission and the European Free Trade Association (EFTA) meet and cooperate. The forum promotes quality, consistency and efficiency and contributes to the more effective enforcement of competition law within the European Economic Area. The authorities meet every six months to consider important topics.

During the first meeting in Amsterdam, 'good practices' were discussed and two working groups were set up: a working group on leniency and a working group on multi-jurisdictional mergers. Following this, a second meeting was held in the Irish capital, Dublin, in September 2001. Three leading economists addressed the members on the application of economic principles to the enforcement of competition law.

Leniency working group

The leniency working group presented the *Principles for Leniency Programmes* in Dublin. In this joint document (which is not legally binding) the working group emphasised that a leniency policy contributes to the effective enforcement of competition rules.
The participants acknowledged that the success of their own (national) leniency policy partly depended on the policies of other authorities in this area. The document contains criteria which leniency programmes should meet, such as transparency, certainty for the undertaking and the confidential treatment of the data that is submitted. In addition, the meeting was a good opportunity to stress once again the importance of cooperation between the various authorities. After the presentation of the working group, the authorities indicated that they would inform an undertaking, where possible, of the 'point of contact' or the leniency notification point for those who wish to notify one of the other authorities of a cartel. In addition, the criterion is applied that, where possible and reasonable, an authority should take into account the discussions with regard to leniency which have already been held with other authorities in dealing with an application for leniency. After this, the *Principles for Leniency Programmes* were adopted.

Working group on multi-jurisdictional mergers

The working group on multi-jurisdictional mergers met on two occasions in 2001. The members of this working group agreed that every authority would appoint people to act as the point of contact for multi-jurisdictional mergers. In addition, the Member States would inform each other immediately if they receive notification of a multi-jurisdictional merger.[32] During 2002, the working group published a *Procedural Guide*, which states the form cooperation between the Member States has taken. In addition, the working group functions as a platform for coordinating joint requests for referrals, in accordance with Article 22 of the European Concentration Directive. This is a very remarkable result, because Article 22 has never before been applied to joint requests for referrals to the Commission, partly because of problems relating to the coordination of the request. On the basis of this encouraging result, the working group also intends to publish procedural guidelines in the near future for requests in relation to Article 22. The members of the working group are also considering the possibility of

32 see also Directive 4064/89, OJEC 1989 L 395/1.

further harmonisation of the terms applicable to the investigation of concentrations. Attention will also be given to the information that has to be submitted to competition authorities through notification forms and the extent to which these forms correspond to each other.

2.10.11 Other international contacts

Competition authorities can learn a considerable amount from each other. It is for this reason that members of staff of the authorities are regularly invited by other authorities to visit and acquire knowledge. During the past two years, for instance, two members of staff of the Competition Board of Estonia spent two weeks at NMa as part of a study visit. In addition, NMa has received delegations from the Swedish, Ukrainian and Hungarian competition authorities.

OECD

In addition to cooperation with the European Commission, NMa also participates in meetings of the Competition Committee of the Organisation for Economic Cooperation and Development (OECD) together with the Ministry of Economic Affairs. In 2001, NMa contributed to the working group on competition and regulation and, and in cooperation with OPTA, gave a presentation on 'access pricing' on the telecommunications market. NMa also contributed to the working group on international cooperation and to the Global Competition Forum.

Interview with Dr. Ulf Böge

The message that Dr. Ulf Böge, President of the German Federal Cartel Office, wishes to put across is clear and concise: the opportunities European competition policies offer can only be fully exploited through genuine partnership between the European Commission and the national competition authorities.

Dr. Böge is optimistic that the current discussions on the effectiveness of future collaboration between the European competition authorities will have a positive outcome, but "we have not yet seen eye to eye in discussions with regard to the network of competition authorities. There is talk of closer cooperation among the competition authorities, but this has to be handled properly now. If the outcome of modernising European competition policies leads to the European Commission's attracting all of the interesting cases, then we are not moving in the right direction. We are a little afraid that the Commission is inclined to stress the issue of competition more than the belief that we should focus on cooperation between partners. For me, there is no question that the Commission is entitled to play an important role in important cases and also in cases in which Member States have divergent opinions. However this should only apply to a few exceptional cases. We must be careful that the Commission does not take on a central role that could limit the legal competence and the willingness to act of the national competition authorities. They should not get the impression that they are merely helpful servants to the Commission. That would seriously damage the effectiveness of fostering competition. The task of the national authorities must remain interesting. Each case must be referred to the authority that has the best knowledge of that particular market sector—the authority that can treat the case most efficiently and is most effective as far as the effect on competition is concerned."

Dr. Böge is not afraid that expanded collaboration between the European Commission and the national competition authorities will lead to more bureaucracy. "We certainly should not have too much bureaucracy. On the contrary, workable collaboration should lead to less red tape. A prerequisite is that we agree on clear-cut responsibilities, at all levels, which are transparent to all those concerned. I do not see any threat in close cooperation. I only see opportunities that we must exploit. Cooperation should not be threatening. That would be a contradiction in terms. Cooperation should not conceal a threatening situation. Whoever feels threatened is not ready for cooperation".

"A prerequisite is that we agree on clear-cut responsibilities, at all levels, that are transparent to all those concerned.".

The President of the German Federal Cartel Office *(Bundeskartellamt)* continued to emphasise that modern and effective competition policies can only be realised through cooperation. "We must collaborate because – as I say frequently – those who dedicate themselves to the principle of sound competition will not have many competitors. It is exactly for this reason that the European and the national competition authorities must cooperate to achieve the following common goal: workable competition regulation. This is why I am happy with the intensification of cooperation during the past two years. The division of tasks between the European Commission and the national authorities must be based on the concept of subsidiarity. Whether we are involved in investigating or eliminating cartels, whether we are concerned about dominant market positions or merger control, we must keep checking which authority is best equipped to deal with each specific case. Expert understanding of the cases and of the market will often be found at the level of the national authorities rather than that of the Commission. The Commission will retain an important task with regard to introducing regulations against cross-border mergers, cartels and the abuse of dominant market positions. If a case involves the entire Union or a number of its Member States, then it is, in the first instance, a matter for

the Commission. We must not let ourselves be led by competence issues in our cooperation. The first concern is which authority is the best-equipped in a specific case – in terms of professional competence and knowledge of the market – to take on that specific case."

According to Dr. Böge there is no certainty regarding the effects that the Commission's modernisation proposals will have on the national competition authorities. A lot will depend on practical experience. Under the terms of the proposed changes to Articles 81 and 82 of the EC Treaty, the European Competition Authority, theoretically the national authorities and the national courts will all have the same powers. Dr. Böge: "As regards the basic principles of modernisation – namely, more effective competition policies and the decentralisation of the executive powers of the European competition regulators – we have not only reached a consensus, we have actually always insisted on such modernisation. Experience will show whether third parties will object to the new regulations proposed by the European Commission or not. Experience will also show whether a whole group of companies will approach the competition authorities in advance for exemptions from the implementation of the new regulations despite the fact that this is explicitly not the aim of modernisation".

"Nowadays German law sometimes goes further than European law, while in other instances European law goes further than German law.".

The German Federal Cartel Office can pride itself on being one of the oldest competition authorities. It was established in 1958. At that time the German Federal Republic drew up a Cartel Act based on the same ideas that also formed the framework for the competition regulations drawn up in the EC Treaty in the very same year. Together with his organisation, President Böge may therefore pride himself on having ample experience. "In a large number of cases we have adopted the European regulations alongside our own national regulations. We first applied this method in 1959 and increased its use in the beginning of the Nineties, at the time with the specific aim in mind of liberalising the energy market. There was an incentive to operate this way because at that time the Cartel Act contained an exception for the energy market. Nowadays German law sometimes goes further than European law, while in other instances European law goes further than German law. In some cases, the option of applying both legal systems is, beneficial to competition and this is why we apply both.

Dr. Böge is very pleased with the cooperation with NMa. He praises the initiative taken by NMa's Director-General, Mr Kist, to establish a forum of European competition authorities. Dr. Böge states that in this forum – the European Competition Authorities (ECA) – 'practical everyday questions' are raised for discussion. A key point on the agenda during the first meeting of ECA was the question of how to deal with merger control in a globalised world. This will be an important issue within the European Community. We have now collectively installed a workable information system which will allow case handlers in the near future to know which case is being dealt with by which competition authority. Another key point that we have taken up within ECA is the issue of so-called leniency (leniency in relation to the penalty that a company involved in a cartel may receive if it is the first to give notice of an infringement of the prohibition on cartels and if it immediately ceases all involvement with the cartel). Within ECA we have come to a mutual arrangement on this point since the application of this mechanism is easier and may gain in importance if all Member States agree to it. In this way we can learn from each other. In the European as well as the international field, ECA may become a factor of importance. It will not first have to wait and see what emanates from the European Commission. Instead it will take the initiative to develop cooperation. ECA has an important role to play in the network of European competition policies. We – whether this is my own organisation, NMa or other colleagues – are each essentially convinced of the considerable importance of a market-oriented approach and of the necessity of sound competition. This collective conviction makes it possible for us to speak the same language when we cooperate with each other.

3 Sector-Specific Regulation

3.1 Introduction

NMa monitors compliance with the Competition Act but also has sector-specific tasks, namely regulation of markets in the process of liberalisation and markets with permanent natural monopolies. With regard to the tasks arising from the Electricity Act of 1998 and the Gas Act, the Office for Energy Regulation *[Dienst uitvoering en toezicht Energie (DTe)]* has been set up as a chamber within NMa. With regard to the tasks in the area of transport, the Netherlands Transport Regulatory Authority *[Vervoerkamer]* is in the process of being established.

3.2 Office for Energy Regulation and its environment

3.2.1 *Tasks*

DTe implements the Electricity Act of 1998 and the Gas Act, both of which are based on EC Directives.[33] These laws have laid the foundation for the liberalisation of the Dutch electricity and gas sectors. The relationships between the players on these energy markets have undergone far-reaching changes. This also applies to the role of public authorities. They no longer fulfil a central role in planning the production and supply of energy, but are required to create conditions in these sectors for a free market, namely ensuring free access to electricity grids and gas networks subject to non-discriminatory conditions. DTe carries out the following activities:

- taking decisions on electricity and gas tariffs;
- granting licences for the supply of electricity and gas to captive customers;
- issuing binding instructions and imposing orders subject to penalties;
- advising the Minister of Economic Affairs;
- making contributions to international consultative bodies of European energy regulators;
- providing public information.

DTe regards its work in the European context as one of its priorities. To emphasise the European dimension, this is dealt with in a separate section (section 3.3).
DTe's agenda was determined to a considerable extent in 2001 by the implementation of the Gas Act Programme, the decisions on administrative appeals against price caps (efficiency discounts) in relation to electricity and the liberalisation of medium-sized energy users as of 1 January 2002. The Gas Act Programme was a major operation for both DTe and the market players involved. In addition, DTe took a large number of decisions on electricity and gas tariffs. The extensive discussion in the Lower House of Parliament on the privatisation of energy companies resulted in an extension to DTe's tasks to include:

- the actual monitoring of market developments, including signalling infringements of the rules pursuant to the Competition Act and the Electricity Acts of 1998 and the enforcement of these rules;
- monitoring compliance (independently of grid and network managers, audits, advice in respect of applications for privatisation);
- regulation of TenneT (takeover of part of the electricity exchange, application of a system of green energy certificates);
- explaining the implementation of the energy laws and providing assistance with regard to more business-oriented and public information on tariffs and conditions, background information and information on issues relating to interpretation.

As a result of this increase in its tasks, it was necessary to increase the number of employees to ensure that these tasks could, in fact, be carried out. The Lower House of Parliament called for "DTe to be substantially strengthened, both qualitatively and quantitatively in the short term".[34] This was translated into staffing proposals which have been submitted to the Minister of Economic Affairs for approval. In advance of this, DTe was given permission to start recruiting new staff.

3.2.2 *Customer satisfaction survey*

In the first half of 2001, DTe commissioned a customer satisfaction survey based on 30 in-depth interviews. The reason for this was that the market players had criticised the way DTe presented itself as the regulator. DTe drew conclusions from the survey and formulated concrete points for improvement. The final report as a whole and DTe's response to this was sent to all those interviewed and was published on DTe's website. Some of the comments related to the DTe's role as the regulator and the 'natural' tension between a regulator and those who are subject to regulation. DTe does recognise and acknowledge some of the points of criticism outlined in the report. The three most important points of criticism

33 *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 community rules for the internal market in electricity and gas respectively.*

34 *Lower House of Parliament,* Parliamentary Proceedings, *2000-2001, 27 250, No. 40.*

relate to communication and the provision of information, the use of knowledge and experience from the sector and DTe's capacity.

To improve communication and public information and, by doing so, to provide the desired degree of transparency, DTe has developed a periodic newsletter, EnergieFocus. This newsletter not only deals with developments in DTe's area of activity, but also provides information on DTe's vision and philosophy. In addition, the newsletter provides more concrete information on decisions that have been taken, the state of affairs in relation to current proceedings and the products (decisions and requests for information) which the markets may expect from DTe.

DTe works with contact groups. Depending on the topic, these contact groups consist of experts from grid managers, licence holders and market players. In this way, DTe makes use of the expertise of the sector. Consultation with market players does not limit itself exclusively to these contact groups. DTe also conducts prior consultation required by law with parties within the framework of public preparatory proceedings. On these occasions, ideas are also exchanged intensively and opinions are formed. As it is not always clear what the status of formal consultations is and who DTe should or should not invite to participate, the Minister of Economic Affairs has announced that she is preparing policy rules which are intended to provide the desired clarity. DTe wishes to work towards a situation with regard to consultation in which market players and DTe may exchange arguments on the basis of mutual respect.

3.2.3 *Relationship with the Minister of Economic Affairs*

DTe and the Minister have a good relationship. This is a developing relationship. This is clear from the fact that the Minister delegated almost all her executive tasks in accordance with the Electricity Act of 1998 and the Gas Act to NMa/DTe on 1 January 2001. The exceptions to this include consenting to the appointment of grid or network managers, granting an exemption from the obligation to appoint a grid or network manager (section 15 of the Electricity Act of 1998) and decisions regarding applications for privatisation. These powers remain with the Minister. In these instances, the Minister takes a decision on the advice of DTe.

If the Upper House of Parliament approves the Bill amending the Competition Act, with a view to granting the status of an independent public authority to NMa, DTe's tasks under the Electricity Act of 1998 and the Gas Acts will reside formally with the Board of Management of NMa. This Board will then be responsible for delegating tasks internally to the Director of DTe. In accordance with the Bill amending the Competition Act, the Minister will retain her powers to make appointments in individual cases in relation to tasks arising from the Electricity Act of 1998 and the Gas Act until 2005.

3.3 DTe's activities

3.3.1 *Privatisation*

In 2001, an intensive discussion took place between the Minister and the Lower House of Parliament with regard to the privatisation of regional energy companies. The outcomes of this were set out in policy rules in 2001. These policy rules have been included in a Bill amending the Electricity Act of 1998 and the Gas Act.[35] The parliamentary proceedings in relation to this Bill have not yet been completed. The Bill includes provisions allowing for the privatisation of 49 percent of the shares of regional grid and network managers, subject to a number of conditions. The most important conditions involve increasing the independence of the grid or network managers and the separation of legal and economic ownership. In addition, further conditions have been formulated with regard to the appointment and independence of supervisory directors and the managers of the grid or network managers. The Minister's consent is required for privatisation. DTe accesses the applications for privatisation and advises the Minister.

With the publication of the policy rules an important step was taken on the road towards the privatisation of the energy companies. A number of measures were taken to guarantee the public interests of these network-based sectors. The criteria of autonomy applicable to the grid or network company were tightened further and, in the event of a failure on the part of the grid or network manager to fulfil its tasks, the Minister of Economic Affairs may resort to appointing a different grid or network manager on the advice of DTe, without becoming involved in expropriation procedures. In 2004, consideration will be given to the possibility of privatising majority shareholdings in regional grid and network companies. The criteria applicable to this have been included in the Bill amending the Electricity Act of 1998 and the Gas Act.

35 *Lower House of Parliament,* Parliamentary Proceedings, *2001-2002, 28 190, Nos. 1-3.*

3.3.2 Market Surveillance Committee

The aim of market monitoring is to investigate the extent to which the intended operation of market forces has, in fact, been achieved. For this purpose, NMa and DTe set up the Market Surveillance Committee (MSC) in 2001 to make it possible to follow developments and the behaviour of market players on the energy market in a structured way. MSC is an independent advisory body and consists of a number of internationally renowned experts in the area of energy market regulation.[36] MSC is supported by an NMa/DTe-wide taskforce. MSC's work concentrates precisely on the cutting edge between regulation on the basis of the energy laws and intervention on the basis of the Competition Act.

MSC systematically gathers and analyses information and, in doing so, focuses primarily on the supply-side of the electricity market. Provision has been made for an extension of this research to the demand side of the electricity market and, in time, to the Gas market.

At the end of october 2001, MSC presented its first recommendations to the Director of DTe and the Director-General of NMa in relation to the transparency of the electricity market. In this advice, MSC noted that the transparency of the Dutch electricity market ought to be improved considerably. In addition, it appears that market players in the Netherlands have equal access to market information on which to base their procurement and sales decisions. MSC also included experience with transparency rules in other countries in its advice. MSC presented concrete proposals to make more data available to all participants in the market. This relates to all data on 'system load' (total electricity consumption in the Netherlands), the export and import flows, the utilisation of transmission capacity between countries, and planned and unplanned interruptions to production.

The Director of DTe and the Director-General of NMa may request advice from MSC in specific situations. DTe itself determines how the conclusions from the various periodic reports and recommendations should be translated into regulatory practice. The inclusion of the results in the Technical Conditions is one way of achieving this. MSC reports and recommendations may also give cause for further research in relation to the Competition Act. On the basis of the advice on the transparency of the electricity market, DTe started a procedure aimed at incorporating the recommendations of MSC in the Grid Code and the Measurement Code.

3.3.3 Rules for the gas market

In 2001, DTe focused on the implementation of the Gas Act. This is a comprehensive package of tasks, which sets out to the rules of play for the gas market. This was an extensive operation for DTe, but also for the market players involved. Last year, DTe issued supply licences for the supply of gas to captive customers. In addition, DTe assessed the vast majority of all the appointments of gas network managers and advised the Minister with regard to the approval of the appointments of gas network managers. The most far-reaching work involved the development of the *Gas Guidelines for 2002*, the efficiency discounts (price caps) for gas transmission and gas supply companies and all the tariff decisions for 2001.

Guidelines for 2002

DTe has approved Guidelines for Gas Transmission and Gas Storage for the year 2002 for the transmission of gas to free customers. This took place in the summer of 2001, following an extensive consultation process with various market players. With these Guidelines, DTe has indicated how 'negotiated Third Party Access' should be implemented. The Guidelines contain the principles that Dutch gas transmission and Gas storage companies must take into account in determining the indicative tariffs and conditions for free customers in 2002. On the basis of these indicative tariffs and conditions, free customers may negotiate with gas companies with regard to access to transmission networks and storage installations.
The Guidelines contain the objectives aimed at promoting trade (the development of a so-called gas-to-gas market). In addition, they focus on how DTe wishes to promote efficient use of the infrastructure. This means that the present situation on the gas market will be changed in a number of respects.

The Guidelines specify, for instance, that companies have to base their tariffs for gas transmission and storage on efficient costs. In addition, all gas transmission companies must make it possible to trade transmission contracts. Gasunie, the manager of the national high-pressure gas transmission network, is obliged to

36 David Newbery, Nils Henrik Von der Fehr, Eric van Damme and Wim Naeije. Mr Newbery and Mr Von der Fehr enjoy international renown due to their knowledge of the area of economic market regulation. Mr Van Damme is an expert in the area of game theories and auction rules. As the former director of Eneco, Mr Naeije has years of practical experience on the Dutch electricity market.

introduce a new tariff structure. Gasunie is also required to structure its balancing regime in such a way that market players are able to regulate the imbalance between demand and supply. For the gas storage market in the Netherlands, the guidelines mean that the gas storage companies, NAM and the Bergen Concessionaries, also have to offer access to their storage facilities to market players other than Gasunie.

Indicative tariffs and conditions

On the basis of the *Guidelines for Gas Transmission for the Year 2002*, the regional gas transmission companies and Gasunie published their indicative tariffs and conditions. DTe has compared these tariffs and conditions to the Guidelines which it had drawn up. On the basis of this, DTe ascertained that not a single gas transmission company had determined its tariffs and conditions in full compliance with the conditions stated in the Guidelines. For this reason, DTe issued binding instructions to the gas transmission companies at the end of 2001. These binding instructions refer to items in relation to the indicative tariffs and conditions which the companies are required to amend in order to satisfy the *Guidelines for Gas Transmission*. The binding instructions related mainly to the absence of a guaranteed transmission service, the use of daily contracts in the conditions and incorrect substantiation of the costs on which the tariffs were based.

In 2001 Gasunie indicated that it had a disagreement with DTe on a matter of principle relating to the implementation of the *Guidelines for Gas Transmission*. In civil proceedings, Gasunie challenged the legality of the Guidelines in the second half of 2001. These proceedings are expected reach a conclusion in 2002.

Gasunie and DTe cooperated on a number of issues during the past year. For instance, Gasunie cooperated in the research carried out by DTe into the balancing regime, storage facilities and the cost of gas transmission and related services. The results of this research were incorporated into the *Guidelines for Gas Transmission*.

Section 11 conditions

After approving the *Guidelines for Gas Transmission for the Year 2002* and the *Guidelines for Gas Storage for the Year 2002*, DTe started an evaluation of the conditions set out in section 11 of the Gas Act. The gas transmission companies had presented a draft version of these conditions to DTe. The conditions aim to establish a minimum system of requirements that the pipelines and installations of persons wishing to connect to the gas transmission networks must meet. On the basis of an assessment of the draft conditions which were submitted, DTe gave its provisional opinion in December 2001. The gas transmission companies were informed of this. The final assessment will follow in 2002 after which the Commission of the European Communities will be notified.

Efficiency discounts (price caps)

As part of the Gas Act programme, in 2001 DTe also approved the efficiency discounts (price caps) for gas transmission companies and gas supply companies for the years 2002 and 2003. These price caps promote efficient operations and consequently result in cost reductions. DTe determines the price caps by means of a so-called benchmark or comparison between the gas transmission companies. With the aid of this comparison, DTe determines how efficient each company. The price caps for the gas transmission companies vary from 7.7 percent to a maximum of 9.0 percent per annum. On average, the Dutch gas transmission companies will have to work 8.9 percent more efficiently in the period 2002- 2003 than in 2001. Every gas transmission company is required to include the price cap in its tariffs for consumers and other captive customers. In addition, DTe also imposed price caps on companies that supply gas to consumers and other captive customers. This means that the tariffs (excluding gas procurement costs) have been frozen for the next two years. In total, the price caps will result in savings for consumers of approximately EUR 230 million within a period of two years. In this regard, it should be noted that administrative appeals have been filed against most of the decisions with regard to price caps.

3.3.4 Freedom of choice?

Since 1 July 2001, the market for green electricity has been fully liberalised. Small consumers are also free to choose the energy company from which they wish to purchase green electricity. TenneT has been given the task of implementing the system of green electricity certificates. The green electricity market is therefore the first market that has been fully opened to competition.

In the course of 2001, it became visible how existing and new players on the energy market deal with their customers. How quickly can customers switch from one energy company to another and what are their marketing strategies? The year 2001 was characterised in any event

by a sharp increase in advertising by energy companies in newspapers, on television and during large events.

In 2001, the importance and necessity for parties to prepare themselves well for entry into the free energy market became clear. This applies both to energy companies and also to future free customers. Without adequate preparation it will not be possible to benefit fully from the liberalisation of the electricity and gas markets. DTe monitored the process of liberalisation closely in 2001. Partly due to signals from the market, DTe made a number of interventions involving network managers and the '2002 customers'. In May 2001, for instance, it was made clear to network managers that the costs which they incur when a customer switches from one supplier to another may not be charged to the customer or to the supplier. After all, DTe has already included these costs in determining the starting tariffs. Nor may the network manager charge for the cost of relocation. The meter belongs to the so-called 'free domain'. This means that companies other than the network manager may supply new meters.

In the second half of 2001, DTe continued to receive signals that network managers and customers were insufficiently prepared for liberalisation. In addition, customers could cite examples from which it appeared that energy companies made their customers offers which would mean that these customers would only have freedom of choice in 1 January 2003. At the beginning of October, DTe therefore sent an open letter to all market players. In this letter, DTe gave its view of, for instance, the splitting of existing contracts and the periods of notice to be used in relation to these. Furthermore the fact that meters belong to the 'free domain' was raised once again.

3.3.5 *Development of tariffs*

DTe actively follows price developments. Particularly with regard to supplier tariffs, DTe ensures that the supplier tariffs for captive customers are adjusted in line with market trends each quarter. The Electricity Act of 1998 stipulates that captive customers must also be able to benefit from the development of tariffs in the free part of the market. After the price caps for electricity licence holders were determined in 2000, DTe introduced the system of yardstick regulation for the year 2001. This mainly affects the procurement costs of licence holders. Using this system, DTe determines both the procurement costs of an individual licence holder, on the basis of 50 percent of its procurement costs, and the average procurement costs of all licence holders, with the exception of the licence holder in question. The Trade and Industry Appeals Tribunal *[College van Beroep voor het Bedrijfsleven]* passed judgment in February 2002 on the judicial appeal brought by N.V. Rendo. This energy company had filed a judicial appeal against the decision on the administrative appeal of August 2001 with regard to the electricity supply tariffs for the first quarter of 2001. One result of the ruling was that the Minister has to take a new X-Decision for the licence holders on the basis of advice from DTe.

At the end of March 2001, DTe approved the method for determining the maximum gas supply tariffs for captive customers for the period 1 April 2001 to 1 January 2002. On the basis of this, parties are obliged to publish their actual procurement costs per quarter, after which DTe will publish supply tariffs for every quarter. In a ruling in interlocutory proceedings on 6 July 2001, the Court of The Hague declared the procurement data to the confidential. This judgment was based on the fact that there is no obligation, in accordance with the Gas Act, to publish these procurement data. Since DTe has a statutory obligation to determine maximum supply tariffs, it has decided to request the procurement costs of the various gas supply companies each quarter. In the case of gas supply companies, the procurement costs consist largely of the price paid by the licence holder itself for the gas and the transmission tariff for the national high-pressure gas network. On the basis of the tariff proposals which the gas supply companies are required to submit to DTe, DTe increases the procurement costs by a surcharge. The procurement costs and the surcharge combined make up the gas supply tariffs for captive customers.

DTe wishes to follow tariff trends even more actively, both nationally and internationally. DTe wishes to communicate the information it gathers in relation to this to market players through the newsletter, *EnergieFocus*, and a separate data section of the website *(www.nma-dte.nl)*. DTe considers it an important part of its task to pay more attention to providing information to companies and the general public. In 2001, DTe started the Codata project. Through this project, DTe wishes to streamline the regular flows of information between energy companies and DTe. The quality of data is becoming increasingly important. Both the quality of the request for information and the information supplied, and the processing and archiving of information are important.

3.3.6 Technical Conditions

In 2001 DTe took ten decisions amending the Technical Conditions (Grid Code, System Code and the Measurement Code). The most important decisions are described briefly below.

The players on the electricity market have been given more opportunities to amend their energy programmes. Through an amendment of the Grid Code and the System Code, DTe has responded to the desire emanating from the market to be in a position to take advantage of fluctuations in the demand and supply of electricity better and quicker. Players may now amend their energy programmes every hour on the hour (24 times a day rather than 12 times). In addition, TenneT only has to be notified of these changes one hour beforehand, rather than two hours.

DTe has set up a scheme whereby customers may be compensated by the responsible grid manager in the event of a serious power failure. If the power failure lasts for longer than four hours, the responsible company must pay the household affected compensation amounting to EUR 35 (NLG 75). The period of four hours starts from the moment at which the first customer gives notice of a power failure. This compensation is independent of any liability claims. In addition, DTe has established criteria which grid managers must meet in the area of customer service, such as how quickly a technician should arrive after notice has been given of a power failure. Terms have also been set for the processing of correspondence and notification of maintenance work.

The liberalisation of the medium-sized energy users from 1 January 2002 resulted in an amendment of the Technical Conditions in 2001. The Measurement Code was supplemented by a method for determining load profiles. Such profiles are required to determine the imbalance between supply and demand, particularly in the case of customers with a transmission capacity of less than 0.1 MW. In this decision, DTe also announced that, with a view to the liberalisation of medium-sized customers, profiles would be drawn up for each customer group. In addition the technical conditions were amended to accommodate the liberalisation of the market for renewable electricity.

The Grid Code has been amended. Consequently up to and including 31 March 2005 TenneT may not reserve more than 900 MW for electricity transmission in implementing the long-term import contracts entered into by the former *Samenwerkende elektriciteitsproductiebedrijven (Sep)*, the joint venture of electricity producing companies, in 1989 and 1990. This amendment of the Grid Code is a direct consequence of the fact that section 13 of the Electricity Production Sector (Transition) Act *[Overgangswet elektriciteitssector]* has taken effect.

The System Code sets out the requirements applicable to the establishment of a programme management company. This means that foreign companies may now also be recognised as programme managers.

3.3.7 Tariff Code

The Tariff Code was amended in a number of respects in 2001. DTe amended the allocation of the costs of the Extra High-Voltage Grid Sections to the High-Voltage Grid Sections. In addition, a more specific definition of a calendar week has been included in the Tariff Code.
DTe will carry out further research into proposals relating to the retrospective calculation of, for instance, the Uniform National Producer Transmission Tariff *[Landelijk Uniform Producententransporttarief (LUF)]*. Decision-making has been postponed until sufficient clarity has been obtained regarding the amendments that need to be made to the Tariff Code to ensure consistency with the method of regulating grid tariffs, contained in section 41 of the Electricity Act of 1998, as implemented by DTe.

3.3.8 Quality of grid managers

In accordance with section 39 of the Electricity Act of 1998, all grid managers are required to send DTe a report each year before 1 November on the extent to which in the previous year the grid manager was able to meet the quality criteria which customer service must satisfy.
On the basis of chapter 6 of the Grid Code, in this report the network managers must, for instance, discuss the frequency and average duration of interruptions in the transmission services on the grid, the maximum time taken to solve the interruption and replies to correspondence. Together with *Consumentenbond*, the Dutch consumer association, a quality indicator has been developed, targeted at consumers and small business customers. The grid managers reported jointly for the first time on this quality indicator in the second half of 2001 in the edition of EnergieNed "Grid Management in the Netherlands in 2001" *[Netbeheer in Nederland 2001]*.
DTe was informed that this report should also be regarded as the report for the year 2001, pursuant to section 39 of the Electricity Act of 1998.

In 2000, quality criteria for customer service and serious malfunctions had not yet been approved. DTe's findings therefore focus on the above-mentioned report. Not all grid managers participated in drawing up this report. It may be concluded from the figures provided by the grid managers that participated that the reliability of the electricity grids in the Netherlands did not undergo any significant change in 2000, compared to previous years. DTe considers it unlikely that the effects of liberalisation on reliability may already be observed in 2000. Since the quality criteria were set out in chapter 6 of the Grid Code in 2001, DTe assumes that the report for the year 2001 will be comprehensive.

3.3.9 Monitoring compliance

The monitoring of compliance embraces a wide range of activities, including public information and advice. DTe is able to prevent a situation which contravenes the law from arising at an early stage. In addition, by issuing binding instructions, DTe can ensure that players adhere to the rules. If these measures do not have effect, DTe may use a more coercive law-enforcement instrument, such as an order subject to a penalty.

With regard to monitoring compliance with the Electricity Act of 1998 and the Gas Act, DTe focuses on the following main themes:

1 ensuring that access to the electricity grids and gas networks is possible, subject to transparent and non-discriminatory conditions;
2 ensuring that captive customers are protected and that small consumers are able to benefit sufficiently from the liberalisation of the energy market;
3 promoting the operation of market forces on the electricity and gas markets.

The main principle in this regard is that players are themselves responsible for carrying out their legal duties in a proper manner. When the amendment to the Competition Act takes effect (and NMa is granted the status of an independent public authority), NMa will be required to present the Minister with a law-enforcement plan annually.

The organisations *Vereniging voor Energie, Milieu en Water (VEMW)* [Association for Energy, the Environment and Water], *Vereniging van de Nederlandse Chemische Industrie (VNCI)* [Association of the Netherlands Chemical Industry] and *Vereniging Vrij handels Organisaties voor Elektriciteit en Gas (VOEG)* [Association of Free Trade Organisations for Electricity and Gas] requested DTe at the end of 2000 to issue a binding instruction to Gasunie. This instruction was directed towards the indicative tariffs and conditions for 2001, as determined by Gasunie on the basis of the Guidelines for 2001.
In February 2001, the Horticulture Marketing Board *[Productschap Tuinbouw]*, the Sector Committee of the Horticulture Marketing Board *[Sectorcommissie van het Productschap Tuinbouw]* and Mr F.H. Hoogervorst (an individual horticulturalist) submitted a similar application to DTe. DTe dismissed the request to issue Gasunie with a binding instruction. In assessing these applications, DTe took into account the fact that the year 2001 was a transitional year for parties on the gas market.
In addition, no concrete data was available from which it could be concluded that Gasunie had not complied with the Guidelines for 2001. These parties filed an administrative appeal against the decision not to issue Gasunie with binding instructions.

In 2001 DTe received an application from Wupperman Staal Nederland B.V. to issue Essent Netwerk Brabant B.V. with binding instructions. The reason for this application was a difference of opinion between Wupperman and Essent with regard to the concept of a connection and the fact that Essent charged a periodic connection tariff.
DTe dismissed the application because it was not established that Essent Netwerk Brabant B.V. had acted in conflict with the Electricity Act of 1998.

3.3.10 Dispute resolution

On 30 August 2001, NMa and DTe jointly determined *Policy Rules for Dispute Resolution [Beleidsregels geschillenbeslechting]*[37]. They wish to use these policy rules to improve information and transparency for parties in the electricity and gas sectors. The policy rules are also intended to avoid a situation where the same issue is presented by market players to numerous institutions. The disputes relate in general to access to the electricity grid, the gas transport network or gas storage installations. In 2001, NMa did not receive any applications for dispute resolution in relation to the Electricity Act of 1998 or the Gas Act.

37 *Policy Rules of the Director-General of NMa and the Director of DTe in Relation to Cooperation in Dealing with Applications for Dispute Resolution Pursuant to the Electricity Act of 1998 and the Gas Act, Netherlands Government Gazette 2001, No. 168.*

The principle on which the policy rules are based is that, in so far as this is possible, DTe will settle disputes on the basis of its law-enforcement powers under the Electricity Act of 1988 or the Gas Act. If this is not possible, NMa will deal with the dispute in accordance with the procedure set out in the policy rules. A condition for this is that the party that brings the dispute before NMa should provide sufficient data. NMa may take a decision to impose a sanction or a provisional measure. During 2002, a description of how the parties may bring a dispute before NMa and what data the parties are required to submit will be published on the websites of NMa and DTe.

3.3.11 Contribution scheme

In 2001, due to the tasks which NMa and DTe have in accordance with the Gas Act, the Minister replaced the Decree in Respect of the Recovery of Costs in Relation to Electricity *[Besluit kostenverhaal elektriciteit]* with the Decree in Respect of the Recovery of Costs in Relation to Energy *[Besluit kostenverhaal energie]*.[38] At the end of October 2001, the specific amounts for 2001 were set out in the Energy Cost Recovery Scheme for 2001 *[Regeling kostenverhaal energie 2001]*.[39] The budget overrun for 2000 and the budget for 2001 amounted jointly to EUR 7.1 million (NLG 15.6 million). On the basis of this, DTe sent annual invoices amounting to a total of EUR 4.1 million (NLG 8.9 million) to the licence holders and grid and network managers in the electricity and gas sectors.

3.3.12 Decisions on administrative appeals and injunctions in relation to energy

Nature of proceedings in relation to energy

In the area of energy, the many rapid developments resulted in regular tightening and adjusting of the legal framework. On the basis of the Electricity Act of 1998 and the Gas Act, a large number of decisions were taken by DTe in 2001. Administrative appeals were brought against these decisions not only by the companies involved, but also by third parties. In a number of cases, companies requested an injunction or accelerated handling of their case by the Trade and Industry Appeals Tribunal.
The processing of administrative appeals and judicial appeals has been delegated to NMa. The Legal Department of NMa is responsible for preparing an administrative appeals and judicial appeals. This ensures that the contested decision is reviewed as objectively as possible.

Energy companies have to acquire a position on the liberalised energy market now and in future years. This naturally involves considerable interests. It is therefore not surprising that energy companies contest the decisions taken by DTe. Experience shows that an administrative appeal is filed by the interested parties against almost every decision taken by DTe and that judicial appeals are filed with the Trade and Industry Appeals Tribunal in many cases against the decisions on the administrative appeals. The administrative appeals against decisions taken by DTe differ from the administrative appeals in the area of competition law due to their strong relationship to each other. In a number of cases, a decision was taken to process administrative appeals against certain decisions taken by DTe jointly or as clusters. A good example is the joint processing of all administrative appeals against the decisions on x-factors in relation to electricity. This made it possible to streamline the process of dealing with administrative appeals and justice was done to the relationship between the decisions. By dealing with administrative appeals against a single decision as clusters, the period required for processing the appeals may sometimes increase. This often results in criticism from the parties which filed the appeals. However, by doing so it is possible to take into account new insights developed in the period between the moment at which the decision was taken and to the decision on the administrative appeal.

Decisions and administrative appeals in relation to energy

- *Efficiency discounts (price caps) electricity grid managers*

Within the regulatory framework, DTe determined a discount (x-factor) for every grid manager for the period from 2001 up to and including 2003 with the aim of promoting efficient operations. This discount is included in the tariffs for the use of the electricity grid. DTe hopes that this will stimulate efficiency to such an extent that ultimately all companies will reach a comparable level of efficiency, which will result in lower tariffs.

Most of the grid managers have filed an administrative appeal against the x-decision imposed on each of them. NuonNet filed an administrative appeal against all the x-decisions. The administrative appeals of most of the grid managers were directed against the benchmark method used by DTe. By means of this method, the performance

38 Netherlands Government Gazette, 2001, No. 338.

39 Netherlands Government Gazette, 2001, No. 208.

of grid managers is compared. The majority of grid managers appealed against the standardisation method DTe uses to compare the capital costs of the companies. According to the grid managers, this method that does not take the specific characteristics of the companies into account adequately.

The x-decisions are interrelated. In other words, if DTe amends the x-decision of one company, this may have consequences for the other x-decisions. DTe was of the opinion that NuonNet rightly filed an administrative appeal against all the x-decisions. On the grounds of this, DTe decided to review all the x-decisions and to adjust the method of regulation in a number of respects.
DTe declared the administrative appeals against benchmarking, in general, and the benchmarking method used, in particular, to be unfounded. DTe is of the opinion that the benchmarking which it carried out and the underlying benchmarking method is suitable precisely for measuring the efficiency of companies. Naturally, the results of the benchmarking must reflect actual differences in efficiency.

- *Tariff Code for electricity and the National Uniform Producer Transmission Tariff*

On 5 December 2001, DTe took a decision on the administrative appeals against the decision of 16 November 2000 amending the Tariff Code and the decision of 13 December 2000 determining the National Uniform Producer Transmission Tariff *[Landelijk Uniform Productentransporttarief (LUP)]* for the year 2001 (No. 00-105). This amendment of the Tariff Code (number 00-068) means that the parties who import electricity through the cross-border grids for the Dutch market will not pay the National Uniform Producer Transmission Tariff due to the amendment. The administrative appeals against this did not result in an amendment, partly because the parties' interests are not affected proportionately. The second amendment related to the position of customers who only consume electricity for a few hours a year. These customers pay lower tariffs. These administrative appeals did not result in an amendment because the majority of the group for whom it is intended will benefit from this tariff.

- *Concept of a free connection*

In the past year, the Horticultural Marketing Board requested the Minister to clarify the concept of a 'free connection' in the Gas Act because this concept is not clearly described in the Gas Act. DTe's standpoint is that installing gas meters for free customers is part of the free domain and is therefore not the exclusive duty of the network manager. DTe made this standpoint known to the market a number of times in 2001. In addition, it was not clear whether a heating installation on the premises of a horticulturalist was deemed to be a separate connection or not under the Gas Act. The Minister passed these questions on to DTe. The Horticultural Marketing Board filed an administrative appeal against DTe's answer.
On 17 October 2001, DTe declared the administrative appeal to be inadmissible as this was not a decision but an opinion of DTe with regard to the interpretation of the Gas Act, which is still the subject of discussion.

- *Gas supply licences*

DTe grants licences for the supply of gas to captive customers. To be eligible for such a licence, the applicant must show that he has taken adequate measures to be able to supply gas to captive customers. The Gas Act Implementation Scheme *[Uitvoeringsregeling Gaswet]* describes what DTe considers to be adequate measures. In the past year, DTe was of the opinion that Essent Energie Brabant B.V. and Essent Energie Limburg B.V. were not able to show that they had taken adequate measures to be able to guarantee the supply of gas to captive customers. DTe subsequently issued a licence to both companies, subject to conditions. They filed an administrative appeal against this and showed that they had taken adequate measures for the supply gas. DTe subsequently issued the licences without the conditions referred to above.

Injunctions

- *National Uniform Producer Transmission Tariff*

The Presiding Judge of the Trade and Industry Appeals Tribunal refused to grant an injunction in March 2001 for the National Uniform Producer Transmission Tariff *[Landelijk Uniform Productentransporttarief (LUP)]*.
Electricity producers in the Netherlands were of the opinion that they were not required to pay this tariff. Since the National Uniform Producer Transmission Tariff is based partly on the Tariff Code, the electricity producers also filed a judicial appeal against this Tariff Code. In this ruling, the Presiding Judge indicated that he was competent to rule on a judicial appeal in relation to the Tariff Code, despite the fact that the Tariff Code is possibly a generally binding regulation against which, in general, it is not possible to appeal to the Administrative Court. The Presiding Judge deemed it insufficiently plausible that the financial interests of the applicants would be affected to such an extent that an injunction was necessary. The Presiding Judge based his ruling on the limited effect of the National Uniform Producer Transmission Tariff on the price of electricity.

• *Capacity auction*

As long ago as 2000, DTe decided that transmission capacity on the so-called interconnecting grids or cross-border transmission grids would be auctioned. VEMW, VNCI and the Federation for the Metal and Electrotechnical Industry *[Federatie voor Metaal en Electrotechnische Industrie (FME)]* and the Contact Group of Employers in the Metal Industry *[Contactgroep van werkgevers in de Metaalnijverheid (CWM)]* petitioned the Presiding Judge of the Trade and Industry Appeals Tribunal for an injunction allowing them to trade all capacity on the interconnecting grids through the auction. Part of this capacity will not be traded on the auction, but may be used for the agreements entered into with foreign producers in the past by Sep *(Samenwerkende elektriciteitsproductiebedrijven)* [Joint Electricity Production Companies]. The Presiding Judge dismissed the request on 9 February 2001. He stated that Sep's so-called preferential position would be included in the Electricity Act of 1998 in the near future, after which the injunction would no longer be possible. Given the short duration of such an injunction, the petition was dismissed. As a result, it was not plausible that the interests of the appellant's during this short period would be adversely affected to any significant degree. The Presiding Judge took into account the fact that Sep does have an interest in not having an injunction issued.

3.3.13 Advice given to the Minister

• *Long-term capacity development: Californian scenarios?*

At the request of the Minister shortly after the major power failures in California, DTe formulated an answer to the question of whether such problems might also occur in the short or medium to long terms in the Netherlands.
To answer this question, DTe analysed the electricity market in California and compared it to the Dutch situation. On the basis of this analysis, DTe concluded that it was unlikely that this problem would occur in the Netherlands in the short-term. Although there is greater uncertainty in the medium to long-term, it is equally unlikely that this problem will arise in the slightly longer term.

In September 2001, the Minister then requested an answer to the question of whether legislation and regulations in the Netherlands could adequately provide for and prevent a possible supply shortage on the Dutch energy market. Are there sufficient mechanisms in the legislation and regulations to make it possible to intervene or are further measures necessary? If so, which measures and how soon?

In November 2001, DTe presented the Minister with its recommendations in the report *Security of Electricity Supply in the Netherlands in the Long Term [Leveringszekerheid van de Nederlandse elektriciteitsvoorziening op de lange termijn].* In these recommendations, DTe notes that the present legislation and regulations are inadequate to provide for and prevent a shortage in supply on the energy market. Statutory mechanisms are lacking that would allow the Minister to intervene in the market for electricity generation capacity. DTe's advice, however, was that it was not necessary for the time being to take concrete measures to combat possible underinvestment, but that it was necessary first to carry out research into the likelihood that such a problem could arise in the Netherlands. This was necessary because it is not certain that the Dutch market has a tendency towards underinvestment. At the time, insufficient data was available to make a good estimate of the security of supply in the longer term. DTe also noted that the formal responsibilities for monitoring security of supply are clear enough. In fact, no single party has formal responsibility for monitoring security of supply. TenneT has a formal responsibility for "taking measures to ensure security of supply" in accordance with the Electricity Act of 1998. This section of the Act, however, only relates to the short term or operational aspects of security of supply.

In its advice, DTe indicated that a statutory scheme was desirable with a view to setting up an adequate system for monitoring available production capacity. This scheme would have to make it obligatory for market players periodically to submit an up-to-dated overview of the available production capacity in the Netherlands, including the capacity of industrial and other decentralised plants. It is clear that TenneT should be given the task of requesting this information from the market players and publishing it in a concise form.
In addition, DTe advised the Minister to introduce obligatory licences for electricity generation plants. Apart from the fact that such obligatory licences would provide insight into new construction plans, the Minister may also include rules for removing plants from production. It is also possible to include an obligation to offer decommissioned plants for sale or to keep power stations in a preserved state for some time before there are dismantled.

Finally, DTe advised the Minister to place security of supply on the agenda at the European level, given the trends on the national power markets towards an integrated European market. The size of Dutch imports may in the future result in dependence on neighbouring

countries, which brings with it a certain degree of vulnerability in relation to security of supply. Guarantees may increase the security of supply of Dutch customers if neighbouring countries are prevented from 'solving' their own production shortages by reducing exports.

• *Exemptions pursuant to section 15 of the Electricity Act*
Legal entities which own an electricity grid to which a small number of natural persons or legal entities are connected, may obtain an exemption from the Minister from the obligation to appoint a grid manager.
The Minister bases her decision on the advice of DTe.
In 2000, 73 of the 122 applications for exemption were granted by the Minister. In 2001, 9 applications for exemption were received sporadically. In 2001 the Minister approved three applications.

• *Approval of the appointment of gas network managers*
In 2001, at the request of the Minister, DTe assessed all the appointments of gas network managers and tested these against the Gas Act and the policy rule in relation to gas network managers. In March 2001, DTe's recommendations to the Minister were ready. In the Lower House of Parliament, however, the privatisation of energy companies was at the centre of discussion.
The Minister opted to hold back the decision to approve gas network managers and first to wait for the conclusions of the discussion in the Lower House of Parliament. As was discussed above, the privatisation of 49 percent of the shares of regional network managers is possible up to 2004, subject to a number of conditions. The most important conditions relate to greater independence of network managers and the division of legal and economic ownership. In addition, further conditions were formulated with regard to the appointment and the independence of supervisory directors and the directors of the network manager. The gas companies were subsequently given the choice of upholding their application for approval or adjusting the application in line with the policy rules (for instance, in anticipation of an application for privatisation). In the case of companies which opted to uphold their applications, DTe drew up recommendations and draft approval decisions and presented these to the Minister. The Minister approved the decisions in December 2001 and dispatched these to the respective gas companies. Approximately 5 gas companies announced that they wished to submit an amended application for approval.

• *Capacity plans*
In accordance with section 21 of the Electricity Act of 1998, all grid managers are obliged to submit capacity plans to DTe. In these capacity plans, the grid managers provide estimates of the total demand for transmission capacity in the coming seven years. On the basis of these capacity plans, DTe notified the Minister that there was no reason to assume that the grid managers would not be able to provide adequately for the total requirement for transmission capacity on the electricity grids in the short term. The grid managers are able to fulfil their transmission tasks properly. On the basis of DTe's advice, the Minister did not exercise her powers, pursuant to section 22 (2) of the Electricity Act of 1998, to require a grid manager to take measures to ensure that the adequate transmission of electricity may take place in an efficient manner. In its advice to the Minister, DTe indicated that it would carry out further research into the dynamics underlying the development of available production capacity on the Dutch market.

3.4 The European energy market

3.4.1 Introduction

The Dutch electricity and gas markets are increasingly becoming part of a single European market. DTe views its work within the European context as one of the main focuses of its policy, precisely because the effectiveness of market forces in the energy sector is largely related to the way the European energy market develops. DTe is therefore of the opinion that ultimately a single European electricity and gas market will emerge, but that for the time being there will not be a single European regulator because the principle of 'subsidiarity' is too strongly anchored in European politics at present for this to be possible. DTe aims to bring the rules applicable to the Dutch market in line, as far as possible, with European trends. Where possible, DTe anticipates, stimulates and takes initiatives to develop this market. For instance, DTe participates actively in the Council for European Energy Regulators (CEER), the Florence Forum (electricity) and the Madrid Forum (gas). All the energy regulators of the European Union are represented in CEER.
The composition of the Florence and Madrid Forums is broader. In addition to energy regulators, national governments and international branch organisations are also represented in these bodies. The European Commission chairs both forums. The emphasis lies on developing a single European energy market rather than a situation consisting of 15 separate liberalised markets. In some respects, DTe plays a leading role, for instance with regard to removing obstacles to cross-border transmission of electricity. In addition, DTe chairs the

European benchmarking initiative of grid managers of high-voltage grids, the so-called Transmission System Operators (TSO).

3.4.2 The European electricity market

Working towards a single European electricity market is a gradual process. In this regard, the right market structure, transparency and non-discriminatory access to the market are essential. TenneT announced in 2001 that it intends to cooperate with Elia, the proposed grid manager of the Belgian high-voltage grid. Together with TenneT and the Minister, DTe will draw up a set of criteria for this cooperation and present these to the Belgian government. The independence of the grid manager is an important aspect of these criteria.

The role of Germany in the European discussion on electricity is cause for concern. The 'separate status' of Germany became more clearly visible in 2001. In contrast to the Netherlands, Germany has numerous TSO's and does not have a regulator that supervises these grid managers. Germany does have the *'VerbändeVereinbarung'*, an agreement between market players with regard to, for instance, access to the German electricity grids. The independence of the grid manager is therefore not guaranteed optimally.

DTe's regulatory philosophy is that grid managers must provide value for money. In order to assess the added value of a grid manager for customers, DTe makes use of benchmarking. In the case of distribution companies, comparable regional grid managers exist in every country. In the future, various countries would like to make use of a regulatory system based on international comparisons. To achieve this, DTe cooperates with Norway, Finland, Denmark and Sweden (the so-called Nordic Group). Benchmarking models have been developed under the chairmanship of DTe. The first study was carried out in 2001 and is presently in its final stage.

Due to the increase in cross-border trade in electricity, the electricity market received a boost in 2001. This was due to a number of national causes. For instance, the cooperation agreement between electricity producing companies ceased and the auctioning of international transmission capacity was introduced. In addition, one of the long-term contracts between the former *Samenwerkende elektriciteitsproductiebedrijven (Sep)* [Cooperating Electricity Producing Companies] and the German VEW lapsed and international transmission capacity was increased by 400 megawatts.

Within the international context, CEER worked hard in 2001 to find a solution to existing obstacles to cross-border trade in electricity. The most urgent problem was the allocation of costs between the European managers of high-voltage grids in relation to the international trade in electricity. CEER has to formulate principles for a workable system. The detailed specification of the system is the responsibility of the European umbrella organisation of operations of national high-voltage grids (ETSO). In 2001, various attempts to develop such a system failed because of the position taken by Germany, which wishes to apply a unilateral export levy. ETSO finally reached agreement with its members on a temporary system. Under this temporary system there is room for a small levy on international transmission of electricity. CEER and the European Commission finally approved this temporary system subject to the strict condition that it may be applied for a maximum of one year. In addition, CEER and ETSO are working at developing a long-term system. This system must be implemented on 1 January 2003.

CEER has formulated principles for the system to be applied in 2003. In doing so, CEER has laid the basis for a permanent system for distributing costs amongst the operators of the national high-voltage grids.
Two important principles in relation to the system are that the cost of international transmission must be 'non-transaction based'. In other words, the costs may not depend on, for instance, the distance of the transmission. In addition, import or export levies are prohibited.
The European market players have been consulted extensively during the formulation of this system. ETSO will do further work on this cost allocation system in 2002. CEER wishes to embed this permanent system in the proposals of the European Commission with regard to regulation. The proposals ought to stimulate further the international transmission of electricity and form part of the proposals to amend the European Directives for electricity and gas.[40]

In addition, CEER is carrying out parallel work on an adequate system for allocating costs amongst European grid managers, preventing bottlenecks on national borders and harmonising the tariff structures in the various EU countries. In December 2000, DTe commissioned independent research into the size of the available transmission capacity and the method used for calculating this. This research was necessary due to a lack

of clarity about the size of the available transmission capacity between the Netherlands and Belgium and Germany respectively. This research revealed that 3900 megawatts of cross-border transmission capacity was an adequate reflection of the actual situation. In addition, it appeared that it was possible to offset import and export capacity. This requires optimal cooperation between the grid managers of the high-voltage grids in Belgium, Germany and the Netherlands. On the basis of this report, TenneT informed DTe that it agreed with the conclusions of the final report with regard to offsetting imports and exports, but that in practice cooperation with German grid managers, in particular, is not yet optimal. The Minister presented the report to the Lower House of Parliament.

3.4.3 *The European gas market*

The Dutch gas market is part of the European gas market. DTe wishes to ensure that the Dutch gas market does not become an island within Europe. In 2001, a Gas Working Group was set up within CEER. This working group will consider tariff structures, harmonisation of balancing regimes, the transparency of available transmission capacity and the allocation of this in the event of scarcity. Considerable attention will be given to a European system of entry/exit tariff system. DTe has already opted for a tariff structure such as this. These choices promote cross-border trade in gas. DTe also has a proactive policy in relation to these issues.

3.5 Netherlands Transport Regulatory Authority [Vervoerkamer]

As of 1 September 2001, the project to set up the Netherlands Transport Regulatory Authority was initiated. The aim of this project is to set up a new organisational unit within NMa, namely the Netherlands Transport Regulatory Authority. This chamber will be responsible for sector-specific regulation assigned to NMa by Parliament within the framework of the Passenger Transport Act of 2000 *[Wet personenvervoer 2000]*, which took effect on 1 January 2001. The Bill introducing the Aviation Act *[Wet luchvaart]* and the Railways Act *[Spoorwegwet]* are also expected to assign sector-specific tasks to NMa. The parliamentary proceedings in relation to both Bills are expected to be completed in 2002.

Regulation within the framework of the Passenger Transport Act of 2000 consists of general duties and the regulation of municipal transport companies. The latter means that the Netherlands Transport Regulatory Authority will ensure that municipal transport companies only carry out public transport activities. The activities which do not fall within public transport must be hived off into a separate legal entity. In addition, the Netherlands Transport Regulatory Authority will ensure that no cross subsidisation occurs between the various parts of the organisation.

The Netherlands Transport Regulatory Authority will use the experience acquired in carrying out tasks within the framework of the Passenger Transport Act of 2000 in relation to other regulatory duties which Parliament will decide on in 2002. In working out of the relevant legislation and regulations, NMa also gives consideration to their feasibility. Naturally in doing so it also takes into account European trends. The Netherlands Transport Regulatory Authority is developing a regulatory policy and is considering possible instruments for intervention, such as orders subject to penalties and informal opinions. In addition, the staff of the Netherlands Transport Regulatory Authority visits relevant market players and analyses the relevant characteristics of the sector.

The organisation of the Netherlands Transport Regulatory Authority is designed in such a way that maximum synergy will be achieved with other NMa directorates. The Netherlands Transport Regulatory Authority adds an extra dimension to the chamber model. For the first time, the Netherlands Transport Regulatory Authority will carry out sector-specific regulation in an area of policy which falls within a Ministry other than the Ministry of Economic Affairs, namely the Ministry of Transport, Public Works and Water Management.

40 COM (2001) 125 def.: Proposal for a Directive of the European Parliament and the Council in Relation to the Amendment of Directive 96/92/EG and Directive 8/30/EG in Relation to Common Rules for the Internal Market for Electricity and Natural Gas. Also the Proposal for a Regulation of the European Parliament and the Council in Relation to Conditions for Access to the Grid for Cross-Border Trade in Electricity.

The Year 2001 in Figures

4.1 Introduction

The following paragraphs give a quantitative impression of NMa/DTe's most important products. A brief explanation is given of these products.

Compared to the year 2000, a large number of cases were once again settled by NMa and DTe in 2001. In total, 1323 cases were dealt with and concluded. In 2000, this figure was 896. The increase in the number of cases dealt with therefore amounts to 48 percent.

Number of cases	NMa/DTe
2000	896
2001	1323
Increase in the number of cases	+ 427
Increase as a percentage	+ 48%

Figure 4.1 Cases settled in 2001

Decisions pursuant to the Competition Act

4.2 Concentration control

In accordance with the Competition Act, a system of preventive testing is in force. This means that NMa must be notified of every concentration that falls within the scope of the Competition Act for the purpose of assessment. For as long as NMa has not been notified of the concentration and has not assessed the concentration, it is prohibited to realise it. The procedure for assessing concentrations set out in the Competition Act consists of two stages, namely the notification stage and the licensing stage.

The notification of an intention to merge must contain comprehensive information with regard to the companies involved, turnover data, the nature of the concentration, the market or markets affected by the concentration, the position of the companies involved on these markets, the most important competitors and customers on these markets, and the agreements in which the intention to realise the concentration is set out. If NMa comes to the conclusion during the notification stage that additional information is necessary, it may request the required information from the companies involved. In this case, the 'clock' is stopped until NMa receives the supplementary information. The same applies in the licensing stage.

In 2001 NMa was notified of 135 proposed concentrations. A total of 138 cases were concluded with a decision in the notification stage. NMa had already been the notified of a number of these in 2000. The table below provides a breakdown of a number of important production data.

Description	Number
Concentration notifications	135
Withdrawn	8
Decisions in the notification stage*	138
– of which, decisions relating to mergers (section 27(a) of the Competition Act)	13
– of which, decisions relating to acquiring control (section 27(b) of the Competition Act)	106
– of which, decisions relating to the creation of a joint undertaking (section 27(c) of the Competition Act)	12
– of which, a decision is not applicable due to a turnover threshold	7
Licence required	2
Decisions in the licensing stage	1
Decisions pursuant to section 40 of the Competition Act	1
Decisions pursuant to section 35(3) of the Competition Act	0
Summary decisions	45
Deferred cases (pursuant to section 35(2) of the Competition Act)	67 (49%)
Settled within four weeks**	77 (56%)
Number of prenotification interviews	18
Number of informal opinions	35

** of which, notification was received in 11 cases in 2000*

*** this relates partly to cases which have been deferred*

Figure 4.2 Assessment of concentrations in 2001

The average total time required to process a concentration case in the notification stage was 36.7 days in 2001. If the three cases that took the longest time to answer are excluded, the average was 33.8 days. The time required to process the cases completed in the year 2001 in the licensing stage was 146 days. In more than half the total number of cases in the notification stage it was necessary to request additional data.

Figure 4.3 provides a breakdown according to the joint turnover of the undertakings involved which notified NMa of proposed concentrations (including notifications which were withdrawn in 2001 by the applicants).

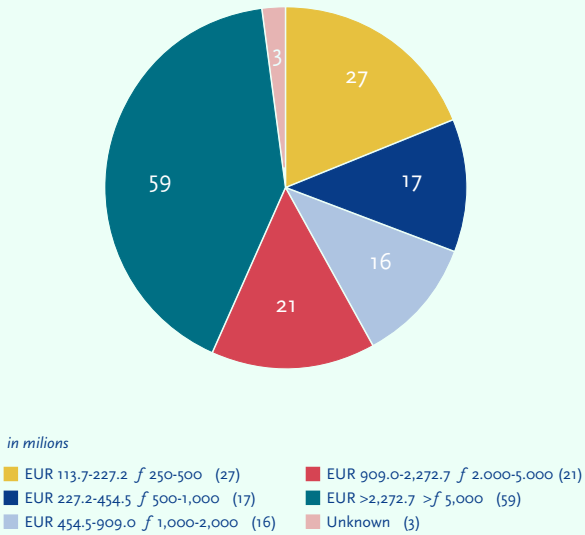


Figure 4.3 Joint turnover of the undertakings involved *(total 143)*

Figure 4.4 provides a breakdown of decisions pursuant to section 37 in accordance with the sectors in which the undertakings involved were active.

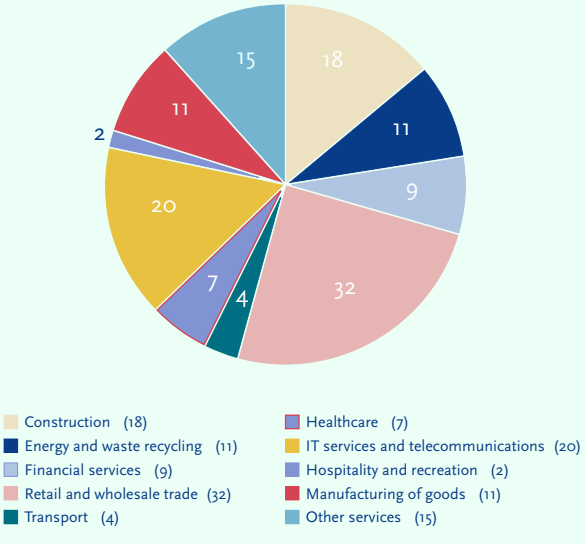


Figure 4.4 Breakdown into sectors *(total 131)*

Of the 143 notifications of concentrations NMa received in 2001, competition authorities in other EU Member States were also notified of 23. The distribution of these is given in Figure 4.5.

Notification given in	**Total**
Notification in two Member States	**13**
The Netherlands and Belgium	2
The Netherlands and Denmark	3
The Netherlands and Germany	7
The Netherlands and Italy	1
Notification in three Member States	**4**
The Netherlands, Belgium and Germany	1
The Netherlands, Denmark and Ireland	1
The Netherlands, Germany and Finland	1
The Netherlands, Germany and United Kingdom	1
Notification in more than three Member States	**6**
The Netherlands, Australia, Belgium, Finland, Denmark and Ireland	1
The Netherlands, Belgium, Denmark and Italy	1
The Netherlands, Germany, Finland and United Kingdom	1
The Netherlands, United Kingdom, Germany and Italy	1
The Netherlands, Ireland, Sweden and Germany	1
Total	**23**

Figure 4.5 Concentrations with multiple notifications

4.3 Concentration supervision

Cartels are agreements between undertakings (such as agreements or decisions of associations of undertakings) or *de facto* concerted practices which restrain competition on (a part of) the market. Since 1 January 1998, a general prohibition on cartels has been in force in the Netherlands.

Agreements that restrain competition may relate to various aspects of the commercial policy of undertakings, such as pricing, the distribution of markets or resources, conditions of supply and restraints on production or sales. The prohibition on cartels applies to all forms of agreements that restrain competition, be they written or verbal, horizontal or vertical. Restraints on Competition may also occur if companies coordinate their market behaviour without actually entering into explicit agreements.

Agreements that restrain competition may be eligible for exemption if they meet the criteria stipulated in the Act in this regard. Exemptions must be applied for in relation to specific cases. A transitional scheme applied to agreements already in existence at the moment that the prohibition on cartels took effect (1 January 1998). If an application for an exemption for these agreements was

submitted before 1 April 1998, these agreements were not prohibited for as long as NMa had not taken a decision with regard to the application.

4.3.1 *Exemptions under the transitional regime*

Description	Numbers
Starting situation 1998	**1040**
Correction for the splitting of dossiers	86
Total number of applications for transitional exemptions	**1126**
Settled in 1998	486
Remaining in 1998	640
Settled in 1999	226
Remaining in 1999	414
Settled in 2000	244
Remaining in 2000	170
Settled in 2001	**133**
Remaining in 2001	**37**

Figure 4.6a Numbers of applications for exemption under the transitional regime

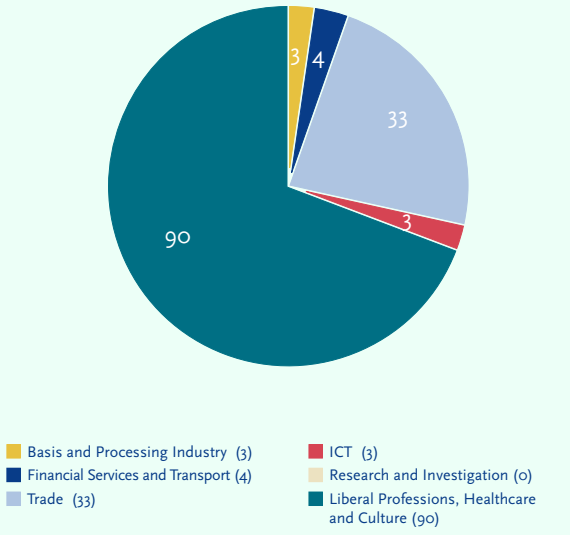


Figure 4.6b Numbers of applications for exemptions under the transitional regime subdivided by unit *(total 133)*

Figure 4.6a and Figure 4.6b show a steady settlement of applications for exemption submitted under the transitional regime. Almost all the applications for exemption, submitted under the transitional regime, have now been settled.

4.3.2 *Regular applications for exemption*

In addition to the large number of applications for exemption under the transitional regime, regular applications for exemption have also been submitted. All applications for exemption submitted after 31 March 1998 belong to this category. The quantitative data is as follows:

Description	Numbers
Starting situation 1998	89
Settled in 1998	57
Remaining in 1998	32
Correction for splitting of dossiers	29
Received in 1999	16
Settled in 1999	31
Remaining in 1999	46
Received in 2000	25
Settled in 2000	31
Remaining in 2000	40
Received in 2001	**24**
Settled in 2001	**32**
Remaining in 2001	**34**

Figure 4.7a Numbers of regular applications for exemption

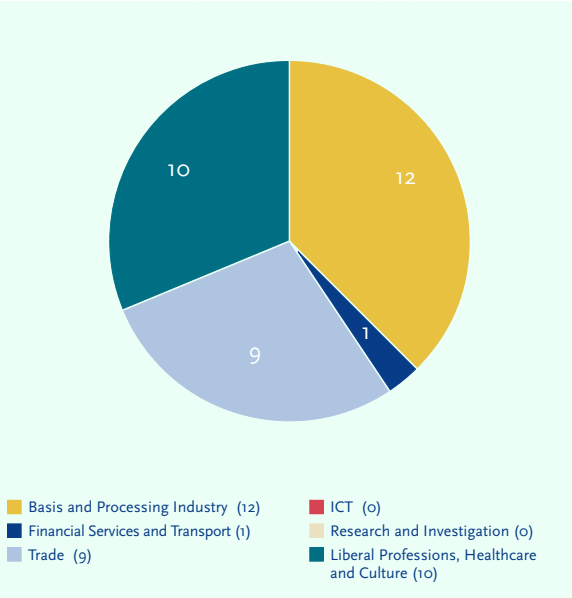


Figure 4.7b Numbers of regular applications for exemptions subdivided by unit *(total 32)*

A remarkable feature of Table 4.7a is that the number of regular applications for exemption submitted has more or less stabilised. The number of settlements is also at the same level as 2000.

4.3.3 *Complaints*

Description	Numbers
Starting situation 1998	266
Settled in 1998	139
Remaining in 1998	127
Received in 1999	92
Settled in 1999	89
Remaining in 1999	130
Received in 2000	72
Settled in 2000	78
Remaining in 2000	124
Received in 2001	**135**
Settled in 2001	**145**
Remaining in 2001	**112**

Figure 4.8a Numbers of complaints processed by NMa

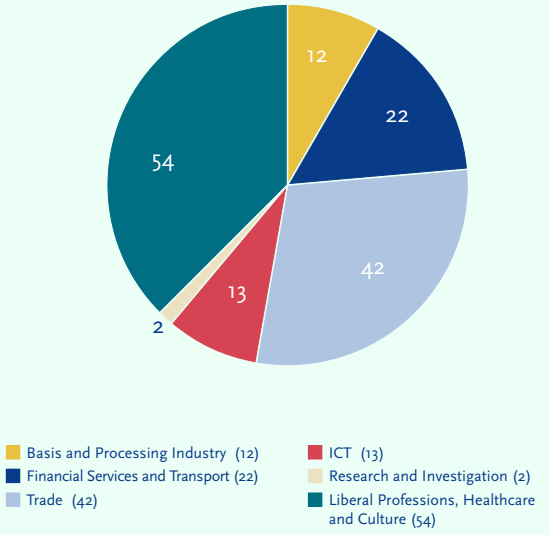


Figure 4.8b Complaints subdivided by unit (total 145)

Figure 4.8a shows a strong increase in the number of complaints received by NMa. Compared to the year 2000, the figure for 2001 has almost doubled. On the other hand, the number of complaints settled has also almost doubled.

4.3.4 *Orientations*

Orientations are cases which are not classified as applications for exemption or as complaints. These are usually requests for an opinion on an issue relating to competition law or requests for advice.

Description	Numbers
Starting situation 1998	28
Settled in 1998	12
Remaining in 1998	16
Received in 1999	148
Settled in 1999	71
Remaining in 1999	93
Received in 2000	217
Settled in 2000	188
Remaining orientations in 2000	122
Received in 2001	**219**
Settled in 2001	**236**
Remaining in 2001	**104**

Figure 4.9a Numbers of orientation cases

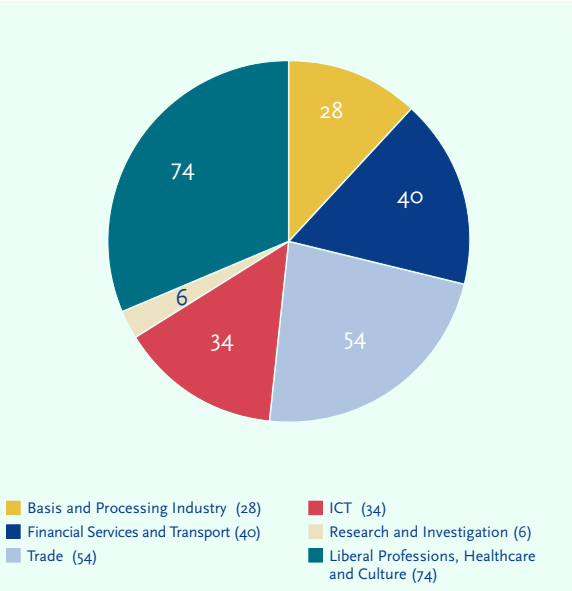


Figure 4.9b Complaints subdivided by unit *(total 236)*

Table 4.9a shows that the trend towards an increasingly in orientation cases received which has already been established appears to have stabilised after a sharp increase in the year under review. In 2001, however, 40 more orientations were processed than in 2000. Part of the backlog that had accumulated has therefore be in processed.

4.3.5 *Ex officio investigations*

Ex officio investigations are investigations initiated in the course of NMa's official duties into possible infringements of the Competition Act. Such investigations may be held because NMa receives information from various sources, such as market studies, reports in the media, tips and the like, which raise such suspicions that an investigation seems appropriate. Figure 4.10 gives an overview of the *ex officio* investigations that have been completed.

Description	Numbers
Starting situation 1998	2
Completed in 1998	0
Remaining in 1998	2
Started in 1999	3
Completed in 1999	2
Remaining in 1999	3
Started in 2000	10
Completed in 2000	5
Remaining *ex officio* investigations in 2000	8
Received in 2001	**11**
Settled in 2001	**6**
Remaining in 2001	**13**

Figure 4.10 Numbers of completed ex officio investigations

4.3.6 *EC verifications*

At the request of the European Commission, NMa carried out two verifications on the premises of Dutch companies in 2001 because the European Commission suspected it the involvement of these companies in an infringement of Article 81 or Article 82 of the EC Treaty.

4.3.7 *Subsequent verifications*

Subsequent verifications are official investigations into compliance with earlier decisions taken by NMa.
In general, these verifications showed that the parties involved had complied properly with these decisions.
The first subsequent verifications occurred in 2001.

Description	Numbers
Started in 2000	8
Completed in 2000	6
Remaining subsequent verifications in 2000	2
Received in 2001	**8**
Settled in 2001	**5**
Remaining in 2001	**5**

Figure 4.11 Numbers of completed subsequent verifications

4.4 Administrative appeals

In principle, it is possible to appeal to the Administrative Court against all decisions taken by NMa/DTe which satisfy the definition of a decision, as referred to in section 1(3)(1) of the General Administrative Law Act. It is possible to file an administrative appeal with NMa/DTe against decisions imposing sanctions and decisions in relation to applications for exemption, as well as decisions taken by the Director of DTe pursuant to the Electricity Act of 1998 or the Gas Act. These administrative appeals are dealt with by the Legal Department.

In total, 41 administrative appeals were completed relating to decisions taken pursuant to the Competition Act. In 5 cases relating to sanctions, the Director-General of NMa requested the advice of the Administrative Appeals Advisory Committee *[Bezwaar Advies Commissie, BAC]* before taking a decision on the administrative appeal. Figures 4.12a and 4.12b show how these administrative appeals were settled.

At the end of 2001, 48 administrative appeals were still being processed by NMa under the Competition Act.

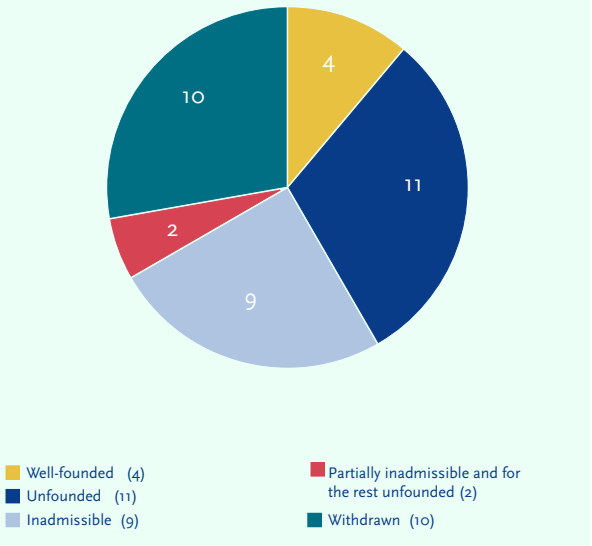


Figure 4.12a Numbers of administrative appeals completed

Completed cases involving the imposition of sanctions	**5**
Unfounded	3
Partially unfounded/partially well-founded	1
Partially inadmissible and for the rest unfounded	1

Figure 4.12b Numbers of administrative appeals in relation to the imposition of sanctions

The Legal Department has also completed 107 administrative appeals against decisions taken by the Director of DTe. In a number of cases, the administrative appeals involved appeals which bear a relationship to each other and which were settled jointly. The decisions on the administrative appeals are included in DTe's figures because the Director of DTe signs these (Figure 4.14).

4.5 Judicial appeals and petitions for injunctions

Through the Legal Department, NMa is directly involved in judicial proceedings. The staff of the Legal Department prepare defence responses and pleadings and increasingly take on the role of attorneys in the judicial proceedings. Judicial appeals were filed with the Court of Rotterdam against more than 35% of the decisions on administrative appeals. At the end of 2001, 25 competition cases were pending before the Court of Rotterdam. Five judicial appeals were pending before the Trade and Industry Appeals Tribunal. Figure 4.13 gives an overview of the judicial appeals completed in 2001 and the applications for injunctions in relation to the Competition Act.

Judicial appeals settled	**12**
Well-founded	1
Unfounded	6
Inadmissible	1
Withdrawn	4
Settled in higher judicial appeals	**1**
Well-founded (judicial appeals instituted by NMa)	1
Petitions for injunctions	**6**
Dismissed	3
Withdrawn	3

Figure 4.13 Numbers of judicial appeals settled

4.6 Decisions in relation to sanctions

In 2001, 6 decisions were taken in relation to sanctions. At the end of 2001, four sanctions proceedings were pending before NMa (Figure 4.14).

Decisions in relation to sanctions	**6**
Failure to give notice (in time)	2
Submission of incorrect data	1
Fines for non-cooperation	1
Decisions not to impose a fine/order subject to a penalty	2

Figure 4.14 Numbers of decisions taken in relation to sanctions

4.7 Decisions in relation to the Electricity Act of 1998 and the Gas Act

DTe has experienced a sharp increase in production. The most important cause for this sharp increase is the fact that the Gas Act Programme was prepared and completed in 2001. During the implementation of the Gas Act Programme, it was DTe's intention to determine the system of gas supply tariffs for captive customers once a year and subsequently to determine and publish the procurement costs of the gas supply companies every quarter. The Court of The Hague did not approve of this and ruled that the gas supply tariffs for captive customers must be determined each quarter by means of separate decisions. In addition, in 2001 the first decisions were taken in relation to the supervision of compliance, namely decisions involving the issuing of binding instructions.

Total number of decisions and recommendations	**498**
Of which, decisions relating to electricity	**170**
Tariff decisions	113
Decisions in relation to the Tariff Code	1
Decisions on administrative appeals	45*
Decisions issuing binding instructions	1
Of which, decisions relating to gas	**287**
Decisions on price caps and Guidelines for 2002	52
Tariff decisions	153
Decisions on administrative appeals	3*
Decisions on supply licences	52
Decisions issuing binding instructions	27
Of which recommendations to the Minister of Economic Affairs	**41**

* *More administrative appeals (namely 107) were settled, including the reported number of decisions in relation to administrative appeals (totalling 48). This difference in numbers is due to the fact that a number of cases bear a relationship to each other and were settled jointly. Where appropriate, this resulted in a single decision on the administrative appeal.*

Figure 4.15 Total number of decisions and recommendations

4.8 Communication

During the past year, NMa extended its communication activities considerably. One of NMa's most important tasks, which was realised was the setting up of the NMa/DTe Information Line.

The NMa/DTe Information Line has been operational since 1 October 2001. With its Information Line, NMa aims to direct all questions from consumers and small and medium-sized enterprises to a single central point within the organisation, so that all information from and to the public may be directed through information officers. The public information officers provide advice and support to citizens, companies and other public authorities that approach NMa with questions, notifications or complaints with regard to the competition, electricity and gas laws. The Information Line also serves as a notification point for signalling alleged restraints on competition. NMa has 20 brochures and forms, of which some are available in English (see Figure 4.16). NMa has also done a considerable amount of work in the area of press information. In the past year, NMa issued 47 press releases and DTe issued 19 press releases. In addition, six press conferences were held.

Number		Total
Questions/comments by e-mail	15–25 a day	1,200
Questions/comments by telephone	20–3 a day	1,500
Questions/comments by letter	5 a month	15
Requests for brochures	5 a day	300

Figure 4.16 Figures for the NMa/DTe Information Line (for the period 1 October up to and including 31 December)

Interview with Prof. David Newbery

"Even if the Dutch electricity market were completely liberalised, NMa/DTe would continue to regulate it. A liberalised market, in particular, cannot exist without regulations".

Prof. David Newbury, a professor of Applied Economics at the University of Cambridge, does not hold the slightest doubt with regard to the importance of regulating the electricity market. In his view, this market can only function well if it is guaranteed the confidence of the consumer. Furthermore, the regulating authority can make a considerable contribution to developing this confidence.

Newbury knows what he is talking about. He is an authority in the field of energy politics, particularly in the area of privatisation and regulation of the energy market. He also has long-standing experience as a member of the British Monopolies and Mergers Commission. He was a member of the Advisory Council of Ofgem, the regulator of the British energy market, and he is currently a member of the Competition Commission, the highest competition authority in the United Kingdom. Indeed it should come as no surprise that NMa/DTe set their sights on him when it decided to establish an independent commission that would monitor developments on the Dutch electricity market and advise DTe on the regulation of that market. Prof. David Newbery is the chairman of this Market Surveillance Committee (MSC).

When he compares the process of liberalisation on the Dutch electricity market with the developments in other European countries, he is struck by 'the assertiveness' of the Netherlands. "I mean this in a positive sense. From the start the Dutch had a clear idea of what they wanted and they were set on realising that idea as quickly and effectively as possible. Nevertheless, having said that, it must be stated that for a small organisation DTe was assigned an enormous task. After the Electricity Act came into effect it had to be implemented and a whole system of regulation had to be set up. It did not surprise me that during the course of the transition it was discovered that the Act is not equally clear on all points. Questions arise as to the correct interpretation of sections of the Act. What kind of power does the regulating authority have? What demands can it make on businesses and what type of regulations can it impose on them? From the start of liberalisation in the Netherlands, it was important first of all to stimulate competition on the market through regulation. That´s the right spirit for regulation!"

"For a small organisation, DTe was assigned an enormous task"

Prof. Newbery describes the task of MSC briefly and concisely: "To gather information about the market and, if something goes wrong, to try to understand the reason for it and, where necessary, to make proposals to ensure that the market functions more effectively. To make the energy companies aware that their behaviour is being monitored. All of the above are in the interest of the consumer".

He finds that the work of DTe and of his own committee is still impeded too much by 'insufficient information'. Often it takes too long for information that is essential for assessing the market to become available.

Newbery cites a recent example: "In July last year large price rises occurred on APX, Amsterdam´s spot market. It took until October 2001 for us to obtain all of the relevant information. Here, in my country, if one requests information, it is available the next day. The reason for this is that companies are obliged to supply information. Agreements have been made in this regard. Such agreements are lacking in the Netherlands or, at any rate, they are not clear".

The Chairman of MSC is open about the fact that he has learnt a lot from the regulation practices in the United States. "There they have had more than a hundred years of experience in regulating private companies. Over many years difficult issues, such as the rights

of companies, the duties of the regulator and the protection of the investor, have been codified by court rulings. In the last ten years the American electricity industry has changed dramatically. A process of liberalisation has also been put into effect there, albeit against a completely different background. That is to say, US companies were already private and therefore already had the right to protect the value of their investment. This rights has to be respected when changes are made. One of the most striking differences between Europe and the US is that in the US the Petrol Energy Regulatory Commission (PERC) is responsible for ensuring that the prices paid by consumers are correct and reasonable – or 'fair' as is literally stated in its directives. If a state wants reforms, it needs to convince the PERC that these reforms will keep prices fair and the market competitive."

"Explaining our actions and the effects of these actions"

The energy economist subsequently explained exactly why it came to pass that, last year in California, almost everything that could go wrong with electricity supply did go wrong. What lessons should Europe learn from this? "We should be very aware of the fact that, on the Continent, we have an integrated system. What matters is not only how much capacity there is in the Netherlands but also, by extension, whether there is capacity and how much capacity there is in neighbouring countries. At the moment there is sufficient capacity but the surplus capacity in Germany is driving prices down to a very low level".

"Another lesson should be that, on the one hand, people bank on the regulation of distribution and transmission – with correspondingly reasonable prices – while, on the other hand, they worry about the market not being regulated. In California wholesale prices soared enormously, whereas retail prices were kept low. As a result, the generating companies soon filed for bankruptcy. In this case regulation did not offer a solution. Indeed there is the problem of how one can manage the regulation of a competitive market. How do you keep players who wield inordinate power off the market while keeping the market competitive? It took the European Commission and its Member States a rather long time to realise and acknowledge that certain generating companies operate beyond their limits and therefore dominate a segment of the market. As an example, in the European context Electrabel is not a large company. However, given its 90 to 95 percent share of the Belgian market and its 20 to 25 percent share of the Dutch market, it is a dominant player."

According to Prof. Newbery´s vision, the market regulator exists first and foremost for the consumer. It is for this reason that he holds a passionate plea for the proper education of consumers. "Explaining our actions and the effects of these actions to the consumer is a very important task of the regulatory authority. We must not hesitate to explain how the market works. The consumer sees the price he pays. He does not realise that this price is subject to the oil price and the cost of electricity generation, transmission and distribution. One must continually explain to the consumer why one price increase is reasonable whereas the other is unreasonable and whether and how one can take action against the latter. The regulator's role is only part of the picture. He can protect consumers against unreasonably high cost of transmission and distribution. He can also show consumers that the cost of transmission is much lower in the Netherlands than in Germany and that DTe is responsible for this. However, there is an additional problem. A lot, even most, of the available information is confidential. DTe cannot make known what the problem lies with such and such a company because generators – and they are entitled to do so – forbid this information to be made public. Of course, in every system certain sensitive information must remain confidential. Nevertheless I am genuinely convinced that in the Netherlands – and this is certainly different in other countries – far too much information is kept confidential. This is not in the interests of consumers. This should change".

5 The Organisation

5.1 Personnel

The sharp growth in NMa's staff and the preparations for NMa's status as an independent public authority exerted additional pressure on the operational aspects of NMa. NMa continued to grow in 2001. The organisation's HRM policy was intensified.

5.1.1 *Staffing*

All the organisational units (with the exception of the Directorate of Merger Control) expanded. This growth was such that for management reasons changes were made to the organisational structure was. On 1 January 2001, NMa started with 134 full-time equivalents (143 employees). On 31 December 2001, NMa had 204 employees (195 full-time equivalents). In 2001, 75 employees joined NMa. Of these, 46 were appointed as civil servants and 29 members of staff were employed through temporary employment agencies. In addition, NMa had eight work placement students. In total, 15 employees left NMa and 18 employees changed jobs within the organisation.

NMa has a young staff. The average age of the employees is 36 years (reference date, 31 December 2001).
The organisation employs more women than men: on 31 December 2001, NMa employed 108 women and 96 men.

5.1.2 *Recruitment and selection*

An organisation which grows and wishes to be qualitatively strong requires a structural approach to recruitment and selection policy. This structural approach was developed in 2001 and resulted in a new labour market campaign (with as its central message "work that is relevant and visible"), which was translated into corporate advertisements, brochures and a standard presentation for fairs and universities. The contact with universities has been intensified, primarily with associations of economics and law students. An exceptionally effective method of recruitment proved to be the recruitment of candidates through the networks of NMa's own staff.

5.1.3 *Education and training*

An adequate training policy is one of the important foundations of a knowledge organisation such as NMa. Well-educated employees with knowledge of business are the basis for NMa's work. NMa therefore makes considerable demands on the quality of the work they do. This requires staff who are well-equipped for their tasks. Not only the recruitment and selection policy, but also the training policy focuses on the further strengthening of NMa. NMa regards development opportunities as an important fringe benefit. Personal development, both through learning on the work floor and through education, are high on the list of the organisation's priorities. Various courses (including introductory courses on competition law and energy law) are organised internally by NMa's staff for NMa's staff. Doing external courses is also encouraged. In the year under review, more than 4 percent of the total personnel budget was allocated to education and training.

5.2 Finance

NMa's budget grew considerably in 2001 compared to 2000. NMa's total expenditure amounted to EUR 2,243,000 in 2001. NMa therefore remained within its allocated budget of EUR 27,133,000. The growth in the budget may partly be explained by structural factors, such as the growth in the number of employees. The growth in expenditure on goods and services was partly incidental. An important component of this was expenditure relating to the furnishing of the new office accommodation, the relocation and the leasing of the new offices.
This amounted to a total of EUR 9 million. Of this, EUR 5.1 million was used for the one-off VAT payments to the Government Buildings Service *[Rijksgebouwendienst]*, as a result of which the monthly tenancy payments are lower.

	Personnel costs	Goods and services	Realised in 2001	Realised in 2000
NMa (excluding DTe)	9,328,000	11,336,000	20,664,000	9,789,000
DTe	1,760,000	3,819,000	5,579,000	3,815,000
Total for NMa	11,088,000	15,155,000	26,243,000	13,604,000
Income DTe			884,000	1,081,000
Income NMa			117,000	6,000

Financial overview of NMa/DTe for 2001 (in EUR, rounded off to EUR 1,000)

In the table, the figures for NMa are broken down into NMa (excluding DTe) and DTe. The reason for this is that 60 percent of DTe's expenditure is charged to the energy sector.

The audit is carried out by the Audit Service of the Ministry of Economic Affairs and occurs within the framework of the auditing of financial reports by the Ministry.

5.3 Information management and administration

The activities in the area of information management in 2000 included:
- amending and extending the existing time recording system;
- improving the user-friendliness of NMa's knowledge system;
- building planning functionalities into the existing registration system;
- development of a registration system for questions posed by the public (NMa/DTe Information Line);
- development of a registration system for European Union documents;
- development of a new system which DTe can use to record the financial data of gas and electricity companies;
- development of a so-called building block programme to support the drawing up of decisions;
- putting the new computerised library system into operation.

The recommendations of the so-called *VIR* Audit for 2000 were implemented in 2001. Within the framework of the Central Government Information Security Regulations *[Voorschrift informatiebeveiliging rijksoverheid, VIR]* the security handbook was updated. This illustrates the importance that NMa attaches to the integrity and security of (confidential) information. The Accountancy Department will carry out an audit in the first half of 2002. The post and archiving activities increased considerably in 2001. The number of registered mail items increased from 13,000 to more than 20,000. The creation of dossiers also increased by two thirds compared to 2000. In mid-2001 a start was made with the modernisation and digitisation of the post and archiving system.

5.4 Ratios ('Balanced Scorecard')

The use of ratios is important both internally (for management purposes) and externally (for 'stakeholders', such as 'customers' and politicians). Ratios are important for internal use because they allow the management team to measure the 'pulse' of the organisation. In addition, with the aid of ratios, NMa is able to meet the demand for accountability and transparency.

On the advice of CapGemini Ernst & Young, NMa opted for the Balanced Scorecard (BSC) to increase insight into the score for NMa's strategic and critical success factors. This also ensures that improvements are not limited to a single area that happens to draw attention. NMa regards BSC as an addition to the ratios which NMa already uses in its work planning cycle.

BSC gives an holistic overview because BSC gives attention to all perspectives within the organisation. NMa has selected the following as the most important perspectives: the contractor, the owner, the internal organisation and customers.

The *contractor's perspective* includes the aspect of effectiveness. It is important for NMa to make the extent to which it has achieved its goals clear to its (political) contractors.

The *owner's perspective* focuses on the Ministry of Economic Affairs as the subsidising institution. The central issues in this regard are production figures and the use of resources.

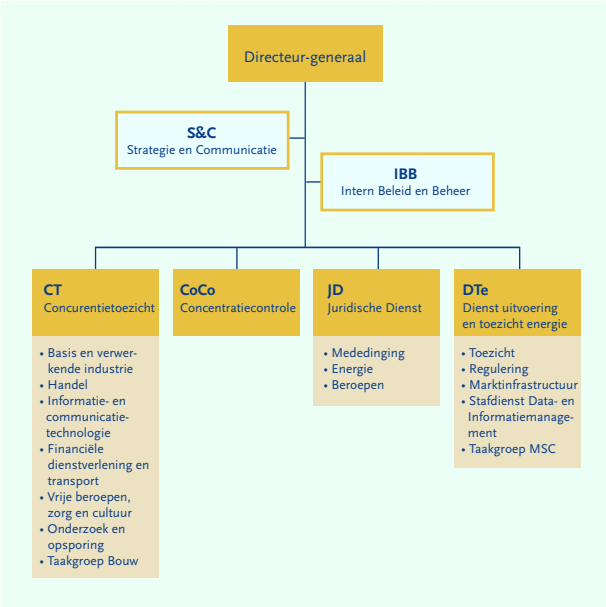
The *internal organisational perspective* relates to the question of what the organisation must do within its business processes to fulfil its task. An important aspect of this is, for instance, the quality and satisfaction of staff, throughput speed and productivity.

The *customer/environmental perspective* focuses on translating opinions with regard to NMa's services into specific performance standards, such as the speed with which NMa's products are produced and the quality of these products.

In the Annual Report for 2002, NMa will report in more detail on the results of the use of the Balanced Scorecard.

5.5 Changes to the organisation

In 2001, a number of changes were made to NMa's organisation. Leaving aside the Netherlands Transport Regulatory Authority, which is currently being set up, at present the organisational chart is as follows:



Organisational chart of NMa

5.5.1 New organisation of DTe

The change to DTe's organisational structure relates to the implementation of the wish expressed by the Lower House of Parliament "to strengthen DTe substantially, both qualitatively and quantitatively, in the short term".[41] The organisational structure has been changed to accommodate the increase in staff and tasks. Since 1 January 2002, DTe has had a new organisational structure with three units, Supervision, Regulation and Market Infrastructure, the MSC Taskforce and a supporting Staff Department.

Supervision Unit

The Supervision Unit is responsible for supervising compliance with the energy acts and related regulations. Supervision of compliance includes a wide range of activities. The staff of the units assess and give advice on matters with which markets players are required to comply. Carrying out verifications, not necessary following an infringement of a legal requirement, falls within the area of supervision. In addition, the unit may prevent a situation arising which is in conflict with the law and can ensure that other companies comply with the rules by giving advice or issuing warnings. If such action does not have the desired effect, the units may issue binding instructions or, if necessary, an order subject to a penalty.

Regulation Unit

The Regulation Unit is responsible for stimulating effective competition in situations where there is no market, as in the case of the providers of the energy infrastructure. This relates primarily to efficient practices on the part of these providers and their customers. A central feature of this is the promotion of a sustainable, optimal relationship between price and quality.

Market Infrastructure Unit

The emphasis of the Market Infrastructure Unit is on the integrated system of transmission and distribution networks. It is essential that this integrated system is always available and provides good services to customers. To achieve this, the Unit is drawing up rules.

Data and Information Management Department

The Data and Information Management Department is responsible for structuring the demand for information. In addition, this department is responsible for the provision of information and the processing and archiving of this information.

MSC Taskforce

The MSC Taskforce supports the Market Surveillance Committee (MSC) and, in addition, carries out analyses. On the basis of MSC's recommendations, DTe may decide to amend rules governing the market and, if necessary, NMa may carry out research into the behaviour of market players.

41 Lower House of Parliament, Parliamentary Proceedings 2000-2001, 27 250, No. 40

5.5.2 Changes to the organisation of the Legal Department

The Legal Department, the successor of the Decisions, Administrative Appeals and Judicial Appeals Section *[Sectie Beschikkingen, Bezwaar en Beroep (BBB)]* is responsible for providing legal advice and support for NMa/DTe as a whole.

In order to meet increasing demand, the Legal Department has been organised into two units, as of 1 May 2001. These are the Competition Unit and the Energy Unit. The Energy Unit focuses on a advising DTe, processing administrative appeals against decisions of the Director of DTe and preparing judicial appeals in energy cases. Advice that is not sector specific, the processing of administrative appeals against decisions of the Director-General of NMa and the preparation of judicial appeals in competition cases is carried out by the Competition Unit.

In addition, the positions of Appeals Coordinator and Disputes Resolution Coordinator were created. The latter will focus on disputes resolution, pursuant to the Electricity Act of 1998 and the Gas Act.

5.5.3 Changes to the organisation of the Competition Department

The division into units within the Competition Department, previously the Research, Regulation and Exemptions Section *[Onderzoek, Toezicht en Ontheffingen (OTO)]*, was formalised in 2001. The Department now consists of the following units: Basic and Processing Industry; Trade, Information and Communication Technology; Financial Services and Transport; Liberal Professions, Healthcare and Culture; and Research and Investigation. This division into units promotes the development and retention of sector-specific knowledge.

6 The decisions

6.1 Decisions in relation to concentrations

This paragraph will first discuss cases in which a licence was required and following this a number of cases in which a licence was not required.

6.1.1 Licence required

With regard to the intentions of companies to merge, described in this paragraph, NMa concluded in the notification stage that a dominant position may arise or be strengthened. Such concentrations may significantly restrain competition in the respective market. A licence is therefore required in these cases.

Case 2184/Air Products – AGA Transfer

Parties and market(s): In 2001, the Director-General of NMa granted a licence to Air Products Holdings B.V for the acquisition of AGA Transfer. The acquisition related to the largest part of the cylinder gas activities and part of the bulk gas activities of AGA Gas B.V. The acquisition was the result of the ruling of the European Commission with regard to the takeover of AGA by Linde. The sale of part of AGA's activities in the Netherlands was one of the conditions which the European Commission linked to the approval of this acquisition. The investigation in the licensing stage focused particularly on the question of whether a joint dominant position would arise or be strengthened in the Netherlands on the markets for oxygen, argon and acetylene cylinder gases and the markets for the (liquid) bulk gases, oxygen and argon.

Considerations (cylinder gases): The structure of the national markets for cylinder and bulk gases has characteristics which may promote the emergence or strengthening of a joint dominant position. These are concentrated markets with two large players with regard to cylinder gases and three players with large market shares in the area of bulk gases. In addition, the market structure is characterised by symmetry in the market positions of the large players on the market and high barriers to entry. Industrial gases are also relatively homogenous products. The large players also encounter each other on the various markets. The figures provided by the parties gave the impression initially that certain customers, who are supplied with cylinder gas through depot operators, were confronted with large price increases in the period from 1995 to 1999, while the average prices of cylinder gases supplied to other customers fell in this period. NMa concluded from this that there was reason to assume that a (collective) dominant position could arise or be strengthened by the concentration. Further investigation in the licensing stage showed that various factors could be identified as a result of which a joint dominant position would not arise. For instance, the transparency of the market is limited. It is consequently not possible for large players to monitor the behaviour of their competitors adequately and it would be difficult for them to coordinate their behaviour. In addition, the relationship between the two large players appeared to be limited. Smaller players on the market ensure that there is sufficient competitive pressure. In the past, competition has existed between the two large players on the market. The markets are not stable and consequently the companies have an incentive to acquire market share. Coordinated behaviour is therefore more difficult to maintain. New information also showed that the price increases assumed earlier in the case of small customers had to be viewed critically. Particularly in the case of bulk gases, customers that purchase large quantities exercise buyer power. In the light of these factors, the Director-General of NMa concluded that a joint dominant position would not arise or be strengthened by the acquisition and therefore granted a licence to realise the acquisition.

Case 2198/Schuitema – Sperwer

Parties and market(s): The Director-General of NMa indicated during the past year that a licence was required for the acquisition of B.V. Sperwer Holding by Schuitema N.V. Schuitema and Sperwer are both active in the supermarket sector and supply goods and services to 443 (Schuitema) and 265 (Sperwer) independent supermarket companies. The supermarket companies, supplied by Schuitema and Sperwer, operate their own stores, largely based on the C1000 formula and the Plusmarkt, Garantmarkt and Gastrovino (delicatessens) formulas.

Considerations: Ahold owns 73 percent of the shares in Schuitema. Due to this interest, Ahold controls Schuitema, in NMa's opinion, and NMa therefore regards Ahold and Schuitema as a single entity for the assessment of this concentration. The market shares of the parties on the market for the sale of daily consumer goods through supermarkets amount to approximately 40 to 50 percent. For the purpose of the assessment, the following aspects were taken into account: the structure of the markets for the sale of daily consumer goods through supermarkets, the recently announced reorganisation of Laurus, the position that the parties have in the area of full-service supermarkets, the parties' strong position on the markets for franchise services in

relation to supermarkets, the strong position on the procurement market, the advantages which Ahold may achieve as a result of the fact that it is a financially strong company and finally the barriers to entry to this market.

These circumstances, together with Ahold's large market share, lead to the conclusion that there is reason to assume that a dominant position may arise or be strengthened as a result of the proposed concentration. As result, de facto competition on the Dutch market or a part of it made the significantly obstructed. The parties did not continue their concentration plans and did not apply for a licence.

6.1.2 No licence required

In assessing the proposed concentrations, the Director-General of NMa concluded that the parties would acquire a strong dominant position. A subsequent investigation by NMa showed that for various reasons such a strong dominant position would not restrain competition unacceptably on the relevant market(s). A licence was therefore not required in the following cases.

Case 2204/Lekkerland – CTN

Parties and market(s): On the sale of CTN Confectionary Tobacco Nederland B.V. by Lekkerland Benelux N.V., following an investigation the Director-General of NMa concluded that a licence was not required for this. The activities of both parties consist of the procurement and wholesale delivery of food and related non-food products. With regard to wholesale delivery, the wholesaler delivers its goods directly to retailers. The activities of both companies overlap in the areas of procurement and wholesale delivery of tobacco products and the procurement and wholesale delivery of confectionary and snacks.

Consideration(s): The parties have a relatively large market share on the market for the procurement of tobacco products. The supplier power on this market, however, is considerable. The wholesale and retail trade is confronted by a consumer price set by the manufacturer (stated on the excise stamp). There are consequently few opportunities to compete on price. In addition, brand loyalty amongst consumers is high. The joint market share of the parties on the procurement markets for confectionary and snacks is lower than 15 percent. With regard to wholesale delivery, the market share of the players on a number of possible segments of the market is large. Customers, however, have sufficient opportunities to switch to other wholesalers or to purchase directly from the manufacturer. The wholesale function in relation to tobacco products has been 'undermined' in recent years. This is largely the result of the strength of suppliers/manufacturers. In the light of these factors, the Director-General of NMa has concluded that a licence was not required.

Case 2209/Gran Dorado – Center Parcs

Parties: The notified transaction related to the acquiring of control by Pierre & Vacances S.A. and Carp (Jersey) Ltd. over the activities of Center Parcs N.V., with the exception of the activities in the United Kingdom and the activities of Gran Dorado Leisure N.V. The parties are active in the area of product development and the operation of the apartment buildings, villa parks and holiday parks.

Market(s): The parties' parks offer self-service accommodation. This is generally in the form of bungalows and, in some cases, hotel and camping facilities. The parks differ, for instance, with regard to the level of the facilities and their size. In this case, the question as to whether hotels, camping sites and other forms of accommodation are part of the relevant market could be left unanswered as this had no effect on the final assessment. It was decided, however, that it was plausible that family hotels, hotels in cities, hotels in the environment of theme parks and luxury camping sites did not belong to the relevant product market. In addition, it also seemed plausible that with regard to villas a distinction could be made on the basis of quality, facilities and price. The geographical definition of the market could include the Netherlands, the so-called "BND" area (which includes the Netherlands, Belgium and the western part of Germany) or an even wider area.

Considerations: The parties are the largest players in the area of villa parks. In relation to various markets that could be defined, the parties had a joint market share in excess of 50 percent prior to the amendment of the notification. The parties subsequently amended their transaction by selling off 33 holiday parks. As a result of this amendment, the assessment of the consequences of the proposed concentration had a different outcome. The market share of the parties on the market for four-season holiday villages were consequently less than 40 percent both in the BND area and in the Netherlands. If parks are taken into account which are for the varied range of facilities, but which do not quite forward in the definition of a four-season holiday village, the joint share

of both parties of the available capacity falls to less than 30 percent. If this market is assumed, considerable competitive pressure is exercised by holiday parks which do not quite fit this market definition, but which do offer a variety of facilities.

The sale of 33 parks resulted in a reduction in the capacity of the parks from a total of 3000 to 4000 villas.
This involved more than 10 percent of the total capacity of villas of the holiday parks in the Netherlands.
The Director-General of NMa concluded that it is not plausible that a dominant position would arise or be strengthened as a result of the amended concentration, which would result in de facto appreciable restraints on competition on the Dutch market or a part of it.

Case 2285/Kalmar Industries – NHC

Parties and market(s): The notified transaction related to the takeover of NHC by Kalmar, which is part of the Finnish Partek group. NHC and Kalmar are active in the area of designing, producing and maintaining container handling machines (including ship-to-shore cranes (SSC's), rubber-tyred gantry cranes (RTG's), rail-mounted gantry cranes (RMG's), straddle carriers and reach stackers). These machines are used for loading and unloading containers. Kalmar and NHC mainly produce various types of container handling machines. The only products produced by both companies are straddle carriers. These machines are used at terminals to transport and stack containers.

Considerations: On the European market for container handling machines (excluding SSC's), NHC and Kalmar's market share is approximately 30 to 40 percent. The largest competitor on this market is Noell/Fantuzzi with a market share of 10 to 20 percent. The joint market share of the parties is 50 to 60 percent on the European market for straddle carriers. Two other suppliers on the market have market shares of 40 to 50 percent and 10 to 20 percent. At the global level, the joint market share of the parties amounts to approximately 20 to 30 percent, while the largest competitor, Noell/Fantuzzi, serves 10 to 20 percent of this market/these markets. Kalmar and NHC's strong position may be viewed from a different perspective, if one takes into account the strong competition from their important competitor, Noell/Fantuzzi, the tendering procedures adhered to by customers, the *de facto* switching behaviour of customers and the buyer power of the larger customers. In addition, the emergence of a joint dominant position was investigated. Container handling machines, however, are custom-made products, which may differ considerably from each other. Since the homogeneity of these products is limited, a joint dominant position does not seem plausible. In the light of these factors, the Director-General of NMa concluded that a joint dominant position would not arise or be strengthened as a result of the acquisition.

Case 2328/Dumeco – SturkoMeat

Parties and market(s): Dumeco B.V. notified NMa of its intention to acquire SturkoMeat Group B.V. Dumeco and Sturkomeat are both active in the area of slaughtering, deboning and processing pork. The activities of both parties overlap in the area of the procurement of slaughter pigs, the sale of pig carcasses and pork cuts, and the production and sale of deboned fresh pork. In addition, there is an overlap in the activities of the parties in the area of the production and sale of fresh meat products and quickly prepared products based on fresh meat.

Considerations: In this case, a national market for slaughter pigs was assumed. In assessing the consequences of the concentration, however, the strong competitive pressure exerted by foreign pig abattoirs, particularly those in the border area with Germany and Belgium, was taken into account. Dumeco and Sturkomeat have a joint market share on the market for slaughter pigs of approximately 40 to 50 percent. As a result of the proposed concentration, the two largest players will merge. In determining the market position of both players, in addition to their market shares, other facts and circumstances were also considered. As a result of the method of pricing, the freedom suppliers have with regard to their choice of abattoir and the relatively small-scale of supply, the parties will not be able to realise better procurement terms than their competitors after the proposed concentration. The reason for this is that they do not have a strong position on the sales markets. In addition, foreign abattoirs exercise competitive pressure. Finally, it was stated in this case that NMa still had to give its approval to the *Saneringsovereenkomst Varkensslachtsector* [Reorganisation Agreement for the Pig Abattoir Sector] so that NMa could assess the consequences of this agreement for the slaughter pig market when it does so.[42] In the light of these factors, the Director-General of NMa concluded that a dominant position would not arise or be strengthened by the acquisition.

42 Later it appeared that the European Commission had been notified of this reorganisation agreement as a measure involving state support

Case 2355/Dumeco – Gebr. Kroot

Parties and market(s): Dumeco B.V. notified NMa of its intention to acquire control of Gebr. Kroot Vlees B.V. Both companies are active in the area of slaughtering, deboning and processing cattle. There is an overlap between the activities of Dumeco and Kroot in the area of the procurement of slaughter cattle, the sale of beef carcasses and the production and sale of deboned fresh beef.
In addition, there is a vertical relationship between the activities of the parties in the area of the production and sale of fresh meat products, quickly prepared products based on fresh meat, cold meats and meat preserves.
The joint market share of Dumeco and Kroot on the Dutch market is approximately 25%. As a result of the concentration, Dumeco will become the largest player on the Dutch market for the procurement of slaughter cattle, followed by Weyl Beef Products B.V., with a share of 18 percent, and Brada's Vleeschbedrijf B.V., with 13 percent. Smaller abattoirs have a joint market share of approximately 19 percent. The market players have indicated that they already experience considerable competition from smaller abattoirs and/or indicated that they expect to experience more competition from smaller abattoirs in the future. In addition, they are of the opinion that not much will change with regard to competitive relationships on the Dutch market for the procurement of slaughter cattle as a result of the concentration in question. There is sufficient remaining slaughter capacity and competition. In the light of these factors, the Director-General of NMa concluded that a dominant position would not arise or be strengthened by the acquisition.

Case 2425/UPC – PrimaCom

Parties: UPC notified NMa of its intention to acquire control of NewCo, which incorporates PrimaCom and the German activities of UPC. The Alkmaar cable network, which is part of PrimaCom, will also be included. UPC and PrimaCom are both active in the area of fixed communication networks. Both offer their customers the distribution of radio and television signals (RTV signals), Internet network access, Internet access services, pay-per-view television, telephony and data communication (leased lines). In addition, UPC is active in the area of Internet advertising.

Markets: The assessment of this case focused on three markets: the market for the distribution of RTV signals through cable networks, the market for Internet access and the market for network access to Internet.
The market for the distribution of RTV signals through cable networks must be viewed both from the perspective of the consumer and from the perspective of the suppliers of television programmes and other services. Whether the market for Internet access services should be subdivided further, for instance into Internet access services through leased lines, narrowband Internet access services and broadband Internet access services, was not answered. No answer was given to the question of whether further distinctions should be made within the market for network access.

Considerations: If regional markets as large as the coverage area of the cable companies are assumed in relation to the distribution of RTV signals through cable networks, the activities of UPC and PrimaCom do not overlap.
The parties have a strong position on the national market. They operate approximately 39 percent of the total number of connections. There is, however, a regulatory framework comprising rules set out in the Media Act *[Mediawet]*, the Telecommunications Act *[Telecommunicatiewet]* and agreements with municipalities. The behaviour of cable companies is disciplined by these regulations. In addition, a number of other large players are active (Casema en Essent). With regard to regional markets, there is no overlap between the activities of UPC and PrimaCom, in relation to Internet access. In relation to a possible future national market for Internet access through the cable, the parties will acquire large market shares on the basis of the present figures. These market shares cannot simply be extrapolated to the future, because the present market shares arose in a completely different situation. The circumstances with regard to competition are very different on this possible future market. In addition, Internet access through xDSL is characterised by high growth figures, which will exert considerable competitive pressure.

With regard to network access, on the regional markets there is no geographical overlap between the activities of the parties with regard to the provision of broadband network access (by cable). If network access by means of xDSL is also considered to be part of the market, the markets will probably become a national market in time. In this case, there will be sufficient remaining competition.

Given the above considerations, the Director-General of NMa concluded that a dominant position will not arise or be strengthened as a result of the acquisition.

Case 2473/Holland – Flora

Parties: This notification related to a merger of Coöperatieve Bloemenveiling Holland and Coöperatieve Bloemenveilingvereniging Flora. The parties are flower

auctions and provide florists with the opportunity to offer their floriculture products (cut flowers, indoor plants and garden plants) for auction or brokerage. In addition, Holland and Flora provide an opportunity for traders to purchase various types of floriculture products at a single market.

Market(s): NMa regards the market for auctioning and brokerage services for floriculture products to be the relevant market. This also includes other sales channels through which floriculture products may be brought to the market ("outside the auctions"). The geographical definition of the market was left undecided, but is at least national. The largest portion of floriculture products that reaches the market through the Dutch flower auctions originates from Dutch florists. The supply from abroad, however, is increasing. Approximately 75 to 80 percent of sales of both auctions is exported. The largest portion of these exports is destined for European countries.

Considerations: Six flower auctions operate in the Netherlands. In addition to Holland and Flora, these are VBA, Veiling ZON, Veiling Vleuten and Bloemenveiling Oost-Nederland. Approximately 80 percent of Dutch floriculture production is traded through flower auctions. The remaining 20 percent is traded outside the auctions. The parties on the Dutch market for auction and brokerage services for floriculture products amounts have a joint market share of more than 40 percent. VBA has a market share of approximately 35 percent. These market shares are lower if the European market is considered. Although the parties will have a strong position on the above-mentioned market as a result of the concentration, important factors play a role which place the market share of the players in a different perspective. As a result of considerable competition and other sales channels, the cooperative structure, the possibility for exemption from the obligation to auction products, and developments on the market, the Director-General of NMa concluded that there was no reason to assume that a dominant position would arise or be strengthened as a result of the concentration in question. The decision also examined whether a joint dominant position may arise or be strengthened. This is also not the case.

2639/Monuta – SCI

Parties and market(s): The notified transaction related to the acquisition of Service Corporation International Nederland B.V. (SCI) by Monuta Uitvaartgroep N.V. Both companies are active in the area of funeral services and the operation of funeral centres and cemeteries.

Calculation of turnover: A large part of the turnover of Monuta and SCI consists of what the parties refer to as 'advances' (e.g. death notices, grave levies and cremation costs). The parties purchase these services and, in principle, are liable for the attributable shortcomings of those from whom they purchase the services.
They coordinate the activities of the various service providers who services they purchase. In addition, they offer various services as a single package. In addition, it appears from Monuta's annual report that it includes the 'advances' in its net turnover. The Director-General of NMa concluded from this that the amounts considered by the parties to be advances should be included in calculating the turnover of the companies in question.

Considerations: Both parties achieve a joint market share of less than 20 percent in a national market for the provision of funeral services. If local markets are assumed, Monuta and SCI achieve market shares of 60 to 70 percent. It is not plausible, however, that a dominant position would arise as a result of the concentration. In the regions in question, the geographical size of the activities is sooner regional in character and it is easy for other parties to enter the market.

Case 2666/Stork – RTD

Parties and market(s): The notified transaction related to the purchase of Röntgen Technische Dienst B.V. (RTD) by Stork N.V. Both parties are active in the area of testing materials and parts of installations. Stork is active, in particular, in the area of testing by means of destructive 'in-house' tests. Destructive testing means that the object to be tested can no longer be used after the test. 'In-house' means that the object to be tested is sent to the company that carries out the test. RTD is active, in particular, in the area of non-destructive 'on-site' testing. In the case of non-destructive testing, the object to be tested is left intact and the test is primarily preventive in nature. 'On-site' means that the test takes place at the location of the object to be tested. Stork and RTD have a joint venture, Materials Testing Technology B.V. (MTT). MTT carries out activities in the area of testing by means of destructive 'in-house' testing and non-destructive 'on-site' testing. A distinction must be made between the market for destructive testing and market for non-destructive testing because the various services cannot be substituted. This decision assumes that at least national markets exist for destructive and non-destructive testing respectively.

Consideration(s): As a result of the proposed concentration, Stork will acquire control of RTD and MTT. Both Stork and MTT have a market share of approximately 10 to 20 percent on the Dutch market for destructive testing. At present, Stork is only active on the market for non-destructive testing through MTT. As a result of the proposed concentration, Stork's market share will increase to 50/60 percent. In fact, Stork will continue the position which RTD had on this market. After all, given the joint control which RTD exercised over MTT, it is not plausible that MTT did not compete with RTD in the area of non-destructive testing. The concentration in question will not result in a significant change to the market structure of either of the markets. In addition, NMa has determined that the possible portfolio effects will be negligible. Customers have a certain degree of market power and there is potential competitive pressure from neighbouring countries. In the light of the above considerations, the Director-General of NMa concluded that a joint dominant position will not arise or be strengthened as a result of the acquisition.

6.1.3 Concentrations in the construction industry

This paragraph discusses the three decisions in relation to the construction sector. The majority of areas within the construction industry distinguished by NMa are discussed in these decisions, namely civil and utility engineering; earthworks, hydraulic engineering and roadworks, project developments, installation engineering, asphalt and concrete production.

Case 2427/NCD – Fernhout

Parties and market(s): The notified transaction relates to the takeover of Fernhout by Nederlandse Cement Deelnemingsmaatschappij (NCD). The assessment focused mainly on the production of wet cement.

Considerations: In order to determine the decisions of the parties at the local level, a calculation was made of the potential total sales within the supply area of each concrete plant. A radius of 40 km around the cement plant was assumed. The calculation resulted in sales percentages of between 60 and 70 percent. It appeared from the calculation of sales percentages that the concrete plants which are and will be controlled by NCD experience competition in all cases within their supply areas from competitors' plants. In addition, concrete experiences competition from other building materials. It is not likely that a concrete plant will be able to behave independently of competitors, partly because in many cases a shareholder of the plant has to be taken into account. In addition, customers have alternatives. In the light of the above-mentioned factors, the Director-General of NMa concluded that a dominant position will not arise on either the national or the local market for the production of wet concrete.

Case 2460/BAM NBM – Van den Bruele & Kaufman

Parties and market(s): This notification relates to the takeover of Van den Bruele & Kaufman B.V. by Koninklijke BAM NBM N.V. Horizontal overlaps exist on the project development (segment of the) market. There is also a vertical relationship on the market (segments) for civil and utility engineering and installation engineering.

Considerations: Regardless of whether the above-mentioned markets (or market segments) are defined as regional, national or international, the parties do not have a market share in excess of 10 percent on any of these markets. Given the market shares of the parties on the markets in question, the Director-General of NMa concluded that there is no reason to assume that a dominant position would arise or be strengthened as a result of the concentration. A licence is not required.

Case 2708/Koninklijke Wegenbouw Stevin – Gebr. Van Kessel Holding

Parties and market(s): Koninklijke Wegenbouw Stevin will acquire Gebr. Van Kessel Holding. Both parties are active in the following markets (or market segments): civil and utility engineering, earthworks, hydraulic engineering and roadworks, and asphalt. In addition to the market for the production of asphalt, the market for asphalting roads was considered separately. No decision was taken on whether there is a local or national market for the production of asphalt and the asphalting of roads. At the local level, a (potential) supply area with a radius of 50 km around the asphalt plant was assumed.

Considerations: On the possible market segments for road construction and earthworks, the parties have a market share of between 20 and 30 percent. In addition to both parties, at least to 20 competitors are active on this market/these markets. In order to determine the position of the asphalt plants of the parties within their supply areas, a calculation of the potential total sales within the respective area was made for each plant. From this it appeared that there is competition from other plants

within the various supply areas. At the local level it is not likely that an asphalt plant belonging to the parties will be able to behave independently of competitors. In many cases a competitor is a co-shareholder of the plant. In addition, customers have sufficient alternatives.
The parties have a joint market share of between 20 and 30 percent on a possible national market for the production of asphalt. With regard to the asphalting of roads, the joint market share in the Netherlands is between 10 and 20 percent. If local markets for asphalt production are assumed, the market share does not exceed 30 to 40 percent.

6.1.4 *Other decisions in relation to concentrations*

The first two cases in this paragraph relate to cases against which an appeal was filed. After this, a case is discussed in which an exemption was granted pursuant to section 40 of the Competition Act. Finally, a case is dealt with in which the central issue is whether the notifying parties are undertakings in terms of the Competition Act.

Case 1878/Digitenne

Parties and market(s): The notified transaction relates to the establishment of a joint company, Digitenne Holding, by Nozema, NOB and KPN, each of which will hold 30 percent of the shares in Digitenne Holding.
The government will soon allocate frequency channels for DVB-T (so-called multiplexes). With a view to this, the parties intend to set up Digitenne Holding, with the aim of obtaining the licence for four multiplexes for commercial use, the exploitation of these multiplexes and multiplexes of the public broadcasting stations. Digitenne will use the DVB-T frequency channels for the distribution of television signals and television-related signals, as well as the development and provision of interactive television services.

Considerations: Since the intention is to grant the DVB-T licence for 15 years, attention was given to the markets on which Digitenne and its parent companies will perhaps be active in the future. Given the fact that this relates purely to future possibilities, the present concentration does not involve horizontal or vertical markets which may be affected. It may be assumed that the development of other (interactive) services for DVB-T will still be in their infancy initially. Furthermore, given the similar moment at which this will commence, this development will occur simultaneously with the development of other services through other infrastructures, such as cable, satellite and telecommunication networks. For this reason, it is possible to assume for the time being that DVB-T belongs to a product market for the transmission of television signals and television-related signals. The DVB-T licence holder will experience competition on this market, in particular from cable companies. In future, competition may be experienced from providers who make use of telecommunications networks. DVB-T may result in more competition between infrastructures. This is an alternative for the transmission of broadcasting services, which takes place at present largely through the cable.
The Director-General of NMa concluded that there was no reason to assume that a dominant position would arise or be strengthened as a result of the concentration in question.

A third party has filed a judicial appeal against this decision.

Case 2545/Gilde – Gazelle

Parties and market(s): The notified transaction relates to the acquiring of control of Koninklijke Gazelle B.V by Gilde Buy-Out Fund II B.V. After carrying out an investigation, the Director-General of NMa concluded that there was no reason to assume that a dominant position would arise or be strengthened as a result of the concentration. There is no overlap in activities.

Considerations: In addition, the parties requested a clause to be deemed a subsidiary restraint. In accordance with this clause, Derby (the seller) undertakes not to carry out activities, directly or indirectly, in the Netherlands in competition with the present activities of Gazelle for a period of three years after the realisation of the concentration. This is a quantitative limitation on the number of bicycles that may be sold by Derby. NMa has determined that the clause is not essential for the realisation of the concentration. In principle, a buyer may protect itself against the development of activities by the seller which detract from the buyer's right to benefit fully from the transfer of the company. In this regard, the buyer may make use of the goodwill and know-how developed by the company that is transferred. The quantitative restraint in question, however, goes further than the above-mentioned protection and goes further than is necessary for realising the concentration.

A judicial appeal has been filed against this decision in relation to the subsidiary restraint.

Case 2655/Yunio – NTN Groep

Parties and market(s): Yunio Coöperatieve Vereniging Kraamzorg U.A. will take over a number of employees and some of the assets of the bankrupt NTN Groep B.V. The parties have submitted an application for exemption from the prohibition against realising a concentration prior to notification of NMa and four weeks have subsequently passed.

Considerations: The Director-General of NMa granted an exemption on the grounds of serious considerations. Mainly in the light of the fact that NTN had been declared bankrupt, it was ruled that in this specific case and under these specific circumstances, irreparable consequences would arise if the obligatory waiting period were to be taken into account.

Case 2760/Hogeschool Alkmaar – Hogeschool Haarlem – Hogeschool Holland – Ichthus Hogeschool

Parties and market(s): The notified transaction relates to the merger of four universities of professional education. In addition to providing higher education, the parties are also active in the area of providing courses and training, providing postgraduate programmes, the rental of meeting rooms, the sale of educational materials etc. In the Higher Education Act *[Wet op het hoger onderwijs en wetenschappelijk onderzoek]*, a distinction is made between so-called subsidised institutions and designated institutions, both of which offer higher professional education. On the subsidised institutions receive a contribution from the state.

Considerations: An investigation was carried out to establish whether the activities carried out by the parties are economic activities. An important consideration is whether the activities may be carried out with commercial room for manoeuvre. With regard to the subsidised activities of the universities, it was concluded that under the present legislation and regulations, there is insufficient freedom to regard these as economic activities. The tuition fees are determined by statute. It is not possible for universities or programmes to deviate from this. Ultimately, universities of professional education cannot determine the courses they offer as the Minister of Education, Culture and Science ultimately decides on the basis of an assessment of its effectiveness whether a new programme is subsidised and whether an existing programme continues to be subsidised. Subsidised institutions have hardly any influence on the numbers of students that they admit and the contribution that they receive from the state.

At the moment that the decision was taken, three Bills were before the Lower House of Parliament. The intentions, however, were still not sufficiently clear to be able to anticipate them. The amendments to legislation and regulations may have resulted in a different conclusion. With regard to designated institutions, it was concluded that these are economic activities as they are able to offer programmes and set their prices (tuition fees) independently. It was concluded that the four universities of professional education would only be taken into consideration insofar as they carry out economic activities as undertakings, as referred to in section 1(f) of the Competition Act.

Calculation of turnover: Since the universities of professional education are undertakings, in terms of the Competition Act, insofar as they carry out economic activities, the consequence of this is that in determining the turnover, in accordance with section 29 of the Competition Act, in principle only the economic activities should be taken into account. With a view to the obligatory structuring of the annual accounts, from which it appears which revenues are received in relation to subsidised education, the turnover, attributable to economic activities, may be determined easily and unambiguously on the basis of the annual accounts. In this case, this led to the conclusion that the notified concentration does not fall within the scope of Concentration Control, as governed by chapter 5 of the Competition Act, since the turnover thresholds, as referred to in section 29 of the Competition Act, have not been exceeded.

6.2 Decisions in relation to the regulation of competition

In 2001, NMa completed the processing of a large number of applications for exemption. In addition, various complaints with regard to infringements of the prohibition on cartels and/or abuse of a dominant position were processed. In this paragraph a number of decisions are discussed.

Cases 496 and 597/Topherstel and Schadegarant

These decisions relate to cooperation between insurance companies involving the selection and contracting of car repair companies in relation to their motor-vehicle insurance. The policyholders are encouraged to make use of one of the selected car repair companies for insured repair work.

Parties and markets: The parties in these cases are Topherstel and Schadegarant. Topherstel consists of 9 insurers. Schadegarant consists of 19 insurers. The joint operating agreements between the insurance companies are regarded as cooperation in procurement. The relevant product markets in these cases are the market for the procurement of car repair services and the market for motor-vehicle insurance policies.

Considerations: Since the market share of Topherstel is small on both of the relevant markets, it was concluded that the possible restraint on competition are not appreciable. In the case of Schadegarant, the same applies on the procurement market for car repair services. The restraint in competition on the market for motor-vehicle insurance is appreciable due to Schadegarant's large market share. Schadegarant, however, meets the criteria for exemption and an exemption was therefore granted.

Cases 1982 and 2026/Stichting Recycling VKG and Auto Recycling Nederland II

In both cases, the parties applied for exemption from the prohibition contained in section 6 of the Competition Act. These exemptions were sought for agreements to set up waste disposal systems for plastic window panels and motor-car wrecks, requiring the payment of a uniform waste disposal fee.

Considerations: At present there is no statutory obligation to dispose of window panels and motor-car wrecks by means of a recycling system. In addition, at present recycling is not economically profitable. The waste disposal systems that have been set up ensure that recycling is cheaper than the incineration or shredding of old products. The uniform waste disposal fee only results in very minor cost harmonisation. Coordination of prices and market behaviour between the parties to the agreements must therefore be deemed to be non-existent. In addition, the setting up of a recycling system has environmental advantages. For these reasons, it was decided that this was not an infringement of the prohibition contained in section 6 of the Competition Act.

Cases 1751-1755/Stichting Verwijdering Elektrische Gereedschappen and Stichting Metalelektro Recycling

These cases focus on the applications for exemption by Stichting Verwijdering Elektrische Gereedschappen and Stichting Metalelektro Recycling. In these cases, both foundations submitted a collective plan for the collection and processing of electrical appliances.

Considerations: The agreements arising from the collection and processing plan restrain competition, in terms of section 6 of the Competition Act. A number of these agreements, however, are eligible for exemption. These are agreements with regard to the setting of the waste disposal fee. The exemption, however, is not granted for the obligatory charging of the waste disposal fee to the following link in the distribution chain and the consequent obligation to specify this separately on the invoice.

Case 81/Gemeenschappelijke Stortings-Acceptgiroprocedure [Joint Deposit and Giro Collection Procedure]

In this case an exemption was granted from the prohibition contained in section 6 of the Competition Act, for which Interpay/Bankgirocentrale [Bank Giro Centre] had applied on behalf of 69 banks. The application related to offering tarot collection forms as a means of payment, which included a multilateral interbank charge, which the receiving bank pays the bank from which the payment originates.

Parties and markets: The parties to the Joint Deposit and Giro Collection Agreement *[Gemeenschappelijke Stortings-Acceptgiro overeenkomst]* are banks, including Rabobank, Postbank and SNS Bank. Interpay/Bankgirocentrale serves as the secretariat. The relevant product market in this decision is the market for giro collection forms and direct-debit authorisations. From a geographical perspective, this market is the Netherlands.

Considerations: The payment in accordance with the agreements is a restraint on competition, but also satisfies the conditions for granting an exemption. A fair share of the advantage gained by the charge is passed on to consumers, the charge does not go further than is necessary to achieve its aim and competition is not actually eliminated. The multilateral interbank charge in accordance with the agreements is therefore eligible for exemption.

Case 502/Stichting Reclame Code

In this case, an application for exemption was submitted by Stichting Reclame Code. This application for exemption relates to the constitution of de Stichting Reclame Code, the Dutch Advertising Code *[Nederlandse*

Reclame Code] and rules aimed at ensuring that advertising in the Netherlands takes place in a responsible manner. It was not necessary to define the relevant market in this case.

Considerations: The constitution is not subject to the prohibition contained in section 6 of the Competition Act as it does not contain restraints on competition. The Dutch Advertising Code contains standards with regard to misleading and comparative advertising, which have been drawn up with a view to promoting fair competition between competitors and protecting consumers. These standards themselves cannot be regarded as restraints on competition. This also applies to rules with the aim of enforcing the Dutch Advertising Code. In accordance with the above, it was concluded that the prohibition contained in section 6 of the Competition Act had not been infringed.

Case 1915/Zilveren Kruis – Geneesmiddelenformularium Kennemerland [Kennemerland Medicine Formulary]

Zilveren Kruis applied for an exemption from the prohibition contained in section 6 (1) of the Competition Act for the development and application of a medicine formulary in the region of Kennemerland. A medicine formulary is a type of preferential list of medicines. It indicates which medicines may best be used for specific ailments.

Parties and markets: Zilveren Kruis is a health insurer. The medicine formulary was developed in the region of Kennemerland by health insurers and healthcare providers. The relevant product markets is the market for the procurement of medicines. Geographically this market is at least a national market.

Considerations: In this case there was no appreciable restraint on competition. The Kennemerland Medicine Formulary only relates to a very small part of the relevant market, as it only applies to less than 5% of policyholders. An additional important feature is the fact that only the names of substances and no brand names are included in the formulary and that the formulary is revised every two years.

Case 1546/Weyl Beef Products

In this case, Weyl Beef Products submitted a complaint against Stichting Saneringsfonds Runderslachterijen in relation to the Restructuring Scheme for Beef Abattoirs of 1995 *[Saneringsregeling runderslachterijen 1995]*. At an earlier stage, Stichting Saneringsfonds Runderslachterijen had applied for an exemption from the prohibition contained in section 6 of the Competition Act for the Restructuring Scheme.

Parties and markets: This case involved two parties, namely Weyl Beef Products and Stichting Saneringsfonds Runderslachterijen. In the case in question, the relevant market was not defined.

Considerations: The complaint of Weyl Beef Products was dismissed because the Court of First Instance ruled in relation to the same restructuring scheme that the restructuring was inseparably linked to the levy directive of the Product Board for Livestock and Meat *[Productschap voor Vee en Vlees]*. This levy directive had already been approved in line with European rules for state support. There was no reason to deviate from the European line as formulated by the Court of First Instance.

Case 1539/Taxivervoer Schiphol

This case relates to the application for exemption for an agreement aimed at regulating taxi transport from Schiphol. This application was submitted by Schiphol, Taxicentrale Amsterdam and Bergisch Boekhoff & Frissen. The Director-General of NMa approved the agreement in an amended form.

Parties and markets: Schiphol is the operating company of the airport with the same name. Taxicentrale Amsterdam and Bergisch Boekhoff & Frissen both operate their own taxi companies. The parties have entered into an agreement to regulate taxi transport. The relevant market is deemed to be the market for public taxi transport, which has not been ordered beforehand, from the taxi rank at Schiphol.

Considerations: Given the present market shares of Taxicentrale Amsterdam and Bergisch Boekhoff & Frissen on the relevant market and the preferential position which they enjoy, this is an appreciable restraint on competition. The agreement is eligible for exemption, however, since there is sufficient remaining competition. The 24-hour availability results in an improvement in the distribution and promotion of economic progress. In addition, the preferential position of the two taxi companies does not go further than is necessary.

6.3 Decisions to impose sanctions

The Competition Act grants NMa the power to impose sanctions. A number of decisions to impose sanctions are discussed below.

Case 2228/Taxi Rotterdam

Case: Rotterdamse Taxi Centrale RTC N.V., Coöperatieve Taxi Onderneming Taxi St. Job UA, ConneXXion Kleinschalig Personen Vervoer Zuid West B.V., Vlaardingse Taxicentrale B.V. and R.T.O. Rotterdamse Taxi Onderneming are taxi companies established in Rotterdam and surrounding areas. These companies placed an advertisement in regional newspapers on a number of occasions in January 2000, in which they indicated the tariffs which they jointly charge for inner-city transport by taxi in Rotterdam, Schiedam and Vlaardingen.

Assessment: By entering into agreements in relation to the tariffs to be applied, these companies infringe the prohibition on cartels. In this case, these were price agreements between competitors, whose joints market share is so large that competition is restrained.

Fine: The Director-General of NMa decided not to impose a fine. The following circumstances played a role in the decision. After placing the advertisements, the taxi companies contacted NMa following an article in a daily newspaper, which suggested that these companies had possibly acted in conflict with the Competition Act. The companies asked for clarification on this. In a letter of 22 January 2000, they showed their willingness, if it appeared that they had infringed the Competition Act, to terminate this infringement in consultation with NMa. In the meeting which followed, NMa explained to the taxi companies, amongst other matters, what the prohibition on cartels, in general, entailed. This was followed by a discussion of the implications of such a prohibition for the taxi branch. After the taxi companies were sent a report on the investigation on 23 November 2001, they decided to set their tariffs separately in the year 2001.

A further factor which played a role in the decision not to impose a fine was the fact that up until 1 January 2000, the province of Zuid-Holland had set the tariffs for the above-mentioned taxi companies. As a result off an amendment to the law of 9 December 1999, every taxi company was entitled to determine the level of its tariffs as it saw fit from 1 January 2000 onwards, subject to a certain statutory maximum. This amendment did not provide for a transitional regime. It was established that the Ministry of Transport, Public Works and Water Management had only provided information on the specific regulations at a late stage. An administrative appeal was not filed again this decision.

Case 2234/ANKO

Case: Koninklijke Algemene Nederlandse Kappersorganisatie (ANKO) [[Dutch Hairdressers' Federation] is a branch association to which approximately 6200 hairdressing salons are affiliated. In November 2000, in a letter to its members, the association indicated that its members should reassess their price lists and that prices had increased on average by 5 percent in the year 2001. ANKO issued a press release so that "newspapers and other media could communicate the increase in the price of its services to consumers," according to ANKO.

Assessment: ANKO acted in conflict with the prohibition on cartels. It appears from the facts of the case that ANKO's intention was to have its members increase their prices by 5 percent. For instance, in an internal memorandum, the Executive Board of ANKO and advised its members to increase their tariffs by "5 percent on average". ANKO also indicated how increases in costs amounting to 5 percent could be passed on in the prices.

Fine: The Director-General of NMa decided against imposing a fine. The following factors played a role in this decision. Shortly after the procedure commenced, ANKO indicated that is wished to consult NMa to obtain clarity on how to communicate information to its members in the future in such a way that it complied with the Competition Act. NMa conceded to this wish on the strict condition that ANKO would provide full openness with regard to the way in which it communicates with its members in relation to cost increases and related matters. Partly as a result of this, it appeared that ANKO's practices, apart from the communication in relation to price increases, contained other elements which NMa also deemed to be in conflict with the Competition Act. The Director-General of NMa came to this conclusion after consulting the *Guidelines for Cooperation between Companies [Richtsnoeren samenwerking bedrijven]* drawn up by NMa.

It appeared, for instance, that ANKO had encouraged its members through a variety of communication channels to apply certain profit margins. This is an infringement of the prohibition on cartels, because this practice is aimed at directing the pricing behaviour of hairdressers and

results in hairdressers charging the same prices. In addition, ANKO encourages its members to pass on cost increases in full in their tariffs. This is also a practice which contravenes the Competition Act, because as a result hairdressers are not given an incentive to reduce their costs, resulting in lower prices. Finally, it appeared that ANKO had sent its members a calculation model in an attempt to direct the pricing behaviour of its members and with the result that competition was reduced.

ANKO entered into a written agreement with NMa to cease these practices with immediate effect and to refrain from these practices in future. In addition, NMa entered into agreements with ANKO with regard to the way it issues information to its members to ensure that this complies with the Competition Act. Most of these changes in behaviour go beyond the boundaries of the report that was drawn up. Partly for this reason, NMa decided against imposing a fine.

ANKO did not file an administrative appeal against this decision.

Case 2034/Deutsche Post

Case: Deutsche Post International B.V. and Trans-o-flex Schnell Lieferdienst gave notice in 2001 of their intention to realise a concentration. The parties stated in their notification that the only market that would be affected (in accordance with the Decision on the Provision of Information under the Competition Act *[Besluit gegevensverstrekking Mededingingswet]*) are: the market for national express cargo transport and the market for logistical services. Both parties indicated that Deutsche Post AG operated through a number of subsidiaries in the Netherlands, including DPIBV, which is active, for instance, in the area of national deliveries of express packages. It subsequently appeared that Trans-o-flex was also active on this market through Correct Business Select (Correct EBS). Both parties wrongfully failed to notify NMa of the national market for express package deliveries as a market that may be affected.

Considerations: From telephone conversations with competitors, it appeared that Correct EBS was active on the above-mentioned market. This also appeared from Correct EBS's website. On the basis of this, NMa asked additional questions in the draft replies to which the parties indicated that Correct EBS offers a service which may be regarded as package delivery within the definition applied by the European Commission. In this decision, the Director-General of NMa took into account the fact that the parties have an obligation to provide full and complete information. Both Deutsche Post and Trans-o-flex had sufficient indications that the service offered by Correct EBS could be deemed to be an express package service. The past decisions of the European Commission show that criteria such as weight, size and handling apparatus must serve as the basis for distinguishing the express package service and express cargo transport markets. The parties did not provide sufficient arguments to show why the basis on which Correct EBS carries out its activity should not be deemed to be package delivery.

Fine: The Director-General of NMa impose the maximum fine of NLG 50,000 on both DPIBV and Trans-o-flex. The fact that the information that was lacking was not essential to assessing the concentration was not relevant. The parties are obliged to provide the data stated in the Decision on the Provision of Information under the Competition Act. DPIBV and Trans-o-flex have filed an administrative appeal against this decision.

6.4 Decisions on administrative appeals

In 2001, a large number of decisions were taken on administrative appeals. A number of decisions which attracted interest are discussed below.

Case 2463/Texaco Nederland B.V.

Contested decision: In relation to an investigation into the pricing behaviour of Texaco, NMa asked Texaco to allow it to interview three employees. Texaco refused to cooperate with NMa as requested. The Director-General of NMa regarded this refusal as an infringement of the obligation to cooperate, as set out in the General Administrative Law Act. After drawing up a report on this failure to cooperate, NMa imposed a fine of NLG 10,000 on Texaco.

Administrative appeal: Texaco is *inter alia* of the opinion that the company's right to remain silent is undermined if individual employees can be interviewed by the regulator. This objection was declared unfounded in a decision of 12 December 2001.

Considerations: In accordance with section 5(16) of the General Administrative Law Act, the regulator is authorised to obtain information. Neither the text of the Act nor the parliamentary proceedings in relation to the section provide grounds for limiting the circle of persons from whom information may be obtained. Information may

therefore be obtained from everyone. In the light of this, the regulator must be deemed to be authorised to obtain information not only from a company. If there is reason to believe that the authorised representatives of a company did not have knowledge of the fact and practices which are the subject of the investigation, the regulator may require the company to ensure that certain employees who do have such information cooperate with the regulator by complying with the request to provide this information. A different interpretation would limit the power of the regulator too much. After all, in this case the company in question could all too easily claim not to have knowledge of the events. Compliance with the obligation to cooperate is of considerable importance for the effective application of the Competition Act and verification of compliance with the Act. An individual employee, in the opinion of NMa, may appeal to the rights of the company to remain silent, for instance if answering questions would result in giving a statement confirming an infringement of the Competition Act by the employer/company in question. Under these circumstances, the company's right to remain silent is not undermined. The conflict of loyalties towards the employer or fellow employees, which Texaco feared, would also not occur. Viewed in this light, Texaco had no reasonable interest in refusing to cooperate in the provision of information. Texaco has filed a judicial appeal against this decision.

Case 1/Telegraaf versus NOS/HMG

Contested decision: In the decision of 10 September 1998 and 16 February 2000, an order subject to a penalty to provide de Telegraaf with weekly programme listings was imposed on NOS and HMG. It was decided that NOS and HMG had abused a dominant position by refusing to provide programme listings.

NOS and HMG filed an administrative appeal against this ruling. This administrative appeal was presented to the Advisory Committee for Administrative Appeals under the Competition Act *[Adviescommissie bezwaarschriften Mededingingswet]*. In its advice, the Advisory Committee was of the opinion that in order to establish whether a dominant position had been abused, the case must be tested against the criteria set out in the Magill ruling of the Court of Justice of the European Communities. The Advisory Committee subsequently reached the conclusion that not all the criteria had been met and that there was ample competition on the market for weekly radio and television magazines. A dominant position was therefore not abused, in the opinion of the Advisory Committee.

Considerations: Partly on the basis of the advice of the Advisory Committee, NMa carried out economic research into the present state of competition on the derived market and the expected effects on this market if new entrants were to enter the market. It appeared from this research that there was only a limited degree of competition and considerable shifts could be expected to take place on the derived market if new players were to enter the market. In the decision on the administrative appeal it was decided that the Magill case should play a role in the assessment and that, in addition, case law in relation to the refusal to supply goods and services was relevant. In the light of this, the Director-General of NMa concluded, partly on the basis of the outcomes of the economic research, that the service that had been refused was essential for de Telegraaf if it wished to be active on the market for weekly radio and television magazines. Secondly, the refusal to provide the listings distorted competition on the market and, finally, there was no objective grounds on which to justify this refusal. In deviation from the advice of the Advisory Committee, it was decided that this constituted an abuse of a dominant position. With regard to section 25 of the Competition Act, in line with the advice of the Advisory Committee, it was decided that public broadcasting companies carry out a duty in the public interest in accordance with the Media Act *[Mediawet]*. The operation of broadcasting magazines, however, is a subsidiary activity and is not essential in carrying out this task. The fact that broadcasters view the programme magazines as a means of binding members to them, does not detract from this. There are other means of developing and maintaining their membership base.

Order subject to a penalty: The order subject to a penalty imposed by the decision of 16 February 2000 was upheld. This order does not take effect immediately because the Court of Rotterdam ruled on 22 June 2000 that the lifting of the suspensive effect of the decision (section 63(2) of the Competition Act) is suspended until the Court passes judgment in the judicial proceedings.

NOS and HMG have filed a judicial appeal against this administrative appeal.

Case 757/Chilly and Basilicum versus G-Star/Secon Group

Contested decision: In a decision of 12 January 2000, a fine of NLG 500,000 was imposed on Secon Group B.V. The Director-General of NMa ruled that provisions relating to (minimum) recommended prices and an

absolute prohibition on supplying third parties in Secon Group's general terms and conditions contravened section 6 of the Competition Act. An order subject to a penalty was imposed which required Secon Group to remove the provisions constituting the infringement from its general terms and conditions. Secon Group filed an administrative appeal against this ruling.
The administrative appeal was presented to the Advisory Committee for Administrative Appeals under the Competition Act. In its recommendations, the Advisory Committee was of the opinion that the agreements which Secon Groep had entered into with its customers up until 1 April 1998 did not contravene the prohibition on cartels because the transitional right contained in section 100(1) of the Competition Act applied. The provisions in relation to the (minimum) recommended prices are in conflict with section 6(1) of the Competition Act from 1 April 1998 onwards. In the opinion of the Advisory Committee, the provisions of these agreements with regard to the absolute prohibition on supplying third parties, in contrast to the provisions in relation to minimum recommended prices, do not contravene section 6(1) of the Competition Act because they do not have the intention of restraining competition and the Director-General of NMa failed to investigate the possible restraining effects on competition of the provisions.
The Committee therefore recommended reducing the fine by NLG 362.500.

Considerations: In the decision on the administrative appeal it was decided that the absolute prohibition on supplies to third parties and the provisions with regard to minimum recommended prices should the regarded as 'hardcore' restraints and therefore, by their very nature, as restraints on competition. In addition, it was decided that the practices of Secon Group during the first three months of 1998 cannot, in general, be said to be unaffected by the prohibition contained in section 6 of the Competition Act due to the application of the transitional right contained in section 100(1) of the Competition Act. Finally, a reduction in the amount of the fine originally imposed was deemed inappropriate.

Secon Group has filed a judicial appeal against this decision on the administrative appeal.

Case 2421 (952)/Agreements between notaries in Breda

Contested decision: In an earlier decision, the Director-General of NMa ruled that the scheme agreed to between 16 notaries in Breda to allocate assignments, involving the execution of deeds to which the municipality of Breda was a party, in accordance with a roster had resulted in a system of market allocation which by nature restrained competition and was prohibited even under the Economic Competition Act *[Wet economische mededinging]*.
The Director-General of NMa imposed a fine varying from NLG 15.000 to NLG 20.000, on each of the notaries. Since there were no mitigating circumstances that gave cause to reduce the fine, apart from the fact that the notaries had already terminated the scheme, the Director-General of NMa deemed the amount of the fine as stated above to be appropriate.

Administrative appeal: Administrative appeals were filed against this decision. The administrative appeals are directed, in particular, against the investigation which was allegedly conducted unlawfully, the legal assessment of the practices and the level of the fines, which are alleged to be disproportionate. The administrative appeal was presented to the Advisory Committee for Administrative Appeals under the Competition Act for advice. The Advisory Committee's advice was that the investigation had been conducted in a lawful manner and that section 6 of the Competition Act had been contravened. In addition, the Advisory Committee recommended reviewing the level of the fines in the light of the effects that the infringement had had on the market. The Director-General of NMa subsequently carried out an investigation into the scope of the scheme in question. This investigation showed that the scheme indeed related to a very small part of the total activities of the notaries, with a total value which was smaller than the sum of the fines imposed. In the light of this, the Director-General of NMa was of the opinion that it has acted fairly in ruling on the administrative appeal to reduce the fines originally imposed to fines of between NLG 5,000 and NLG 8,000 per notary.

A judicial appeal has been filed against this decision on the administrative appeal.

Case 1861/Nederlands Instituut van Psychologen

[Netherlands Institute of Psychologists]

Contested decision: Until 2 September 1999, Nederlands Instituut van Psychologen (NIP) applied a policy with regard to the setting up of new practices. According to NMa, NIP exercises direct influence on the number of members, namely the psychologists in primary healthcare, through its policy with regard to the setting up of new practices. This policy restrains competition. Since the policy in relation to the setting up of practices had already been withdrawn, a report as not drawn up.

Administrative appeal: NIP filed an administrative appeal against this decision. The administrative appeal was directed against the decision that section 6 of the Competition Act had been infringed. Since possible future claims for damages may be brought before the Civil Court, due to its policy with regard to the setting up of practices, NIP was of the opinion that it had an interest in having the decision reviewed in an administrative appeal.

Considerations: The Director-General of NMa declared the administrative appeal to be inadmissible. For NIP, the decision was favourable so that (in this respect) a better legal position cannot be obtained by instituting an administrative appeal. The withdrawal of the contested decision cannot indemnify NIP from proceedings to obtain damages on the grounds of liability arising from an unlawful deed due to the Institute's policy with regard to setting up practices. According to NMa, NIP therefore has no interest in the proceedings. The aim which NIP hopes to achieve by submitting an administrative appeal cannot be achieved

A judicial appeal was not filed against this decision.

Case 1963/Ruhrkohle versus Hoogovens

Contested decision: In 2000 NMa dismissed the application by Hoogovens for an exemption and the complaint by Ruhrkohle in relation to the agreement entered into between these two companies in 1988 for the production and supply of crude benzol, as well as the financing by Ruhrkohle of the plant necessary for this (case 426). The Director-General of NMa was of the opinion that the agreement did not contravene section 6 of the Competition Act nor Article 81(1) of the EC Treaty.

Administrative appeal: In the administrative appeal, in the first instance Ruhrkohle requested NMa to declare that the agreement contravened section 81(1) of the EC Treaty and alternatively to decide that the Director-General of NMa is not competent to rule on the applicability of Article 81(2) of the EC Treaty. Ruhrkohle argued that the geographical market is limited to Western Europe and that the agreement must be viewed as an exclusive commitment to supply goods, which does not fall within the European block exemption for vertical agreements. In addition, Ruhrkohle was of the opinion that, in view of the duration of the agreement, it has an exclusionary effect which restrains competition, in terms of Article 81 of the EC Treaty. Since there are no buyers of crude benzol in the Netherlands, Ruhrkohle was of the opinion that section 6 of the Competition Act did not apply. Ruhrkohle is of the opinion, however, that the reasons given for the contested decision in relation to section 88 of the Competition Act are internally contradictory. Hoogovens argued that Ruhrkohle's claim was inadmissible. Establishing that no infringement of competition rules had been committed is, after all, not a burden on Ruhrkohle as a party to the agreement. In the opinion of Hoogovens, Ruhrkohle apparently feared that the decision by the Director-General of NMa would have an effect on the current arbitration between the parties that would be to the detriment of Ruhrkohle. Hoogovens supported the original ruling, namely that the agreement promotes competition since Hoogovens would not have started producing crude benzol of its own accord.

Considerations: Ruhrkohle's administrative appeal was declared to the admissible. Its interest in the proceedings lies in the fact that Ruhrkohle did not achieve what it had intended with its complaint. Its administrative appeals were directed partly against substantial considerations. The authority of the Director-General of NMa to apply section 88 of the Competition Act in conjunction with Article 81(1) of the EC Treaty is not limited in an absolute sense to cases in which he is authorised to apply section 6 of the Competition Act. However, the discretionary use which NMa makes of this authority within the present legislative framework is generally limited to these cases. The principle of restraint in applying section 88 of the Competition Act, and the present European legal framework for cooperation between the European Commission and the national competition authorities lead to the conclusion that the Director-General of NMa rightfully decided against using his powers in accordance with section 88 in this case. After all, it is clear that the consequences of the agreement do not "mainly take place within" or "relate closely to" the territory of the Netherlands. This does not mean, however, that the Director-General of NMa is obliged to refrain entirely from expressing an opinion on the substantial aspects of the case in relation to competition law. Within the limited context of a *prima facie* assessment of whether Ruhrkohle's complaint is well-founded for unfounded, NMa rightly reached the conclusion in the contested decision that Article 81(1) of the EC Treaty had been infringed. NMa is not obliged to carry out a further investigation which would have to extend beyond the Netherlands. The alternative claim made by Ruhrkohle was not taken into consideration because the contested decision does not contain a ruling in relation to the article 81(2) of the EC Treaty. The Director-General of NMa therefore declared Ruhrkohle's administrative

appeal to be unfounded, subject to the addition and clarification of the reasons and with a reformulation of the operative part of the decision.

A judicial appeal was not filed in this case.

Case 2491/Bols, De Kuyper

Contested decision: In this case, Bols, UTO en De Kuyper filed a partial administrative appeal against an extensive decision in relation to an application for exemption in accordance with section 17 of the Competition Act regarding a joint operating agreement. This focused on the production, storage and distribution of 9 alcoholic beverages. Despite repeated requests for information from NMa during the initial stage, De Kuyper provided no information which showed that combining the production of these beverages would result in a cost saving for the beverage Advocaat. In relation to the beverage Advocaat, the application for exemption was therefore dismissed, since the joint operating agreement would not result in cost savings.

Consideration: In the administrative appeals stage, however, De Kuyper did show that cost savings would result. After De Kuyper had confirmed this by means of a statement by an accountant of PriceWaterhouse Coopers, the Director-General of NMa, on the basis of the new factual material that was provided, was of the opinion that Bols' standpoint had been substantiated, namely that cooperation would result in efficiency improvements in relation to the production of Advocaat.

In the decision on the administrative appeal, on the basis of the above, the partial administrative appeal was declared to be well founded and the exemption with regard to the combined activities in relation to Advocaat were granted retrospectively for ten years from the date of the initial decision (29 March 2001). This is in line with the granting of the exemption for other beverages in the initial decision.

A judicial appeal was not filed against this decision.

Cases 507, 568, 617 en 620/Nederzand and separate sand extraction projects

Contested decision: In an earlier decision, the Director-General of NMa refused to grant exemption for agreements in which 7 sand extraction companies, united in Nederzand B.V., agreed to cooperate in relation to locations for large-scale extraction of sand for making concrete and cement. The refusal related to the fact that a framework agreement (case 620) and 3 projects agreements based on this in relation to cooperation in the locations Geertjesgolf (507), Heeswijkse Kampen (568) and (part of) Kraaijenbergse Plassen.
The application for exemption was refused because of the structural nature of the cooperation resulting in market positions being rendered permanent. In this regard, the fact that the parties account for a large part of the total production of sand for concrete and cement in the Netherlands is an important consideration.

Administrative appeal: Nederzand B.V. and the sand extraction companies united within it submitted an administrative appeal against these decisions, mainly because the provincial authorities supposedly compelled them to cooperate in the projects. They argued that the prohibition on cartels is therefore not applicable.
In addition, it was argued that the part of the market to which the agreements related was much smaller.

Considerations: In a framework agreement, it was agreed that the companies would cooperate in all the locations that the provinces of Gelderland, Noord-Brabant en Limburg opened for large-scale sand extraction until 2008. As far as the framework agreement is concerned, the Director-General of NMa decided that the provinces had not compelled the companies to cooperate at all. The agreements aimed at making it possible to work together on a permanent basis on all new projects mean that a very large part of the production costs (approximately 40%) are incurred jointly which, in contravention of section 6 of the Competition Act, restrains competition in relation to the sale of sand. This restraint is reinforced by the strong position that the sand extraction companies have on the (production) market, the difficulty third parties would experience in accessing this market (high investments, long preparatory periods) and the long duration of the framework agreement. With regard to the project agreements, on the other hand, it was ascertained during the administrative appeal proceedings that the provinces only grant the companies a licence if the companies cooperate at these specific locations. The cooperation with regard to these specific locations may therefore not be regarded as an autonomous practice of the 7 sand extraction companies. No infringement of section 6 of the Competition Act has therefore been committed by the sand extraction companies.

A judicial appeal was not filed in this case.

Case 2414/VBBS

Contested decision: On 31 March 1998, NMa received an application for exemption for six schemes from Vereniging Belangen Behartiging Schildersbedrijven, Stichting Meldadres Belangen Behartiging Schildersbedrijven, and Bureau Meldadres Belangen Behartiging Schildersbedrijven B.V. (jointly known as VBBS). On 19 February 2001, the Director-General of NMa dismissed the applications for exemption.

Administrative appeal: On 28 March 2001, VBBS filed an administrative appeal against the contested decision. VBBS is of the opinion that the schemes do not have the intention of restraining competition. Even if this were the case, the schemes result in sufficient advantages that justify exemption in accordance with section 17 of the Competition Act.

Considerations: In the decision on the administrative appeal, the Director-General of NMa concluded that the schemes have the purpose of restraining competition. The schemes apply to all work (above a price of NLG 5,000) in the painting and finishing branch in the Netherlands. The main elements of the scheme are set out in the Anti-Peddling Regulations (1998) *[Anti-Leur Reglement]*, which specify a prior subscription procedure in relation to tenders for work in the painting and finishing branch. The participants in the scheme are obliged to notify Bureau Meldadres Belangenbehartiging Schildersbedrijven [Notification Bureau for the Promotion of the Interests of Painting Companies] if they wish to make an offer of work or to enter into negotiations. The Bureau appoints a mediator who is responsible for the prior subscription procedure. This mediator is responsible for determining the level of the subscription fee (the sum of the calculated fee and the organisational fee) and the beneficiary (the candidate with the lowest offer for a particular assignment). The beneficiary has the exclusive rights to negotiate with the party issuing the tender for a period of two months. The other participants may not contact the party issuing the tender during this period, unless they are given permission to do so by the mediator. The mediator may intervene in the tender procedure at all times if he is of the opinion that peddling is taking place. In the decision on the administrative appeal, the Director-General of NMa ruled that the general competition rules apply to the notified schemes. In addition, the Director-General of NMa came to the conclusion that the schemes in their entirety, in particular the aim of "combating peddling", are in conflict with section 6(1) of the Competition Act. The parts of the schemes restraining competition between the participants with regard to price and freedom of action limit the freedom of action and freedom of choice of parties issuing tenders in this branch. The Director-General of NMa ruled that the schemes may not be granted an exemption because they do not satisfy the first two conditions of section 17 of the Competition Act. As a result of the schemes, customers/consumers cannot benefit fully from competition between the various suppliers. VBBS has not presented plausible arguments that its schemes will result in economic advantages from which customers/consumers will benefit.

VBBS filed a judicial appeal against this decision.

Addenda

Addendum I Decisions of NMa and DTe in 2000

1 Decisions in relation to concentrations

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

No.	Parties	Date	Sector
1878	Naamloze Vennootschap Gemengd Bedrijf "Nederlandsche Omroep-Zender-Maatschappij", "NOZEMA", Nederlands Omroepproduktie Bedrijf N.V. and KPN Telecom B.V.	02-04-01	Transmission of television signals
2127	Getronics Holdings B.V. and Intercai Holding B.V.	22-10-01	IT services
2197	Stichting Holding Rijnstate/Velp and Stichting de Katholieke Ziekeninrichting	10-01-01	Healthcare
2204	Lekkerland Benelux N.V. and CTN Confectionary Tobacco Nederland B.V.	11-01-01	Wholesaler in daily consumer goods
2205	Landis Group N.V. and Citee B.V.	03-01-01	Telecommunications
2209	Pierre & Vacances S.A., Carp Ltd, Center Parcs N.V and Gran Dorado Leisure N.V.	20-02-01	Holiday parks
2246	Creyf's N.V. and BBB Uitzendorganisatie B.V.	08-01-01	Temporary employment agencies
2259	De Goudse N.V. and Tiel Utrecht Levensverzekering N.V., Tiel Utrecht Schadeverzekering N.V. and Tiel Utrecht Verzekerd Sparen N.V.	08-01-01	Insurance and pension funds
2267	Alchemy Partners (Guernsey) Ltd. and William Baird Plc.	10-01-01	Production of (work) clothing
2275	Zurich Insurance Company and Forum Schadeverzekering Maatschappij N.V	16-01-01	Insurance and pension funds
2279	Stichting Vestia-Estrade Groep and Stichting Woningstichting Naaldwijk	22-01-01	Social housing
2280	The Thomson Corporation and Harcourt General Inc.	18-01-01	Wholesaler in academic books
2281	ISS Europe A/S and Randstad Holding N.V.	17-01-01	Cleaning services
2282	Wessanen Nederland B.V. and Boas Holding B.V.	12-01-01	Production/wholesale trade in foodstuffs
2283	Mandemakers Groep B.V. and Brugman Beheer B.V. and Brugman C.V.	25-01-01	Kitchens/bathrooms
2284	Pon Holdings B.V. and HDW B.V.	05-02-01	Trade in construction and transport machinery
2285	Kalmar Industries AB and NHC Holding B.V.	08-03-01	Harbour container machinery
2287	Heijmans N.V. and Koninklijke IBC B.V.	08-03-01	Construction industry
2301	Coöperatieve aan- en verkooporganisatie voor de land- en tuinbouw Cavo Latuco U.A. and Pouw-De Ruiter Beheer B.V.	21-02-01	Trade in horticultural products
2304	Burger King B.V., various Transautex companies and Burger Station B.V.	01-02-01	Fast-food restaurants
2307	LP Gas B.V. and Ultragas B.V. and LPG Tankverhuur Nederland B.V.	22-02-01	Trade in fuels
2308	Nutreco International B.V. and Ham Holding B.V	14-02-01	Production of meat from poultry
2314	Van Gelder Beheer B.V. and NedOil Holding B.V.	06-03-01	Trade in mineral oil products
2315	Vaillant GmbH and Hepworth Plc.	14-02-01	Production/sale of heating installations
2324	Amicon Groep and Onderlinge Ziektekosten Verzekering Maatschappij "Het Anker" U.A. and de Onderlinge Ziekenfonds Maatschappij "Het Anker" U.A.	05-03-01	Insurance and pension funds
2327	Ineos Vinyls Holdings Ltd and EVC International N.V.	14-02-01	Production of chemicals

No.	Parties	Date	Sector
2328	Dumeco B.V. and SturkoMeat Group B.V.	11-05-01	Abattoirs
2329	Blokker Holding B.V. and Tuincentrum Overvecht Holding B.V.	06-04-01	Garden centres
2336	Laurus N.V. and Mitra C.V.	08-03-01	Off-licence stores
2344	B.V. Transport Management International Holding and AMAS Holding B.V.	19-03-01	Transport
2348	PontEecen and Houthandel Vries B.V.	07-03-01	Wholesaler in construction materials
2350	GTI N.V. and Siersema Engineering International B.V., Siersema en Zoon, Roestvrijstalen Leidingnette Apparatenbouw B.V. and Siersema Scheffers B.V.	27-02-01	Installation engineering
2351	Computer Services Solutions Holding N.V and Landis Group N.V.	03-04-01	Communication technology
2355	Dumeco B.V. and Gebr. Kroot Vlees B.V.	13-03-01	Abattoirs
2356	NEM B.V. and Stork Energy Services B.V.	20-03-01	Services for industrial plants
2363	Van der Sluijs Holding Statendam B.V. and BP Direct V.O.F.	23-03-01	Trade in mineral oil products
2364	DKV Beheer B.V. and Achterdoelen Beheer B.V.	19-03-01	Supermarkets
2365	First Reserve-Odyssey-Dresser Equipment Group	30-03-01	Industrial systems
2366	ABN AMRO Participaties B.V. and Zorg Participaties B.V.	26-03-01	Prostheses and orthoses
2376	Vilenzo International N.V. and United Fashion Makers Holding B.V.	20-03-01	Clothing production
2377	PinkRoccade N.V. and Computercentrum Waterbedrijven B.V.	22-03-01	Computer services, IT firms etc.
2378	Sirona Dental Systems B.V. and NDO Leeflang Beheer B.V.	09-04-01	Distribution of dental products
2380	Visserijmaatschappij Kennemerland and Gebr. Muys	30-03-01	Fish wholesaler
2388	Athlon Groep N.V. and Autobedrijf De Vries Purmerend B.V., Autobedrijf De Vries Volendam B.V. and Purmer-Lease B.V.	30-03-01	Trade in (haulage) vehicles
2389	Soficolis Holding GmbH & Co K.G. and Direct Parcel Distribution (Holland North) B.V.	11-04-01	Package delivery
2392	Woonstichting Groene Stad Almere, Woningbouwvereniging, 'De Dageraad', Atrium Woonpartners in Midden-Nederland and Stichting Wooncorporatie SCW	11-05-01	Social housing
2395	Westfälische Ferngas AG and Maatschappij voor Intercommunale Gasdistibutie Intergas N.V.	06-04-01	Gas distribution
2396	NIB Capital N.V. and FanoFineFood B.V.	02-04-01	Salads, sauces and meals
2397	PMG Milieuservices B.V. (Essent Milieu) and N.V. Sturing Afvalverwijdering Noord-Brabant	12-04-01	Waste recycling
2400	Nationale-Nederlanden Schadeverzekering maatschappij N.V./ SR Participatie Maatschappij N.V. and Arbo B.V./ SFB Arbo Duo B.V.	17-04-01	Health, safety and welfare services
2401	DPW Holding B.V. and Blees & Kluyver's Houtimport B.V.	13-04-01	Construction materials
2402	Swets & Zeitlinger Holding N.V. and MIN Holding B.V.	18-04-01	Wholesaler in academic books etc.
2415	V een Uitgevers Beheer B.V. and Bosch & Keuning N.V.	31-05-01	Publishers
2419	HAL Investments B.V. and Verenigde Bedrijven Groeneveld B.V.	25-04-01	Glasses, contact lenses, opticians
2420	Pearle Europe B.V. and Groeneveld Winkelbedrijven/ Groeneveld Produktie B.V.	25-04-01	Glasses, contact lenses, opticians
2425	United Pan-Europe Communications N.V. and NewCo AG	04-07-01	Cable networks
2426	N.V. Deli Universal and Gouderak Holding B.V.	09-05-01	Wholesale trade in wood/garden decorations
2427	NCD Nederlandse Cement Deelnemingsmaatschappij B.V. and Fernhout B.V.	20-07-01	Production of concrete
2434	Wessanen Nederland B.V. and Zonnatura B.V.	02-05-01	Manufacturing foodstuffs
2442	United Parcel Service Inc. and Fritz Companies Inc.	11-05-01	Package delivery/logistical services

No.		Parties	Date	Sector
2444	Stichting Algemeen Christelijk Bosch Medicentrum Willem-Alexander, Groot Ziekengasthuis and Stichting Carolus-Liduina-Lindenhorst	22-10-01	Hospitals	
2445	Dura Vermeer Groep N.V. and Hazag Holding B.V.	04-05-01	Construction industry	
2451	Mediveen Groep B.V. and TPP Participaties Rotterdam B.V./ Coriopharma C.V.	14-05-01	Retail trade in pharmacy and chemist articles	
2452	InWear Group A/S and Carli Gry International A/S	27-04-01	Ladies' and men's clothing	
2454	Central butcheries of the Laurus Groep and Hendrix Meat Group	17-05-01	Butcheries	
2460	Koninklijke BAM NBM N.V. and Van den Bruele & Kaufman B.V.	15-05-01	Construction industry/project development	
2471	Inter Access B.V. and WoningraadGroep B.V.	23-05-01	Computer services, IT firms etc.	
2473	Coöperatieve Bloemenveiling Holland B.A. and Coöperatieve Bloemenveilingvereniging "Flora" U.A.	12-07-01	Flower auctions	
2474	Steel Logistics Europe B.V. and P&O Ferrymasters Ltd.	05-06-01	Road transportation of steel	
2483	Fortis Bank N.V. and Beleggingsmaatschappij Calvé Delft N.V.	23-05-01	Financial services	
2484	Houdstermaatschappij Dekker B.V. and Vos Arnhem Holding B.V.	05-06-01	Sand, gravel and road construction materials	
2494	Creyf's N.V and Titan Technology Beheer B.V. and Titan Technology Development B.V.	30-05-01	IT services	
2497	Consumentencoöperatie Co-op Nederland U.A. and Codis C.V.	12-06-01	Retail trade in daily consumer goods	
2504	Internatio Müller N.V. and Datelnet N.V.	11-06-01	IT services	
2512	Novell Inc. and Cambridge Technology Partners	22-06-01	IT services	
2519	Aalberts Industries N.V. and Heat & Surface Treatment and Philips Galvano Eindhoven	15-06-01	Industrial services	
2525	IMKO B.V. and Marvelo B.V.	29-06-01	Nuts and nut products	
2526	Aan- en Verkoopcoöperatie Meppel B.A. and Coöperatieve and Aan- en Verkooporganisatie voor de Land- en Tuinbouw U.A.	23-07-01	Animal feeds	
2528	A/S Em.Z Svitzer and Wijsmuller Groep Holding B.V.	27-07-01	Ocean salvaging services	
2534	Achmea Holding N.V. and Reaal Verzuimverzekeringen N.V.	29-06-01	Insurance	
2535	Veneka B.V. and Het Nieuwe Centraal Inkoop Bureau CIB B.V.	06-07-01	Office products	
2536	Distilleerderij M. Dirkzwager B.V. and Mitra Beheer B.V.	04-09-01	Trade in alcoholic beverages	
2544	Gilde Participaties B.V and W/M Systems Holding B.V.	17-07-01	Financial services	
2545	Gilde Buy-Out Fund II B.V. and Koninklijke Gazelle B.V.	16-07-01	Bicycles	
2552	N.V. Interpolis and SGG Beheer B.V.	10-08-01	Banking and insurance services	
2558	Petroplus International N.V. and Sidopa Holding B.V.	06-08-01	Oil products	
2566	Interpolis N.V. and Réaal Assurantiediensten N.V.	23-07-01	Insurance	
2569	Grontmij Beheer Reststoffenprojecten B.V. and AVR Milieutechniek B.V.	24-07-01	System development	
2576	Grontmij Beheer Reststoffenprojecten B.V. and AVR Milieutechniek B.V.	08-10-01	Transportation of sand, gravel and road construction materials	
2579	Brouwer Groep B.V. and Van Ginneken & Mostaard Holding B.V.	19-07-01	Printing industry	
2586	Zwanenberg Food Group Holding B.V. and Boekos Food Group B.V.	02-08-01	Meat and meat preserves	
2587	De Lage Landen International B.V. and KPN Lease B.V.	08-08-01	Telecommunications	
2589	Stichting Diaconessenhuis Eindhoven and Stichting Sint Joseph Ziekenhuis	24-07-01	Healthcare provider	
2590	KPN Telecom B.V. and Operationeel ICT Department van Netherlands Car B.V.	29-08-01	IT services	
2591	Coöperatieve Centrale Raiffeisen-Boerenleenbank B.A. and Janssen de Jong Groep B.V.	10-08-01	Financial services	
2592	B.V. Nettorama Verbruiksmarkten and Primarkt B.V.	26-07-01	Supermarkets	

No.	Parties	Date	Sector
2597	United Services Group N.V. and Secretary Plus	10-08-01	Recruitment and selection of personnel
2599	Technip S.A. and Coflexip S.A.	15-08-01	Services to the oil and gas industry
2608	Spijker Group B.V. and Nedac Sorbo Groep	23-08-01	Wholesaler in non-food articles
2611	Origin Nederland B.V. and KPN Datacenter B.V.	28-08-01	IT services
2615	Ordina N.V. and Devote N.V.	28-08-01	IT services
2625	Multihouse N.V. and KSI International N.V.	17-08-01	System development services
2626	Yamaha Motor Europe N.V. and Motori Minarelli S.P.A.	11-10-01	Motorcycles
2629	3i Group plc. and L.C.G. Malmberg B.V./Educational Network B.V./Uitgeverij Van In N.V.	16-08-01	Publishers
2630	N.V. NUON Energy Trade & Wholesale and Demkolec B.V.	17-09-01	Production and distribution of electricity
2633	Portaal Woonstichting, Stichting Genuagroep and Stichting Bejaardenzorg Nijkerk	18-09-01	Social housing
2634	CRH plc. and Harry Cox Beleggingsmaatschappij 's Hertogenbosch B.V.	05-09-01	Building materials
2637	Kroymans Corporation B.V. and Nimox N.V.	31-08-01	Car dealer, accessories
2639	Monuta Uitvaartgroep N.V. and Service Corporation International Nederland B.V.	25-09-01	Funeral services
2646	Gilde Participaties B.V. and Hazlewood Convenience Food Division B.V.	17-09-01	Frozen snacks
2647	Thermo King Corporation and Grenco Transportkoeling B.V	13-09-01	Transport refrigeration systems
2648	Gilde Participaties B.V. and Codi International B.V.	05-09-01	Non-woven hygiene products
2655	Yunio Coöperatieve Vereniging Kraamzorg U.A. and NTN Groep B.V.	08-11-01	Maternity care
2656	PinkRoccade N.V. and Commit Information Systems B.V.	17-09-01	IT services
2661	Essent Nederland B.V. and Breman Beheer B.V. Essent-Breman Service Holding	09-11-01	Production and distribution of electricity, installation engineering, heating equipment
2665	Coöperatieve Centrale Raiffeisen-Boerenleenbank B.A. and Land- en Tuinbouworganisatie Nederland	28-09-01	Agriculture and horticulture
2666	Stork N.V and Röntgen Technische Dienst B.V.	09-10-01	Destructive and non-destructive research
2668	B.V. Sperwer Holding and Laurus N.V.	26-09-01	Supermarkets
2683	Burgers Ergon B.V. and Lingestreek B.V.	09-10-01	Installation engineering
2691	Phillips, de Prury & Luxembourg Limited and Louwman Brooks Limited	11-10-01	Auction firms
2697	Debitel Nederland B.V. and Talkline Nederland B.V.	16-10-01	Telecommunications
2708	Koninklijke Wegenbouw Stevin B.V. and Gebr. Van Kessel Holding B.V.	07-11-01	Construction industry
2710	Fri-Jado and Getronics Installation Services	18-10-01	Refrigeration and air conditioning
2714	Dimension Data and In-Time-Netbuilding	17-10-01	Data networks
2717	Ballast Nedam Woningbouw B.V. and Laudy Bouw Groep B.V.	02-11-01	Project development
2719	Borstlap Masters in Fasteners Group B.V. and Beleggingsmaatschappij Maasoever Rotterdam B.V.	18-10-01	Iron and metal goods and heating equipment
2720	Kwetters Holding B.V. and Coöperatie Koninklijke Cebeco Groep U.A.	21-11-01	Trade in eggs
2731	Stern Groep N.V. and Athlon Groep N.V.	09-11-01	Car dealer, accessories, leasing
2734	Guilbert S.A. and Corporate Express Nederland B.V.	06-11-01	Office products and furnishings
2744	Stichting Verantwoord Wonen and Stichting Vestia Groep	21-11-01	House rental
2760	Stichting voor Hoger Beroepsonderwijs in Noordelijk Noord-Holland, Stichting Hogeschool Haarlem, Stichting voor Protestants-Christelijk en Rooms-Katholiek Hoger Onderwijs and Stichting Hoger Onderwijs Nederland	21-12-01	Higher professional education, courses

No.	Parties	Date	Sector
2779	Land- en Tuinbouw Coöperatie Rijnvallei B.A. and Verbeek's Pluimvee Beheer B.V.	19-12-01	Compound animal feeds
2784	Raab Karcher Bouwstoffen B.V. and Van Ditshuizen, Betonwaren-fabriek and Mortelcentrale B.V. and Wesselink Degro B.V.	11-12-01	Construction materials
2787	Cap Gemini Ernst & Young ISM B.V. and Arbeidsvoorzieningsorganisatie (Werkling)	18-12-01	IT services
2807	United Technologies Corporation and Dewoh Beheer B.V.	19-12-01	Components of air-conditioning systems
2824	Motorhuis Holding B.V. and Riva c.s.	21-12-01	Car dealer, accessories, leasing, rental, repairs, insurance

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

2184	Air Products and Chemicals Inc. and AGA Transfer B.V.	10-01-01	Manufacturing of industrial gases
2198	Schuitema N.V. and B.V. Sperwer Holding	03-01-01	Retail trade in daily consumer goods

Decisions in relation to exemptions from section 34 (section 40 of the Competition Act)

2655	Yunio Coöperatieve Vereniging Kraamzorg U.A. and NTN Groep B.V.	24-08-01	Maternity care

Decisions in relation to licence applications (section 44(1) of the Competition Act)

2184	Air Products and Chemicals Inc. and AGA Transfer B.V.	06-08-01	Manufacturing of industrial gases

2 Decisions in relation to applications for exemption from the prohibition on cartels

Exemption granted

No.	Parties	Date	Sector	Brief Description
1654	Vereniging Far West	16-10-2001	Basic and processing industry	Pursuant to section 17 of the Competition Act, exemptions from the prohibition in section 6 are granted for a period of ten years.
1539	Samenwerkingsovereenkomst Taxivervoer Schiphol [Joint Taxi Operating Agreement Schiphol Airport]	30-10-2001	Financial services and transport	Pursuant to section 17 of the Competition Act, exemptions from the prohibition in section 6 are granted until 1 June 2004.
597	Stichting Schadegarant	15-11-2001	Financial services and transport	Pursuant to section 17 of the Competition Act, exemption from the prohibition in section 6 is granted for a period of five years.
317	Algemene Voorwaarden overeenkomsten[agreements in respect of General Termsand Conditions] PVV/IKB Blanke Vleeskalveren 1997	25-10-2001	Trade	Pursuant to section 17 of the Competition Act, exemption from the prohibition in section 6 is granted for a period of five years.
305	Algemene Voorwaarden overeenkomsten [agreements in respect of General Terms and Conditions] PVV/IKB Rosé Vleeskalveren 1996	25-10-2001	Trade	Pursuant to section 17 of the Competition Act, exemption from the prohibition in section 6 is granted for a period of five years.

81	BankGiroCentrale B.V and joint deposit and giro collection procedure	04-07-2001	Financial services and transport	Pursuant to section 17 of the Competition Act, exemption from the prohibition in section 6 is granted for a period of five years.

Partial exemption granted

No.	Parties	Date	Sector	Brief Description
1891	Avandis	29-03-2001	Trade	Pursuant to section 17 of the Competition Act, a partial exemption from the prohibition in section 6 is granted for a period of ten years.
1755	Stichting Metalelektro Recycling inz. Verwijderingsstructuur elektr(on)ische muziekinstrumenten [Recycling scheme for electronic music instruments]	01-10-2001	Basic and processing industry	Pursuant to section 17 of the Competition Act, a partial exemption from the prohibition in section 6 is granted until the date on which the approval of the Minister of Housing, Spatial Planning and the Environment, pursuant to the Decree in Respect of the Disposal of White and Brown Goods [Decision verwijdering wit- en bruingoed] expires, but at the latest on 1 January 2005.
1754	Stichting Metalelektro Recycling inz. Verwijderingsstructuur naai- brei- borduur- en lockmachines [Recycling scheme for knitting, embroidery and lock machines]	01-10-2001	Basic and processing industry	Idem.
1753	Stichting Metalelektro Recycling inz. Verwijderingsstructuur verwarmings-apparatuur and warmwaterapparatuur [Recycling scheme for heating equipment and boilers]	01-10-2001	Basic and processing industry	Idem.
1752	Stichting Metalelektro Recycling inz. Verwijderingsstructuur warmwater-boilers [Recycling scheme for heating equipment boilers]	01-10-2001	Basic and processing industry	Idem.
1751	Stichting Metalelektro Recycling inz. Verwijderingsstructuur elektrisch en elektronisch (tuin)gereedschap [Recycling scheme for electrical and electronic (gardening) tools]	01-10-2001	Basic and processing industry	Idem.
1153	Stichting Verwerking Elektrische Huis-houdelijke Apparaten and Stichting Verwerking Elektronische Apparaten [Recycling schemes for household and electronic equipment]	18-04-2001	Basic and processing industry	Idem.

Does not fall within the scope of section 6 of the Competition Act – no exemption required

No.	Parties	Date	Sector	Brief Description
2026	Auto Recycling Nederland II	22-10-2001	Basic and processing industry	No appreciable restraint on competition.
1915	Zilveren Kruis –Geneesmiddelen-formularium Kennemerland	23-08-2001	Liberal professions, health-care and culture	No appreciable restraint on competition.
912	Stichting CZ groep Ziekenfonds	06-07-2001	Liberal professions, health-care and culture	No (appreciable) restraint on competition.
502	Stichting Reclame Code	12-07-2001	Liberal professions, health-care and culture	No restraint on competition.
469	Royal Nederland Schadeverzekering N.V.	15-11-2001	Financial services and transport	No appreciable restraint on competition.
266	Vereniging van Nederlandse Installatie-bedrijven (Algemene Voorwaarden Consumentenwerk) [General Terms and Conditions for Work on behalf of Consumers]	25-10-2001	Trade	No appreciable restraint on competition.

Applications for exemption dismissed

No.	Parties	Date	Sector	Brief Description
602	Koninklijk Nederlands Vervoer Busvervoer	21-05-2001	Financial services and transport	The conditions for exemption, contained in section 17 of the Competition Act, have not been met.
537	Landelijke Huisartsen Vereniging [Netherlands Association of General Practitioners]	11-04-2001	Liberal professions, health-care and culture	The conditions for exemption, contained in section 17 of the Competition Act, have not been met. Exempted from the prohibition contained in section 6 partly on the grounds of section 16 of the Competition Act.
381	Vereniging Belangen Behartiging Schildersbedrijven, Stichting Meldadres Belangen Behartiging Schildersbedrijven and Bureau Meldadres Belangen Behartiging Schildersbedrijven B.V. [Organisations representing painting companies]	19-01-01	Basic and processing industry	The conditions for exemption, contained in section 17 of the Competition Act, have not been met.
203	Nederlandse Textiel Conventie and Stichting Centraal Bureau der Nederlandse Textiel Conventie [Organisation representing the clothing trade]	13-02-01	Trade	The conditions for exemption, contained in section 17 of the Competition Act, have not been met.

3 Decisions in relation to complaints

Decisions in relation to complaints pursuant to section 6 of the Competition Act

No.	Parties	Date	Sector	Brief Description
2323	AKO ONLINE B.V. versus Koninklijke Vereeniging ter bevordering van de belangen des Boekhandels [organisation representing bookshops]	19-03-2001	Liberal professions, healthcare and culture	Exemption for the fixed book price granted under the Economic Competition Act [Wet economische mededinging] under the Competition Act. No separate assessment pursuant to section 6 of the Competition Act.
1669	X vs NVM [association of real estate agents] and Chamber of Commerce	19-01-01	Liberal professions, healthcare and culture	No infringement of the Competition Act.
1587	Automotive Technology Group B.V. vs Stichting Opleidings- en Ontwikkelingsfonds Motorvoertuigenbedrijf en Tweewielerbedrijf	24-09-2001	Financial services and transport	No infringement of the Competition Act.

Decisions in relation to complaints pursuant to section 24 Competition Act

No.	Parties	Date	Sector	Brief Description
2704	Pecos vs Ministry of Transport, Public Works and Water Management	12-11-2001	Basic and processing industry	The Ministry does not act as an undertaking. For the rest, no plausible evidence of abuse.
2383	Kuipers vs Friesche Vlag	29-06-2001	Trade	No plausible evidence of a dominant position.
2295	Stichting Pensioenfonds NIGOCO, pension fund of the company Van Nievelt Goudriaan & Co B.V., vs. Netherlands Pensions and Insurance Supervisory Authority [Verzekeringskamer]	15-06-2001	Financial services and transport	Competition Act does not apply to the Netherlands Pensions and Insurance Supervisory Authority [Verzekeringskamer] in the exercising of its duties and powers as the regulator.
1978	Mr L. Hesselink versus Canal Digitaal B.V.	02-05-2001	Information and communication technology	No reason to assume that a dominant position has been abused.
1657	Talkline Benelux B.V. versus KPN Telecom B.V	12-03-2001	Informationand communication technology	No abuse of a dominant position
1436	Baron Von Quast - Juchter versus Pels Rijcken & Droogleever Fortuijn	13-04-2001	Liberal professions, healthcare and culture	No plausible evidence of a dominant position.
1177	De Nederlandse Organisatie van Leesportefeuille Uitgevers versus VNU N.V	10-05-2001	Information and communication technology	No plausible evidence of a dominant position.
144	Innocom Bureau voor Bedrijfscommunicatie B.V. vs Nira Nederland B.V.	20-12-2001	Information and communication technology	No plausible evidence of a dominant position.
77	Fiscaal up to Date and Kluwer	06-07-2001	Information and communication technology	No infringement ascertained of the prohibition contained in section 24 of the Competition Act.

Decisions in relation to complaints pursuant to section 6 and section 24 of the Competition Act

No.	Parties	Date	Sector	Brief Description
1655	Insufficient operation of market forces in 'Vinex' locations	12-09-2001	Basic and processing industry	No indication of infringements of the Competition Act which give cause for further investigation.
1437	Monuta Funeral services N.V. vs Stichting Schiedamse and Vlaardingse Ziekenhuizen/Matrice	30-03-2001	Liberal professions, healthcare and culture	Exclusivity clause does not result in an appreciable restraint on competition; the practices cannot be deemed to be an abuse of a dominant position.
1216	Stichting Bevordering Vakbekwaamheid Beroepsgoederenvervoer and Stichting Opleidings- en Ontwikkelingsfonds Beroepsgoederenvervoer	12-07-2001	Financial services and transport	Subsidy scheme falls outside the scope of section 6 of the Competition Act. No plausible evidence of abuse of a dominant position.
1199	Europees Massagoed-Overslagbedrijf B.V. vs SHB Personeelsplanning B.V., FNV Bondgenoten and Bedrijvenbond CNV	12-07-2001	Financial services and transport	Preferential right in collective labour agreements are not subject to section 6 of the Competition Act due to their nature and purpose. Insufficient plausible evidence of an abuse of a dominant position.
804 and 184	Mr J.P. Buiteman and Koninklijke Maatschappij tot bevordering der Bouwkunst Bond van Nederlandse Architecten and Municipality of Leerdam	25-07-2001	Basic and processing industry	Agreement not in conflict with section 6 of the Competition Act. No evidence of a dominant position.
58	Koninklijke Maatschappij tot Bevordering der Bouwkunst Bond van Nederlandse Architecten vs Municipality of Utrecht	06-04-2001	Basic and processing industry	No evidence of an infringement of the Competition Act.
11	Sociaal Kulturele Vereniging Shiva vs Koninklijke Luchtvaartmaatschappij N.V., Surinaamse Luchtvaartmaatschappij and Antilliaanse luchtvaartmaatschappij	08-10-2001	Financial services and transport	The cooperation and joint operating agreement is not subject to the exemption contained in section 16 of the Competition Act. No evidence of an abuse of a dominant position on the Amsterdam-Paramaribo route during the period investigated.

4 Decisions on administrative appeals

No.	Parties	Date	Sector	Brief Description
407	Texincare/Oost-Nederland Zorgverzekeraar	15-01-01	Insurance and pensions	The Director-General of NMa declared the administrative appeals to be unfounded; there was no evidence of an abuse of a dominant position, in terms of section 24(1) of the Competition Act.
1861	Nederlands Instituut van Psychologen (NIP)	23-01-01	Healthcare	The Director-General of NMa declared the notice of administrative appeal to be inadmissible. NIP had no interest in the proceedings.
2321	Van Eck Havenservice	04-05-01		The Director-General of NMa declared the notice of administrative appeal to be inadmissible on the grounds of section 6(6)of the General Administrative Law Act.

1947	Vereniging Organisatie Nederlandse Tandprothetici (ONT)	07-05-01	Healthcare	The Director-General of NMa declared the administrative appeal to be unfounded.
1943	Stichting Auto & Recycling Nederland	27-06-01	Preparation for recycling of metal waste	The Director-General of NMa declared the notice of appeal to be inadmissible due to inexcusable exceeding of the prescribed term.
602	Koninklijk Nederlands Vervoer Busvervoer	02-07-01	Transport	The administrative appeal was withdrawn.
2499	Baron von Quast	18-07-01	Services	The administrative appeal was withdrawn.
2462	Chapel (Visionstar)	19-07-01	Air transportation	The administrative appeal was withdrawn.
2472	AKO Online	23-07-01	Media	The administrative appeal was withdrawn.
2368	Mr Pieterse / NVM and Chamber of Commerce	01-08-01		The Director-General of NMa declared Mr Pieterse's administrative appeal to be inadmissible.
1963	Ruhrkohle / Hoogovens	17-08-01	Metal industry	The Director-General of NMa declared the objections to be unfounded.
507 568 617 620	Geertjesgolf Kraaijenbergse Plassen Heeswijkse Kampen Nederzand	21-08-01	Sand and gravel extraction	The Director-General of NMa declared the objections to be unfounded in so far as they related to the framework agreement. The project agreements as such did not contravene the Competition Act.
2273	Libertel	08-10-01	Telecommunications	The Director-General of NMa declared the notice of administrative appeal to be inadmissible, since the contested response from NMa did not satisfy the criteria applicable to the the definition of a decision.
2260	Vereniging Vrije Vogel	30-10-01	Air transport	The Director-General of NMa declared the administrative appeal to be unfounded.
2320	Marino Cargo Services	30-10-01		The Director-General of NMa declared the administrative appeal to be inadmissible. Marino Cargo has no interest in the proceedings.
2277	Sturko Meat	23-11-01	Abattoirs and meat processing	The administrative appeal was withdrawn.
2278	Murris Meppel	23-11-01	Abattoirs and meat processing	The administrative appeal was withdrawn.
2446	Talkline / KPN	26-11-01	Telecommunications	The administrative appeal was withdrawn.
2594	Wijnhoven	13-12-01	Production of dairy products	The administrative appeal was withdrawn.

2463	Texaco Nederland B.V.	14-12-01	Trade brokerage in fuels, ores, metals and chemical products	In the administrative appeals proceedings, the Director-General of NMa upheld the imposition of a fine on Texaco due to its non-compliance with the obligation to cooperate contained in section 5(20) of the General Administrative Law Act.
2491	Bols, de Kuyper, UTO	14-12-01	Manufacturing of beverages	In the administrative appeals stage, the cost savings in relation to the beverage Advocaat were shown for the first time. The exemption with regard to this part was granted in this stage.
2638	Van Hecke / Postbank Hypotheken NV	14-12-01	Financial institutions	Mr Van Hecke's administrative appeal was declared to be inadmissible as he had no interest which was distinguishable to a significant degree in law from others with a contractual relationship with Postbank and was therefore not an interested party.
2673	Keizer	14-12-01		Mr Keizer's administrative appeal was declared inadmissible as he had acted in the general and therefore not in a personal and individual interest. The fact that he was the addressee of the primary decision was not sufficient grounds to be deemed an interested party.
2414	VBBS	17-12-01	Painting and finishing branch	The administrative appeal was declared inadmissible and the Director-General of NMa upheld his decision that the aim of the anti-peddling scheme applied by VBBS was to restrain competition in terms of section 6 of the Competition Act. The scheme was not eligible for exemption in terms of section 17 of the Competition Act.
11	Shiva vs KLM	17-12-01	Air transport	Shiva's administrative appeal was declared to be inadmissible as there is no interested party. The interests of Shiva, the association, were too general in relation to the interest which Shiva defends in this case (opposition to price agreements and abuse of a dominant position).
11	Jankie vs KLM	17-12-01	Air transport	Mr Jankie's administrative appeal was declared inadmissible since he was not an interested party due to the absence of a personal interest.

11	Ganpat vs KLM	17-12-01	Air transport	Mr Ganpat's administrative appeal was declared inadmissible since he failed to sign the notice of appeal, despite being given the opportunity to remedy this. In addition, Mr Ganpat is not an interested party due to the absence of a personal interest.
2412	Energiebedrijf.com	17-12-01	Energy	The administrative appeal was withdrawn.
97	Samenwerkingsovereenkomst Zand-winning [joint operating agreement for sand extraction]	17-12-01	Sand and gravel extraction	The administrative appeal was withdrawn.
2110	Basismedia	20-12-01	Other services	The administrative appeal was declared unfounded since the agreement between NS Stations and Metro, which gave Metro the exclusive right to distribute its newspaper at NS Stations through its dispensers, did not have the effect of excluding the newspaper Sp!ts from the reader and advertising market.
2513	Landelijke Huisartsen Vereniging [Netherlands Association of General Practitioners]	21-12-01	Healthcare	The administrative appeal against the refusal to grant an exemption for a number of schemes relating to the establishment, substitution, contactability, availability, and collective contractual negotiations was declared unfounded.
2705	V ebega and Klaas Puul	21-12-01	Shrimp industry	The Director-General of NMa upheld in the administrative appeals proceedings the decision that the Competition Act is characterised by a special regime with regard to publication, so that the Public Information (Access) Act [Wet Openbaarheid van Bestuur] does not apply.
952	Bredase Notarissen [Notaries in Breda]	12-02-01	Services	The Director-General of NMa declared the objections to be valid insofar as greater importance must the attached to the economic significance of the infringement in setting the fine and unfounded for the rest.
1774	Verkerk/Horn	29-06-01	Retail trade	The administrative appeal against the decision that the parties had committed an offence due to the realisation of a concentration before a decision was taken on the notification was declared to be unfounded.
1	Telegraaf vs NOS/HMG	03-10-01	Media	The Director-General of NMa declared the objections to be unfounded and upheld the order subject to a penalty which had been imposed earlier.

2227	Carglass	16-10-01	Insurance and pension funds (excluding obligatory social insurance)	Carglass's objections were declared unfounded due to the absence of an interest in the proceedings. The objections of Glasgarage Rotterdam were declared unfounded.
757	Chilly Basilicum vs Secon Group/G-Star	21-12-01	Retail trade	The Director-General of NMa declared the objections to the decision to impose a sanction to be unfounded. The fine imposed on Secon Group B.V. was upheld.

5 Decisions to impose sanctions

No.	Parties	Date	Sector	Brief Description
2228	Taxi Rotterdam	23-04-01	Transport	The Director-General of NMa decided against imposing a fine and/or an order subject to a penalty.
2346	Advent-Vinnolit- Vintron	10-05-01	Manufacturing of PVC	The Director-General of NMa imposed a fine of NLG 40,000 each on Vinnolit Geschäftsführungs GmbH, Celanese AG and Wacker Chemie GmbH for contravening section 34 of the Competition Act.
2463	Texaco Nederland B.V.	06-07-01	Trade brokerage in fuels, ores, metals and chemical products	The Director-General of NMa impose a fine of NLG 10,000 on Texaco for non-compliance with the obligation to cooperate, contained in section 5(20) of the General Administrative Law Act.
2034	Deutsche Post	09-11-01	Personal and courier services	The Director-General of NMa imposed a fine of NLG 50,000 each on Deutsche Post International B.V. and Trans-o-flex Lieferdienst GmbH due to an infringement of section 73 of the Competition Act.
2234	ANKO	31-12-01	Hairdressing and related services	The Director-General of NMa decided against imposing a fine and/or an order subject to a penalty.
2727	NN-ASR-ArboDuo	13-12-01	Insurance and venture capital companies	The Director-General of NMa imposed a fine of NLG 40,000 each on Nationale Nederlanden Schadeverzekering, Maatschappij N.V., ASR Participatie Maatschappij N.V. and SFB Fintus B.V. due to an infringement of section 34 of the Competition Act.

6 Decisions and advice of DTe 2001

Decisions of the Director of DTe to amend electricity tariffs for 2001

Electricity

No.	Decision	Date
100320 up to and including 100337	Decisions determining supply tariffs for captive customers for the second quarter of the year 2001	02-03-01
100392	Decision determining the and reverse supply tariff for the second quarter of the year 2001	22-03-01
100267 up to and including 100284	Decisions determining the connection tariffs per meter for connections in excess of 25m in length for the year 2001	26-03-01
100469 up to and including 100486	Decisions determining the supply tariffs for captive customers for the third quarter of the year 2001	22-06-01
100487	Decision determining the reverse supply tariff for the third quarter of the year 2001	22-06-01
100501 up to and including 100518	Decisions determining the supply tariffs for captive customers for the fourth quarter of the year 2001	21-09-01
100519	Decision determining the reverse supply tariff for the fourth quarter of the year 2001	21-09-01
100557 up to and including 100574 and 100576	Decisions determining the connection tariffs and the transmission tariffs for the year 2002	30-11-01
100575	Decision determining the National Uniform Producer Transmission Tariff [Landelijk Uniform Producenten transporttarief] for the year 2002	30-11-01
100677 up to and including 100694	Decisions determining the supply tariffs for captive customers for the first quarter of the year 2002	20-12-01
100695	Decision determining the reverse supply tariff for the first quarter of the year 2002	20-12-01

Decisions of the Director of DTe amending the Technical Conditions

No.	Decision	Date
100340	Decision to amend the Grid and System Codes in relation to amendments to energy programmes	02-03-01
100389	Decision to amend the Grid Code in relation to quality criteria	14-03-01
100417	Decision to amend the Measurement Code in relation to the method and profiles for determining imbalance	30-03-01
100078	Decision to amend the Grid, System and Measurement Codes in relation to clarification of the concept of kWmax	11-04-01
100345	Decision to amend the Grid Code in relation to the allocation of transmission capacity	21-08-01
100578	Decision to amend the Grid Code in relation to the timing of transmission capacity auctions	09-11-01
100556	Decision to amend the System Code in relation to the revocation of the location requirement in respect of programme managers	21-11-01
100700	Decision to amend the Grid, System and Measurement Codes in relation to the introduction of the Euro	18-12-01
100703	Decision to amend the Grid, System and Measurement Codes in relation to the opening of the market for renewable electricity	21-12-01
100697	Decision to amend the Measurement Code in relation to consumer profiles	27-12-01

Decision of the Director of DTe amending the Tariff Code

No.	Decision	Date
100498	Decision to amend the Tariff Code in relation to the allocation of costs to various voltage levels and the amendment of a definition	13-12-01

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

No.	Decision	Date
100319	Decision in respect of the petition by Wuppermann Staal Nederland B.V. for the issuing of binding instructions to Essent Netwerk Brabant B.V.	18-12-01

Decisions of the Director of DTe in relation to administrative appeals

No.	Decision	Date
Price caps (grid managers)		
100121 up to and including 100125, 100130 and 100131, 100134 up to and including 100137	Decisions on administrative appeals against the decision of 22 September 2000 determining the x-factor, as referred to in section 41 of the Electricity Act of 1998 in respect of grid managers	21-09-01
100129	Decisions on administrative appeals against the decision of 22 September 2000 determining the x-factor, as referred to in section 41 of the Electricity Act of 1998 in respect of B.V. Transportnet Zuid-Holland (No. 00-064) and against the decision of 1 December 2000 amending the x-factor (No. 00-077).	25-10-01
100114 and 100144	Decisions on administrative appeals against the decision of 22 September 2000 determining the x-factor, as referred to in section 41 of the Electricity Act of 1998 in respect of TenneT B.V. (No. 00-063) and against the decision amending the x-factor in respect of TenneT B.V. (No. 00-076).	25-10-01
100135/105	Decisions on administrative appeals against the decision of 22 September 2000 determining the x-factor, as referred to in section 41 of the Electricity Act of 1998 in respect of Westland Energie Infrastructuur B.V. (No. 00-066)	06-11-01
100135/98	Decisions on administrative appeals against the decision of 22 September 2000 determining the x-factor, as referred to in section 41 of the Electricity Act of 1998 in respect of Netbeheer Nutsbedrijven Weert N.V. (No. 00-065)	06-11-01
Price caps in relation to the supply of electricity		
100304	Decision on administrative appeals against the decision of 13 October 2000, No. E/EM/00063652 determining the x-factor, as referred to in section 58 of the Electricity Act of 1998	16-08-01
Tariffs		
100287 up to and including 100291	Decisions on the administrative appeals of ENECO NV, ENECO Energie Zuid-Kennemerland NV, ENECO Energie Delfland N.V., ENECO Energie Midden-Holland and ENECO Energie Weert N.V. against decisions 00-109, 00-111, 00-110, 00-112 and 00-119 of 19 December 2000 determining the supply tariff for captive customers for the first quarter of the year 2001	17-08-01
100259	Decision on the administrative appeal of NV ONS Energy against decision 00-121 of 19 December determining the supply tariff for captive customers for the first quarter of the year 2001	17-08-01
100262	Decision on the administrative appeal of NV Nutsbedrijf Regio Eindhoven (NRE) against decision 00-118 of 19 December determining the supply tariff for captive customers for the first quarter of the year 2001	16-08-01

100263	Decision on the administrative appeal of Westland Energie Services against decision 00-120 of 19 December determining the supply tariff for captive customers for the first quarter of the year 2001	14-09-01
100285	Decision on the administrative appeal of NV RENDO against decision 00-123 of 19 December determining the supply tariff for captive customers for the first quarter of the year 2001	16-08-01
100296	Decision on the administrative appeal of Delta Nutsbedrijven against decision 00-108 of 19 December determining the supply tariff for captive customers for the first quarter of the year 2001	05-09-01
100150 up to and including 100167	Decisions on the administrative appeals against the decision of 13 December 2000 determining the National Uniform Producer transmission tariff [Landelijk Uniform Producenten transporttarief] for 2001 (No. 00-105)	05-12-01

Technical conditions

No.	Decision	Date
100078	Decision on the administrative appeals against in the decision of 12 April 2000, No.00-011, determining the second part of the conditions, as referred to in section 36 of the Electricity Act	11-04-01
100139 up to and including 100141 and 100146	Decision on the administrative appeals against in the decision of 16 November 2000, No. 00-074, in respect of the allocation of transmission capacity on cross-border connections for 2001	13-09-01
100260, 100293, 100294 and 100300	Decision on the administrative appeals against in the decision of 21 December 2000, No. 00-124, in respect of the amendment of the Grid and System Code in relation to the obligatory supply of power to eliminate limitations on transmission and control and reserve power	19-12-01
100261, 100265 and 100295	Decision on the administrative appeals against in the decision of 19 December 2000, No. 00-127, in respect of the amendment of the System Code in relation to programme management	19-12-01
100443 and 100444	Decision on the administrative appeals against in the decision of 14 March 2001, No. 100389, in respect of the amendment of the Grid Code in relation to quality criteria	19-12-01

Tariff code

100145 up to and including 100149	Decision on the administrative appeals against in the decision of 16 November 2000 amending the Tariff Code (No. 00-068)	05-12-01

Withdrawn administrative appeals against decisions of the Director of DTe

No.	Parties	Date
100162	Administrative appeal of ENECO Energie Weert N.V. against the decision of 1 December 2000, Nos 00-079 up to and including 00-081, in respect of the amendment of the decisions determining the x-factor, as referred to in section 41 of the Electricity Act of 1998, in respect of grid managers	26-02-01
100164	Administrative appeal of ENECO N.V., ENECO Energie Zuid- Kennemerland N.V., ENECO Energie Delfland N.V., ENECO Energie Midden-Holland against the decision of 1 December 2000, Nos 00-079 up to and including 00-081, in respect of the decisions determining the x-factor, as referred to in section 41 of the Electricity Act of 1998, in respect of grid managers	26-02-01
100264	Administrative appeal of Westland Energie Services against the decision of 21 December 2000, No. 00-124, in respect of the amendment of the Grid and System Codes	23-03-01
100166	Administrative appeal of EnergieNed against the decisions of 13 December 2000, Nos 00-085 up to and including 00-104, in respect of the determination of connection and transmission tariffs for 2001	02-04-01

100301 and 100302	Administrative appeals of VEMW and VNCI against the decision of 21 December 2000, No. 00-124, in respect of the amendment of the Grid and System Code	15-06-01
100148	Administrative appeal of EnergieNed against the decision of 16 November 2000, No. 00-068, in respect of the amendment of the Tariff Code	24-04-2001
100120	Administrative appeal of Sep against the decision of 22 September 2000 in respect of the determination of the x-factor, as referred to in section 41 of the Electricity Act of 1998, in respect of grid managers	11-12-01
100151	Administrative appeal of Sep against the decision of 1 December 2000 in respect of the decisions determining the x-factor, as referred to in section 41 of the Electricity Act of 1998, in respect of grid managers	11-12-01

Gas

Decisions of the Director of DTe in respect of the determination of efficiency discounts (price caps)

No.	Decision	Date
100418 up to and including 100442	Decisions in relation to the x-factor 2002/2003, as referred to in section 80 of the Gas Act in respect of network managers	29-08-01
100418 up to and including 100442	Decisions in relation to the x-factor 2002/2003, as referred to in section 25 of the Gas Act in respect of licence holders	29-08-01

Decisions of the Director of DTe in respect of the determination of guidelines for 2002

	Decision	Date
	Guidelines for Gas Transmission for the Year 2002	30-08-01
	Guidelines for Gas Storage for the Year 2002	30-08-01

Decisions of the Director of DTe in respect of the determination of gas tariffs for 2001

No.	Decision	Date
100222 up to and including 100247	Decisions in respect of the determination of the maximum tariffs which network managers and licence holders may charge for the transmission of gas for captive customers and the supply of gas to captive customers from 1 April 2001 until 1 January 2002	29-03-01
100499/20 up to and including 45	Decisions in respect of the gas supply tariffs for captive customers for the second quarter of the year 2001	24-10-01
100499/46 up to and including 71	Decisions in respect of the gas supply tariffs for captive customers for the third quarter of the year 2001	24-10-01
100586 up to and including 100610	Decisions in respect of the determination of the regulated maximum consumption-related gas transmission tariffs for the year 2002, as referred to in section 80 of the Gas Act	12-11-01
100611 up to and including 100635	Decisions in respect of the determination of the regulated maximum surcharge on the procurement costs of gas for the year 2002, as referred to in section 26 of the Gas Act	12-11-01
100640 up to and including 100664	Decisions in respect of gas supply tariffs for captive customers for the fourth quarter of the year 2001	12-12-01

Decisions of the Director of DTe in respect of the granting of licences to captive customers

No.	Decision	Date
100196 up to and including 100221	Decisions in respect of the granting of licences for the supply of gas to captive customers	28-03-01

100197	Decision in respect of the amendment of the licence for the supply of gas to captive customers	23-06-01
100202 and 100205	Decisions in respect of the amendments of licences for the supply of gas through captive customers	04-07-01
100196, 100198 up to and including 100201, 100203 and 100204, 100206 up to and including 100216 and 100218 up to and including 100221	Decisions in respect of the amendments of licences for of gas through captive customers the supply	13-07-01
100197	Decision in respect of the amendment of the licence for the supply of gas to captive customers	30-07-01

Decisions of the Director of DTe in respect of binding instructions

No.	Decision	Date
100249	Decision pursuant to the joint petition from VEMW, VOEG and VNCI for the issuing of a binding instruction to N.V. Nederlandse Gasunie and jointly by the Horticulture Sector Committee of the Horticulture Marketing Board [Productschap Tuinbouw, Sectorcommissie Tuinbouw], and Mr F.H. Hoogervorst	23-05-01
100520 up to and including 100544 and 100546	Decisions in respect of the issuing of binding instructions in relation to the assessment of indicative tariffs and conditions for the transmission of gas	19-12-01
100554	Decision in respect of the issuing binding instructions to N.V. Nederlandse Gasunie as well as a decision on petitions from LTO and PT jointly and VEMW, VNCI, VOEG and FME-CWM jointly in respect of the issuing of a binding instruction.	20-12-01

Decisions of the Director of DTe on administrative appeals

No.	Decision	Date
100202	Decision on the administrative appeal against the decision of 28 March 2001, No. 100202/8 in respect of the issuing of a licence to Essent Energie Brabant B.V. to supply captive customers	04-09-01
100205	Decision on the administrative appeal against the decision of 28 March 2001, No. 100205/8 in respect of the issuing of a licence to Essent Energie Limburg B.V. to supply captive customers	04-09-01
100555	Decision on the administrative appeal by the Horticulture Marketing Board [Productschap Tuinbouw] against the explanation by DTe of the concept of a 'free connection' in the Gas Act	17-10-01

Withdrawn administrative appeals against decisions of the Director of DTe

No.	Parties	Date
100197	Administrative appeal of Delta Netwerkbedrijf against the decision of 30 July 2001, No. 100197, amending the licence for the supply of gas to captive customers	31-07-01

Advice given by the Director DTe to the Minister

No.	Advice	Date
01003516	Advice in relation to the possibility that the problems on the electricity market in California may also occur in the short or medium to long term in the Netherlands	17-01-01
01040118	Advice in relation to the findings with regard to the capacity plans of grid managers	01-08-01
01013568	Advice in relation to the final report relating to the research into the distribution of available import capacity in the Netherlands (research by Professor Haubrich of Technische Universität Aachen)	08-03-01
100169 up to and including 100195	Advice in relation to the approval of the appointment of gas network managers	23-08-01
01060375	Advice in relation to certainty of supply of electricity in the Netherlands in the long term	23-11-01
01063544	Advice in relation to the final report on the customer satisfaction survey and the response of DTe	06-12-01
Advice given a 9 occasions	Advice in relation to exemptions from the obligation to appoint a grid or network manager	Various dates

Addendum II Court Rulings

1 Rulings of the (Presiding Judge of the) Court of Rotterdam

In deviation from the General Administration Law Act, only the Court of Rotterdam is competent to hear appeals against decisions pursuant to the Competition Act. This includes judicial appeals which reached a conclusion in the year under review and the rulings of the Presiding Judge of the Court of Rotterdam in relation to petitions for injunctions, as referred to in section 8(81) of the General Administrative Law Act.

Court	Date	Case	No.	Subject
	02-02-01	Vendex-KBB	166	The judicial appeal was withdraw by the parties.
	06-02-01	Stork FDO	2264	The judicial appeal was withdraw by the parties.
	16-03-01	Modint	2379	The application for an injunction was withdrawn.
	16-03-01	Nederlandse Kleding Conventie	2345	The application for an injunction was withdrawn.
Rotterdam	16-05-01	Vereniging Koninklijke Nederlandse Maatschappij voor Diergeneeskunde [veterinary association] versus Director-General of NMa	MEDED 99/2584	Sections 6 and 17 of the Competition Act; deontological code of conduct; grounds for the judicial appeal; appeal unfounded
	03-06-01	Dumeco B.V.	2405	Application for an injunction withdrawn
	14-06-01	Vereniging Dakbedekkingsbrache Nederland	1873	The judicial appeal was withdraw by the parties.
Rotterdam	21-06-01	Essent N.V. versus Director-General of NMa	MEDED 99/2633-SIMO 2633-SIMO	The appeal is directed against the condition linked to the licence granted for the concentration; appeal unfounded verbonden; beroep ongegrond.
Rotterdam	21-06-01	KPN Telecom B.V. and Denda Multimedia versus OPTA	TELEC 01/066, 01/111 and 01/191-SIMO 01/191-SIMO	Telecommunications; tariffs judicial testing; boundaries of OPTA's authority; appeal unfounded
Presiding Judge, Rotterdam	02-07-01	Stichting Witgoed, Stichting Bruingoed and NVMP versus Director-General of NMa	VMEDED 01/1080-SIMO	The application for an injunction against the ruling by the Director-General of NMa in relation to notice given to producers and importers that transparent passing on of costs is not obligatory and in relation to the amendments to public statements was dismissed
Rotterdam	01-08-01	A versus Director-General of NMa	1874-SIMO	Appeal against the dismissal of the complaint against the municipality of Amsterdam; appeal unfounded

Rotterdam	01-08-01	Van Vollenhove Olie versus Director-General of NMa with the third parties the municipality of Venlo and Schreurs Oliemaatschappij B.V.	MEDED 99/ 1690-SIMO	Appeal against the dismissal of the complaint against the municipality of Venlo on the grounds that 1) there was no agreement or concerted practice involving Venlo and Schreurs Oliemaatschappij and 2) the municipality of Venlo could not be deemed to be an undertaking; appeal unfounded
Rotterdam	09-08-01	X versus Director-General of NMa with the third party PTT Post B.V.	MEDED 99/ 1783-SIMO	Appeal against the ruling that a notice of appeal against the dismissal of a complaint against PTT Post was inadmissible on the grounds that PTT Post did not abuse a dominant position; appeal unfounded
Rotterdam	09-08-01	A B.V. versus Director-General of NMa with the third party PTT Post B.V.	MEDED 99/ 1836-SIMO	On judicial appeal, the administrative appeal of Aasmail was declared inadmissible since Aasmail had wrongly been deemed to be an interested party in the administrative appeals proceedings.
Rotterdam	26-09-01	Inter Partner Assistance S.A. versus Director-General of NMa with the third party Stichting Incident Management Nederland.	MEDED 00/ 886-SIMO	Appeal against the exemption granted to Stichting Incident Management Nederland by the Director-General of NMa; appeal unfounded
Rotterdam	14-06-01	Galerie Y and the Management Board of Mondriaan Stichting	BELEI 99/ 1318-SIMO	Section 1(f), Competition Act.; government body acting in the capacity of a subsidising institution is not an undertaking in terms of section 6 of the Competition Act and/or Article 81 of the EC Treaty.
Presiding Judge, Rotterdam	12-10-01	VBBS et al. versus Director-General of NMa	VMEDED 01/ 1551-SIMO	Application for an injunction dismissed
Rotterdam	23-10-01	Centrale Organisatie voor de Vleesgroot-Handel [organisation representing meat wholesalers] and Director-General of NMa	MEDED 00/ 910-SIMO	Appeal against the decision of the Director-General of NMa not to grant an exemption to Centrale Organisatie voor de Vleesgroothandel; appeal unfounded

2 Rulings of the Trade and Industry Appeals Tribunal

Appeals against rulings of the Court of Rotterdam in relation to judicial appeals against decisions pursuant to de Competition Act may be filed with the Trade and Industry Appeals Tribunal [College van Beroep voor het bedrijfsleven]. Appeals may be brought before the Trade and Industry Appeals Tribunal against decisions taken by DTe in administrative appeals proceedings.

Trade and Industry Appeals Tribunal	Date	Case	No.	Subject
Presiding Judge, Trade and Industry Appeals Tribunal	09-02-0	Vereniging voor Energie, Milieu en Water [Association for Energy, Environment and Water]	Awb 00/945	Application for an injunction *inter alia* against DTe dismissed. This application related to the Energy Act *[Energiewet]*.
Presiding Judge, Trade and Industry Appeals Tribunal	22-03-01	A, C, E and G versus de Minister of Economic Affairs and DTe	Awb 18050	The application for an injunction pending a decision on appeal suspending the decisions was dismissed. This application related to the Energy Act.
Trade and Industry Appeals Tribunal	25-04-01	OPTA, Koninklijke KPN N.V., KPN Telecom B.V., KPN Mobile The Netherlands B.V. and Dutchtone N.V.	00/829, 00/854 and 00/857	The appeals filed by Dutchtone and OPTA were declared to be valid in part; the appeal by Koninklijke KPN N.V. and KPN Telecom B.V. was declared inadmissible. The appeal related to the Telecommunications Act *[Telecommunicatiewet]*.
Trade and Industry Appeals Tribunal	05-06-01	Apotheek Neptunus versus *College tarieven Gezondheidszorg* [Health Care Charges Board]	Awb 99/85, 00/69 and 00/628	Section 5, 101 and 102 of the EC Treaty (currently Articles 10, 96 and 97 of the EC Treaty); the appeals were declared unfounded
Trade and Industry Appeals Tribunal	18-07-01	Secretary of State for Transport and Water Management, Libertel N.V., Versatel Telecom International N.V . and Dutchtone Multimedia B.V .	Awb 00/910, 00/913, 00/924 and 00/925	Insofar as the appeal by the Secretary of State were directed at the inadmissibility of the appeal by Versatel Telecom International N.V., they were declared inadmissible; the appeal by Versatel 3G N.V. was declared inadmissible. This appeal relates to the Telecommunication Act and the General Administrative Law Act.
Trade and Industry Appeals Tribunal	31-08-01	A versus Minister of Economic Affairs	Awb 98/473	The administrative appeal was declared inadmissible in the judicial appeals proceedings since A had wrongfully been deemed to be an interested party in the administrative appeals proceedings. The dispute was based on sections 19 and 24 of the Economic Competition Act [Wet economische mededinging].

Trade and Industry Appeals Tribunal	24-09-01	Parenco B.V. versus Director of DTe	Awb 01/354	Appeal against the ruling that the notice of appeal of Parenco was inadmissible; judicial appeal apparently inadmissible. This appeal relates to the Energy Act.
Presiding Judge, Trade and Industry Appeals Tribunal	19-10-01	Essent Zuid B.V. and Edon Groep B.V. versus de Director-General of NMa	Awb 01/793 VV	Application for suspension of the conditions linked to the concentration licence was dismissed.
Trade and Industry Appeals Tribunal	24-10-01	W. Bakker Electronics B.V. versus Minister of Economic Affairs	Awb 99/850	Appeal against the refusal to grant an application to take measures against Multichoice, in accordance with section 24 of the Economic Competition Act [Wet economische mededinging]; appeal unfounded.
Presiding Judge, Trade and Industry Appeals Tribunal	07-11-01	NV Nutsbedrijf Regio Eindhoven vs Director of DTe	Awb 01/528, 01/529 and 01/530	The petition for an injunction to the effect that the Presiding Judge should declare that for the duration of the administrative appeal and (possibly) the judicial appeal the gross margin which determines the level of the supply tariffs for captive customers shall amount to EUR 4.1 million was dismissed. This application related to the Energy Act [Energiewet].
Trade and Industry Appeals Tribunal	05-12-01	Director-General of NMa and Wegener	Awb 00/867 and 00/870	The appeal by the Director-General of NMa was declared valid; the appeal by Wegener was declared inadmissible.

3 Rulings by Dutch Courts

The Competition Act may also be invoked in proceedings between market players brought before the Civil Court, often in interlocutory proceedings.

Court	Date	Case	No.	Subject
Utrecht	14-03-01	V&S Groothandel B.V. versus J. Klop	104516/ HA ZA 99-1519 BL	Transitional right; section 100 of the Competition Act; franchise; exclusive obligation to purchase; directive 4087/88
Presiding Judge, Court of Middelburg	28-06-01	GlasGarage Breda B.V. versus Onderlinge Verzekeringen Maatschappij	ZLM U.A. KG 88/2001	Section 6 Competition Act; without further investigation, an opinion cannot be given on section 6 of the Competition Act; such a investigation cannot be carried out within the framework of kg proceedings.
Presiding Judge, Court of Alkmaar	29-06-01	Canal+ Nederland B.V. versus Multikabel N.V.	KG 240/ 2001 JJ	Contract will only become final is NMa and/or OPTA has given their/its opinion on the documents submitted by Canal+.
Presiding Judge, Court of The Hague	06-07-01	Nederlandse Gasunie versus State of the Netherlands	KG 01/646	Publication of sales prices by whatever means, including publication on Internet, is prohibited.

Presiding Judge, Court of Haarlem	09-07-01	N.V. Luchthaven Schiphol versus Dutchbird	75565/KG ZA 01-349	Allocation of slots; discussion of competition law excluded since the slot coordinator is not a party to the proceedings.
Presiding Judge, Court of Haarlem	17-07-01	Dutchbird versus Transavia Airlines C.V and Transavia Airlines B.V.	75723/KG ZA 01-362	Section 24 of the Competition Act; 'slot-abuse'; it is not easy to establish in interlocutory proceedings that a dominant position has been abused.
Presiding Judge, Court of Zutphen	20-07-01	De Baar Trucks B.V. versus Daf Trucks et al.	40879/ KG ZA 01-240	Directive 1475/95; exclusivity of the dealer agreement.
The Hague	25-07-01	Dutchtone N.V. versus State of the Netherlands and Koninklijke KPN N.V .	109653/HA ZA 98-411582	No conflict with Article 86(1) of the EC Treaty in conjunction with Article 82 of the EC Treaty; no state support in terms of Article 88 of the EC Treaty.
Presiding Judge, Court of Arnhem	28-08-01	Houterman Lent B.V. versus VOF van de Coolwijk et al.	74602/KG ZA 01-310	Exclusive right to initial assistance of motorists in difficulties; unlawful practices.
Presiding Judge, Court of Utrecht	25-10-01	De Kaasspecialist B.V. versus Stichting Pensioenfonds Stork	136098/KG ZA 01/963	Section 6 of the Competition Act; franchise; freedom to exercise discretion and contractual freedom
Presiding Judge, Court of Roermond	01-11-01	Vollenhoven Olie B.V. versus B.V. Inter-Zuid Transport	46778/KG ZA 01-242	Duration of exclusive procurement or non-competition clause; application of European notification in minor cases in accordance with section 6 of the Competition Act
Presiding Judge, Court of Roermond	22-11-01	Concell B.V. versus MCS Diagnostics B.V.	47172/KG ZA 01-268	Non-competition clause; Directives 2790/1999 and 1984/83.
Presiding Judge, Court of Amsterdam	29-11-01	KaZaA B.V. versus Vereniging Buma and Stichting Stemra OdC	KG 01/2264	No abuse of a dominant position
Presiding Judge, Haarlem	07-12-01	Boomerang Nederland B.V. versus Premium Media B.V.	78965/KG ZA 01-605	Section 6 and 24 of the Competition Act; exclusivity.
Presiding Judge, Court of Alkmaar	28-12-01	Waayer B.V. versus Ahold Vastgoed B.V.	455/2001 JJ	Section 6 Competition Act; exclusive right of sale.

Court	**Date**	**Case**	**No.**	**Subject**
The Hague	30-01-01	N.V. Holdingmaatschapij De Telegraaf, De Telegraaf Tijdschriften Groep B.V. and Dagblad De Telegraaf versus NOS, AVRO, KRO, NCRV, EO, TROS, VARA and VPRO	99/1.65 (interlocutory proceedings)	Section 24 of the Competition Act, Magill doctrine; programme listings.
The Hague	22-03-01	Vereniging Centraal Bureau voor de Rijn- en Binnenvaart [Central Bureau for Rhine and Inland Shipping] and Internationale Tankscheep-vaartuigenvereniging [International Tanker Shipping Association] versus State of the Netherlands	95/663	Articles 86 and 87 of the EC Treaty; market and public authorities.

Arnhem	08-05-01	Appellant versus respondent 1, 2 and 3	2000/074	Transitional right, section 100 of the Competition Act; section 6 Competition Act; non-competition clause.
The Hague	31-05-01	KNVB versus Stichting Feyenoord	00/2	Judgement of the Court of Rotterdam of 9 September 1999 was upheld.
Presiding Judge, 's-Hertogenbosch	09-05-01	Mulleners Vastgoed B.V. versus Meulen Bouwpromotie B.V. and Municipality of Weert	KG C0001087/ RO	Section 6 of the Competition Act; agreement in relation to the realisation of housing with price fixing for the less wealthy.
Arnhem	04-12-01	Wijnhoven and Meulens versus Zuivel Coöperatie Campina Melkunie U.A.	2000/810 KG	Section 6 of the Competition Act; refusal to purchase or imposition of a discount by the buyer on the supplier because the supplier does not have KKM recognition.

Supreme Court	**Date**	**Case**	**No.**	**Subject**
Supreme Court	16-02-01	B.V. Maatschappij Drijvende Bokken versus De Stichting Pensioenfonds voor de vervoer- en havenbedrijven [pension fund for transport and harbour companies]	16.300 (C96/119HR)	The pension fund is an undertaking in terms of Article 81 of the EC Treaty; obligatory membership of a pension fund is not in conflict with Articles 81, 82 and/or 86 of the EC Treaty.
Supreme Court	12-10-01	N.V. Nutsbedrijven Maastricht versus N.V. Waterleiding Maatschappij Limburg	1310	Water Supply Act [Waterleidingwet]; Article 90 in conjunction with Article 86 (currently Article 86 in conjunction with Article 82) of the EC Treaty.

Colophon

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