

*Please note: This is an unofficial translation of the Dutch original text. The Dutch version is authentic.*

## **Act of 22 May 1997, Providing New Rules for Economic Competition (Competition Act)**

We Beatrix, by the grace of God, Queen of the Netherlands, Princess of Orange-Nassau, etc. etc. etc.

Greetings to all who see or hear these presents! Be it know:

Whereas We have considered that it is desirable to replace the Economic Competition Act<sup>1</sup> by adopting new rules in respect of competition agreements and dominant positions, as well as to determine rules in respect of the regulation of mergers of undertakings and, in doing so, to follow as far as is possible rules in respect of competition, pursuant to the Treaty establishing the European Community;

We, therefore, having heard the Council of State, and in consultation with the States General, have approved and decreed, as We hereby approve and decree:

## CHAPTER 1. Definition of Terms

### Section 1

The following definition of terms shall apply for the purposes of this Act and the decisions based upon it:

- a) Our Minister: Our Minister of Economic Affairs;
- b) competition authority: the Netherlands Competition Authority, as referred to in section 2(1);
- c) Board: the Board of the competition authority;
- d) Treaty: the Treaty establishing the European Community;
- e) agreement: an agreement, as referred to in Article 85(1) of the Treaty;
- f) undertaking: an undertaking, as referred to in Article 85(1) of the Treaty;
- g) association of undertakings: an association of undertakings, as referred to in Article 85(1) of the Treaty;
- h) concerted practices: concerted practices, as referred to in Article 85(1) of the Treaty;
- i) dominant position: a position of one or more undertakings which enables them to prevent effective competition being maintained on the Dutch market or a part thereof, by giving them the power to behave to an appreciable extent independently of their competitors, their suppliers, their customers or end-users;
- j) investigation: actions performed with a view to determining whether an violation has been committed;
- k) Regulation 1/2003: Council Regulation (EC) No. 1/2003 of the Council of the European Union of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJEC 2003, L 1);
- l) Regulation 139/2004: Council Regulation (EC) No. 139/2004 of the Council of the European Union of 20 January 2004 on the control of concentrations between undertakings (OJEC L 24);
- m) Competition Regulation: the Regulation as specified in subsections (k) and (l);
- n) consumer organizations: foundations or associations with full legal powers whose objective it is, pursuant to their articles, to protect the collective interests of consumers.

## CHAPTER 2: The Netherlands Competition Authority

### § 1. General

#### Section 2

1. A Netherlands Competition Authority shall exist.
2. The competition authority shall be governed by a Board.

#### Section 3

1. The Board shall consist of three members, one of whom shall be the Chairperson.
2. Appointments, suspensions and dismissals shall be based on recommendations put forward by Our Minister by royal decree. Appointments shall be based on expertise in the field of the responsibilities with which the Board is charged.
3. The Chairperson shall be appointed for a term of no more than six years, while the other members shall be appointed for terms of no more than four years. The members may be reappointed once, for a term of no more than four years.
4. A member of the Board may be dismissed at his own request. He may also be suspended or dismissed on the ground of unsuitability or incompetence with regard to the position he holds or on another serious personal ground.

#### Section 4

1. A member of the Board shall not hold any other positions that are deemed undesirable in view of his or her duty to perform his or her job properly or to remain independent therein or to preserve the confidence that is placed therein.
2. A member of the Board shall notify Our Minister of any intention to accept another position other than one based on his job.
3. Any other positions that a member of the Board holds, except those based on his job, shall be publicly disclosed. Public disclosure shall be realized by making a list of such other positions available for inspection at the offices of the competition authority and with Our Minister.
4. A member of the Board shall not have any financial or other interests in undertakings that may give rise to questions concerning his or her impartiality.

#### Section 4a

Our Minister shall determine the remuneration and other rules regarding the legal position of the members of the Board.

#### Section 4b

1. The Board shall adopt a set of management rules, which shall at least include rules on methods and procedures. The management rules shall also include rules for allocating tasks and duties for when preparing Board decisions.
2. The management rules shall be subject to Our Minister's approval. That approval may be withheld on the grounds that the management rules conflict with the law or that, in Our Minister's opinion, the management rules may prevent the Board from carrying out its duties properly.

3. Upon having received Our Minister's approval, the management rules shall be published in the *Netherlands Government Gazette*.

## § 2. Duties and powers

### Section 5

The Board shall be charged with duties aimed at implementation of this Act, and implementation of other laws, insofar as the law in question so specifies.

### Section 5a

1. Our Minister shall provide the Board with staff for the purpose of carrying out the duties as meant in Section 5.
2. That staff shall be under the Board's authority and shall be accountable exclusively to the Board with regard to activities.
3. The Board shall draw up mandate regulations with regard to the powers of the staff.
4. The mandate regulations shall set out rules for granting general mandates concerning the implementation of the Electricity Act 1998 and the Gas Act, and may set out rules concerning the implementation of other laws.
5. The Board shall provide for a specific organizational unit that is charged with the enforcement and oversight of the Dutch Electricity Act 1998 and the Dutch Gas Act.
6. The rule, as referred to in subsection (3), shall be subject to Our Minister's approval. Our Minister shall withhold his approval if, in his opinion, the mandate regulations may prevent the Board from carrying out its duties properly. Upon having received Our Minister's approval, the mandate regulations shall be published in the *Netherlands Government Gazette*.
7. If Our Minister is of the opinion that the mandate regulations prevent the duties from being performed properly, he may ask the Board to amend the mandate regulations.
8. If the Board has not followed up on the request, as meant in subsection (7), Our Minister may instruct the Board to amend the mandate regulations in the manner he wishes.

### Section 5b

1. Our Minister may instruct the Board to carry out activities in connection with the implementation of regulations concerning competition pursuant to the Treaty, insofar such has not already been arranged in or pursuant to the law, and activities concerning competition relating to other conventions or international agreements.
2. Our Minister may issue instructions to the Board concerning the performance of the activities as meant in subsection (1), and concerning the position to be adopted by the Board in advisory committees, as referred to in Article 14(2) of Regulation 1/2003 and Article 19(4) of Regulation 139/2004, on the understanding that any instruction concerning a position in an advisory committee shall not affect the competition aspects of individual cases.

### Section 5c

1. Whether at the request of any of Our other Ministers, Our Minister may instruct the Board to issue a report on the effects for competition of intended or current regulations or of an intended or current decree.
2. The Board may also issue a report, as meant in subsection (1), on its own initiative.

3. Reports to another of Our Ministers shall be issued through Our Minister.
4. At the request of one or both Houses of the States General, the Board, acting through Our Minister, shall report to both Houses of the States General. Our Minister shall submit the report in question to both Houses of the States General without delay. Our Minister may include his findings with the report.

### **§ 3. Provision of information, control and supervision**

#### **Section 5d**

1. Our Minister may adopt policy rules concerning the implementation of the powers allocated to the Board.
2. Policy rules concerning the implementation of the powers allocated to the Board in this Act may concern, in whole or in part, the manner in which the Board is to include other interests besides economic interests in its considerations for purposes of section 6(3).
3. The policy rules shall be announced by publication in the *Netherlands Government Gazette*.

#### **Section 5e**

1. Upon request, the Board shall provide Our Minister with all information he needs to perform his duties. Our Minister may demand access to all business information and documents insofar as such is necessary, within reason, for the performance of his duties.
2. After the Board has been allowed the opportunity to comment, Our Minister may adopt further rules concerning exchanges of information between Our Minister and the Board.

#### **Section 5f**

1. If the Board is at serious default in the performance of its duties, in Our Minister's opinion, Our Minister may take whatever measures are necessary.
2. With the exception of urgent cases, such measures shall not be taken until the Board has been allowed the opportunity to perform its duties properly as yet, within a time limit set by Our Minister.
3. If the neglect of duties, as meant in subsection (1), concerns activities for the implementation of another law, as referred to in section 5, Our Minister shall consult Our other Minister concerned before taking any measures.
4. Our Minister shall notify both Houses of the States General without delay of any measures he has taken, as meant in subsection (1).

#### **Section 5g**

1. Every year, before July 1<sup>st</sup>, the Board shall draw up an annual report. The annual report shall concern the implementation of this Act and the implementation of other laws, as referred to in section 5 insofar as the law in question does not provide for a separate obligation to draw up a report.
2. The report shall be submitted to Our Minister, and if applicable to Our other Minister concerned, and shall be made available to the general public.
3. Our Minister shall present the report, accompanied by his findings in that respect and the findings of Our other Minister, as meant in subsection (2), to both Houses of the States General before September 1<sup>st</sup>.

**Section 5h**

1. Every five years, Our Minister shall report to the States General on the effectiveness and efficiency of the Board's performance.
2. Insofar as the report concerns the activities for the implementation of another law, as referred to in section 5, Our Minister shall consult with Our other Minister concerned before drawing up his report.

**Section 5i**

1. Every year, before April 1<sup>st</sup>, the Board shall submit the draft budget for the following year to Our Minister.
2. If, during the year, significant discrepancies arise or become probable between the actual and the budgeted income and expenditure, or revenue and expense, the Board shall notify Our Minister of that fact without delay, with an explanation of the cause for the discrepancies.

**Section 5j**

The Board shall ensure the necessary technical and organizational facilities, based on the rules that apply in that connection to Government Departments, to secure the information held by the competition authority against loss or impairment and against unauthorized access, alteration or provision of that information.

**Section 5k**

The Board shall periodically provide Our Minister with information concerning its products and services provided and yet to be provided.

**Section 5l**

The Board may adopt implementation regulations for the performance of the duties with which it is charged. The Board shall publish such implementation regulations in the Netherlands Government Gazette.

## CHAPTER 3: Anti-competitive Agreements

### § 1. Prohibition of anti-competitive agreements

#### Section 6

1. Agreements between undertakings, decisions by associations of undertakings and concerted practices of undertakings, which have the intention to or will result in hindrance, impediment or distortion of competition on the Dutch market or on a part thereof, are prohibited.
2. Agreements and decisions that are prohibited under subsection (1) are legally null and void.
3. Subsection (1) shall not apply to agreements, decisions and concerted practices which contribute to the improvement of production or distribution, or to the promotion of technical or economic progress, while allowing consumers a fair share of the resulting benefits, and which do not:
  - a. impose any restrictions on the undertakings concerned, ones that are not indispensable to the attainment of these objectives, or
  - b. afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products and services in question.
4. Any undertaking or association of undertakings invoking subsection (3) shall provide proof that the conditions of that subsection are met.

#### Section 7

1. Section 6(1) shall not apply to agreements, decisions and concerted practices, as referred to in the said section, if:
  - a. no more than eight undertakings are involved in the agreement or concerted practice in question, or if no more than eight undertakings are involved in the respective association of undertakings; and
  - b. the combined turnover of the undertakings party to the respective agreement or the concerted practices in the preceding calendar year, or the combined turnover of the undertakings which are members of the respective association of undertakings does not exceed:
    - i. €5,500,000 if the agreement, concerted practice or association involves only undertakings whose core activity is the supply of goods
    - ii. €1,100,000 in all other cases.
2. Without prejudice to the provisions set out in subsection (1), section (6)(1) shall furthermore not apply to agreements, decisions and concerted practices as referred to in the said section insofar as they involve undertakings or associations of undertakings that are actual or potential competitors on one or more of the relevant markets, if:
  - a. the combined market share of the undertakings or associations of undertakings involved in the agreement, decision or concerted practice is no greater than 5 per cent on any of the relevant markets affected by the agreement, decision or concerted practice; and
  - b. the combined turnover of the undertakings or associations of undertakings involved in the agreement, decision or concerted practice from the goods or services falling within the scope of the agreement, decision or concerted practice during the previous calendar year was no more than €40,000,000.
3. If separate agreements with the same purpose have been concluded between an undertaking or association

of undertakings and two or more other undertakings, such agreements shall be regarded jointly as a single agreement for the purpose of the application of subsection (1).

4. By Order-in-Council, subject to conditions and restrictions if necessary, section 6(1) may be declared inoperative in respect of categories of agreements, decisions or practices, as referred to in the said section and described in that order, which are clearly of minor significance from the point of view of competition.
5. The figures stipulated in subsection (1)(a), and the amounts stipulated in subsection (1)(b), may be amended by Order-in-Council.

#### **Section 8**

1. The calculation of the turnover, as referred to in sections 7(1)(b) and 7(2)(b) shall be based on the provisions of section 377(6) of Book 2 of the Netherlands Civil Code in respect of net turnover.
2. If an undertaking is part of a group, as referred to in section 24b of Book 2 of the Netherlands Civil Code, the turnover of all the undertakings comprising that group shall be added together for the purpose of calculating the turnover. For the purposes of this calculation, transactions among the undertakings that make up that group shall be disregarded.
3. For the purpose of calculating the combined turnover of the undertakings involved, as referred to in sections 7(1)(b) and 7(2)(b), transactions between the undertakings shall be disregarded.

#### **Section 9**

1. The Board may issue a decision declaring that section 6(1) is nonetheless applicable to an agreement between undertakings, a decision by an association of undertakings or a concerted practice of undertakings, which, pursuant to section 7(1), (2) or (4), are not subject to section 6(1), if, in view of market relationships on the relevant market, such agreements, decisions or practices have a significant detrimental effect on competition.
2. The Board shall notify interested parties in writing of its intention to issue a decision, as referred to in subsection (1), stating the reasons for doing so.
3. In derogation from paragraph 4.1.2 of the General Administrative Law Act,<sup>2</sup> the Board shall afford interested parties an opportunity to state their views, verbally or in writing, before applying subsection (1).

#### **Section 10**

Section 6 shall not apply to agreements, decisions or practices, as referred to in that section, which are directly associated with a concentration, as referred to in section 27, and are necessary for the implementation of the respective concentration.

### **§ 2. Exception in relation to the performance of special tasks**

#### **Section 11**

Section 6(1) shall apply to agreements, decisions or practices, as referred to in that section, involving at least one undertaking or association of undertakings entrusted with the provision of services in the public economic interest, by law or by an administrative body, only insofar as the application of the said section does not prevent the performance of the special task entrusted to the said undertaking or association of undertakings.

### § 3. Exemptions

#### Section 12

Section 6(1) shall not apply to agreements between undertakings, decisions by associations of undertakings and concerted practices of undertakings to which section 85(1) of the Treaty is declared inoperative, pursuant to a regulation of the Council of the European Union or to a regulation of the Commission of the European Communities.

#### Section 13

1. Section 6(1) shall not apply to agreements between undertakings, decisions by associations of undertakings and concerted practices of undertakings which cannot have a detrimental effect on trade between the Member States of the European Communities, or which do not hinder, impede or distort competition within the common market, and which, if this were the case, would be exempt, pursuant to a regulation, as referred to in section 12.
2. The Board may issue a decision declaring section 6(1) nonetheless applicable to an agreement between undertakings, a decision by associations of undertakings or a concerted practice by undertakings which, pursuant to subsection (1), are not subject to section 6(1), if circumstances arise which, pursuant to the respective regulation, could result in the said regulation being declared inoperative.
3. Section 3(4) of the General Administrative Law Act applies to the preparation of the decision.
4. The decision shall come into force no earlier than six weeks after the date on which it is made available for inspection, pursuant to section 3:44(1a) of the General Administrative Law Act.

#### Section 14

Section 6(1) shall not apply to agreements between undertakings, decisions by associations of undertakings and concerted practices of undertakings for which dispensation has been granted, pursuant to Article 85(3) of the Treaty.

#### Section 15

1. By Order-in-Council, subject to conditions and restrictions if necessary, section 6(1) may be declared inoperative in respect of such categories of agreements, decisions or practices, as referred to in the said section, as defined in the said order, which contribute to the improvement of production or distribution of goods or to the promotion of technical or economic progress, while allowing consumers a fair share of the resulting benefits, and which do not:
  - a. impose any restrictions on the undertakings concerned, ones that are not indispensable to the attainment of these objectives, or
  - b. afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products and services in question.
2. An Order-in-Council, as referred to in subsection (1), may stipulate that the Board may issue a decision declaring section 6(1) nonetheless applicable to an agreement, a decision or a concerted practice which, pursuant to that Order, is not subject to section 6(1), if the conditions set out in that Order-in-Council are satisfied.
3. Section 3(4) of the General Administrative Law Act applies to the preparation of the decision.
4. The decision shall come into force no earlier than six weeks after the date on which it is made available for inspection, pursuant to section 3:44(1a) of the General Administrative Law Act.

#### Section 16

Section 6(1) shall not apply to the following:

- a. collective labor agreements as defined in section 1(1) of the Dutch Collective Labor Agreement Act;

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- b. agreements within an industry or sector between one or more employers' organizations and one or more unions that pertain exclusively to pensions as meant in section 1(1)(a) of the Pension and Savings Funds Act;
- c. agreements or decisions by organizations of professionals that pertain exclusively to participation in an occupational pension scheme as defined in section 1(1)(d) of the Occupational Pension Scheme (Obligatory Participation) Act, if a request for obligation by Our Minister of Social Affairs and Employment has been lodged in accordance with section 2 of that Act, pertaining to such a scheme, and the request has not been rejected.

#### **§ 4. [Repealed as of August 1, 2004]**

##### **Section 17**

[Repealed as of August 1, 2004]

##### **Section 18**

[Repealed as of August 1, 2004]

##### **Section 19**

[Repealed as of August 1, 2004]

##### **Section 20**

[Repealed as of August 1, 2004]

##### **Section 21**

[Repealed as of August 1, 2004]

##### **Section 22**

[Repealed as of August 1, 2004]

##### **Section 23**

[Repealed as of August 1, 2004]

## **CHAPTER 4: Dominant Positions**

### **§ 1. Prohibition of the abuse of dominant positions**

#### **Section 24**

1. Undertakings are prohibited from abusing a dominant position.
2. The implementation of a concentration, as described in section 27, shall not be deemed to be an abuse of a dominant position.

### **§ 2. Exception in relation to the performance of special tasks**

#### **Section 25**

1. The Board may, on request, declare section 24(1) inoperative in respect of a designated practice, insofar as the application of section 24(1) prevents the provision of a service in the public economic interest, entrusted to an undertaking by law or by an administrative body.
2. A declaration, as referred to subsection (1), may be issued subject to restrictions; a declaration may be issued subject to conditions.

## CHAPTER 4a. Financial Transparency within Certain Undertakings

### Section 25a

The following definitions shall apply to this chapter:

1. directive: Directive No. 2000/53/EC of the Commission of the European Communities of 26 July 2000 (OJEC L 193) amending Directive No. 80/723/EEC in relation to the transparency of financial relations between Member States and public undertakings;
2. exclusive right: a right granted by law or by a decision of an administrative body to an undertaking, whereby the right to provide a service or to carry out an activity is reserved for the said undertaking;
3. special right: a right, granted by law or by a decision of an administrative body, to a limited number of undertakings, whereby within a certain geographical area:
  - a. the number of such undertakings, which may provide a service or carry out an activity, is restricted to two or more in accordance with criteria other than the criteria of objectivity, fairness and non-discrimination;
  - b. various competing undertakings, which may provide a service or may carry out an activity, are designated in accordance with criteria other than the aforementioned criteria; or
  - c. benefits are granted to one or more undertakings in accordance with criteria other than the aforementioned criteria, as a result of which the opportunity for any other undertaking to carry out the same activities within the same geographical area subject to materially equivalent conditions shall be appreciably obstructed;
4. various activities: those include, on the one hand, products or services, in relation to which an undertaking has been granted a special or exclusive right, or all the services in the public economic interest with which an undertaking is entrusted and, on the other hand, each other individual product or each other individual service in respect of which the undertaking is active.

### Section 25b

1. Undertakings, to which a special or exclusive right has been granted, in accordance with Article 86 (1) of the Treaty, or which, in accordance with Article 86 (2) of the Treaty, are entrusted with providing a service in the public economic interest, which, in respect of this service, receive compensation in any form, and which carry out various activities, shall keep administrative records such that:
  - a. the registration of the income and expenditure of the various activities is separated;
  - b. all income and expenditure is properly allocated in accordance with objectively justifiable principles of cost accounting;
  - c. the principles of cost accounting, on which the administration is based, are clearly recorded.
2. The undertaking shall keep the data, referred to in subsection (1)(a), (b) and (c), for five years, calculated from the end of the financial year to which the data relate.

### Section 25c

Section 25b(1) shall not apply to activities which are subject to specific provisions adopted by the European Community in relation to the separation of administrative records other than those contained in the directive.

### Section 25d

1. Section 25b(1) shall also not apply to:
  - a. undertakings that provide services which do not have appreciably detrimental effects on trade

between Member States;

- b. undertakings, whose total net annual turnover has amounted to less than €40 million for the two financial years prior to the financial year in which the undertaking has enjoyed a special or exclusive right, granted in accordance with Article 86(1) of the Treaty, or in which it was entrusted with providing a service in the public economic interest, in accordance with Article 86(2) of the Treaty;
  - c. undertakings that have been entrusted with the provision of a service in the public economic interest for a reasonable period, in accordance with Article 86(2) of the Treaty, if the government assistance it receives, in whatever form, including a subsidy, support or compensation, was determined in accordance with an open, transparent and non-discriminatory procedure.
2. For the application of subsection (1)(b), in the case of public credit institutions, the net annual turnover shall be substituted by a balance-sheet total of less than €300 million.
  3. The amount, referred to in subsection (1)(b) and the amount, referred to in subsection (2), may be amended by a decision of Our Minister, if the amendment is pursuant to a binding decision of a body of the European Communities.

#### **Section 25e**

If the Commission of the European Communities requests that it wishes to be provided with information, as referred to in section 25b(1), the undertaking in question shall provide the Board, at its request, with the respective information within a term to be set by the Board. The Board shall forward the information to the Commission of the European Communities.

#### **Section 25f**

If the proper implementation of the directive so requires, Our Minister may introduce regulations containing further rules in respect of the application of this chapter.

## CHAPTER 5: Concentrations

### § 1. Definition of terms

#### Section 26

For the purposes of this chapter, the term 'control' refers to the ability of exercising decisive influence on the activities of an undertaking on the basis of actual or legal circumstances.

#### Section 27

1. The term 'concentration' shall be understood to mean:
  - a. the merger of two or more previously mutually independent undertakings;
  - b. the acquisition of direct or indirect control by:
    - i. one or more natural persons who or legal entities which already control at least one undertaking,
    - ii. one or more undertakings of the whole or parts of one or more other undertakings, through the acquisition of a participating interest in the capital or assets, pursuant to an agreement, or by any other means;
2. The creation of a joint undertaking, which performs all the functions of an autonomous economic entity on a lasting basis shall qualify as a concentration as meant in subsection (1)(b).

#### Section 28

1. In derogation from section 27, a concentration shall not be deemed to arise where:
  - a. credit institutions, other financial institutions, and insurance companies as referred to in section 1(1)(a) and (1)(c) of the Dutch Act on Financial Oversight [Wet op het financieel toezicht],<sup>3</sup> of which the normal activities include transactions and dealings in securities for their own account or for the account of others, hold on a temporary basis securities which they have acquired in an undertaking with a view to reselling these, provided that they do not exercise the voting rights in respect of those securities with a view to determining the competitive behavior of the said undertaking, or provided they exercise such voting rights only with a view to preparing for the sale of those securities and that any such sale takes place within one year of the date of acquisition.
  - b. control is acquired by:
    - i. receivers, as referred to in section 68(1) of the Dutch Bankruptcy Act [Faillissementswet],<sup>6</sup>
    - ii. managers appointed by the courts, as referred to in section 215(2) of the Dutch Bankruptcy Act [Faillissementswet];
    - iii. persons, as referred to in section 1:76(1) of the Dutch Act on Financial Oversight [Wet op het financieel toezicht];
    - iv. managers, as referred to in section 3:162(4) of the Dutch Act on Financial Oversight [Wet op het financieel toezicht];
    - v. persons, as referred to in section 3:175(9) of the Dutch Act on Financial Oversight [Wet op het financieel toezicht];
  - c. participating interests in the capital, as referred to in section 27(1)(b), including participating interests in joint undertakings as referred to in section 27(2), acquired by venture capital

undertakings, provided the voting rights pertaining to the participating interest are exercised only to maintain the full value of these investments.

2. If requested, the Board may extend the term, referred to in subsection (1)(a), if the respective institutions or insurance companies show that, within reason, the sale was not feasible within the stipulated term.

## § 2. Scope of application of concentration oversight

### Section 29

1. The provisions of this chapter shall apply to concentrations, of which the combined turnover of the participating undertakings exceeded €13,450,000 in the preceding calendar year, at least €30,000,000 of which was realized in the Netherlands by at least two of the undertakings involved.
2. The thresholds, referred to in subsection (1), may be increased by Order-in-Council.
3. By Order-in-Council, the threshold, referred to in subsection (1), may be lowered for specific categories of undertakings as determined by that Order-in-Council for periods of up to five years. Any such periods may be renewed by Order-in-Council.

### Section 30

1. The turnover, as referred to in section 29(1), shall be calculated in accordance with the provisions of section 377(6) of Book 2 of the Netherlands Civil Code in respect of net turnover.
2. Where the concentration is implemented through the acquisition of control over parts, whether or not constituted as legal entities, of one or more undertakings, in respect of the seller or sellers, only the turnover relating to the parts which are the subject of the transaction shall be taken into account in calculating the turnover, as referred to in section 29(1). Two or more acquisitions, as referred to in the first sentence, that are effected within a time span determined by the Board and that are interdependent, or for economic purposes are linked together in such a manner that those acquisitions should be considered as one, shall be deemed to constitute a single concentration effected on the day of the final transaction.
3. Without prejudice to the provisions of subsection (2), the aggregate turnover of the undertaking involved, as referred to in section 29(1), shall be determined by the sum of the respective turnovers of the following undertakings:
  - a. the undertaking involved;
  - b. those undertakings in which the undertaking concerned, directly or indirectly:
    - i. owns more than half of the capital or business assets, or
    - ii. has the power to exercise more than half the voting rights, or
    - iii. has the power to appoint more than half the members of the supervisory board, the management, or bodies legally representing the undertaking, or
    - iv. has the right to manage the undertaking;
  - c. those undertakings which, as part of the undertaking involved, hold the rights or powers listed in (b);
  - d. those undertakings, in which an undertaking, as referred to in (c), holds the rights or powers referred to in (b);
  - e. those undertakings, in which two or more undertakings, as referred to (a) to (d), hold the rights or powers, as referred to in (b).
4. Where undertakings involved in the concentration jointly hold the rights or powers, as

referred to in subsection (3)(b), in calculating the aggregate turnover of the undertakings concerned, for the purposes of section 29(1):

- a. no account shall be taken of the turnover resulting from the sale of products or the provision of services between the joint undertaking and each of the undertakings involved, or any other undertaking connected with the undertaking involved, as referred to in subsection (3)(b) to (3)(e);
  - b. the turnover resulting from the sale of products and the provision of services between the joint undertaking and any third-party undertakings shall be taken into account. This turnover shall be apportioned to the undertakings in proportion to their participating interests in the joint undertaking.
5. Transactions between the undertakings, as referred to in subsection (3), shall not be taken into account in calculating the combined turnover of the undertakings involved, as referred to in section 29(1).

### Section 31

1. For the application of section 29(1), the turnover of credit institutions and financial institutions, as referred to in the Dutch Act on Financial Oversight [Wet op het financieel toezicht], shall be replaced by the sum of the following income components included in the profit and loss account for the previous financial year, in accordance with the rules laid down in section 417 of Book 2 of the Dutch Civil Code [Burgelijk Wetboek]:
  - a. interest and similar income;
  - b. revenue from securities;
  - c. commissions received;
  - d. income from financial transactions;
  - e. other operating income;
  - f. net of value added tax and other taxes relating directly to the income components in question.
2. For the application of section 29(1), in respect of insurance companies, as referred to in the Financial Supervision Act, the turnover shall be substituted by the value of the gross contributions written in the preceding financial year, of which at least €4,540,000 are received from Dutch residents.

### Section 32

[Repealed as of January 1, 2000]

### Section 33

[Repealed as of August 1, 2004]

## § 3. Notification

### Section 34

It is prohibited to implement a concentration before the Board has been notified of the intention to do so and before a subsequent period of four weeks has passed.

### Section 35

1. Notifications shall include such information as is required by Order-in-Council. Section 4:4 of the General Administrative Law Act shall apply mutatis mutandis.
2. The Board may require the parties involved in the concentration to provide further information in the event of

non-compliance with the provisions of section 1, or if the information provided is insufficient for the purpose of the assessment of a notification.

3. Information, which the undertaking deems to be confidential, provided by an undertaking with the notification shall not be made public until one week has passed after the announcement of a decision of the Board to this effect.
4. If an application is made for a provisional injunction, as referred to in section 8:81 of the General Administrative Law Act [Algemene wet bestuursrecht], in relation to the decision of the Board, as referred to in subsection (3), the term stipulated in sections 34 and 37(1) and (3) shall be suspended until the day on which the written ruling of the district court in interlocutory proceedings, as referred to in section 93(1), is handed down.

### **Section 36**

Notifications the Board receives shall be announced in the Netherlands Government Gazette [Staatscourant] at the earliest opportunity.

### **Section 37**

1. Within four weeks of the receipt of a notification, the Board shall give notice as to whether a license is required for the concentration to which the notification relates.
2. The Board may determine that a license is required for a concentration if it has reason to assume that the said concentration could appreciably impede effective competition on the Dutch market or on a part thereof, particularly as a result of the creation or strengthening of a dominant economic position.
3. If the notification concerns a concentration, as referred to in section 27(2), that is aimed at or results in coordination of the competitive behavior of the effecting undertakings, the Board's decision as to whether a license is required shall also take into account the criteria set out in section 6(1) and (3).
4. Conditions may be attached to the notice that no license is required for effecting the concentration if it is indisputably evident from the data and proposals submitted in connection with the notification that the consequences as described in subsections (2) and (3) may be avoided if the conditions specified are met.
5. If subsection (1) is not applied within four weeks, no license shall be required for the concentration. The term, referred to in the previous sentence, shall commence on the first day following receipt of the notification, provided this is not a Saturday, Sunday or a public holiday, in accordance with the Dutch General Extension of Time Limits Act [Algemene termijnenwet].
6. Pursuant to the Board's unconditional notice, as described in subsection (1), that a license is not required for the concentration, the prohibition in section 34 shall cease to apply in respect of the said concentration. In the event of a notice as described in subsection (4), the prohibition in section 34 shall remain applicable until the conditions specified have been met. If the parties fail to meet those conditions, or fail to meet them within the time permitted, a license shall then be required.
7. The notice of the Board, as referred to in subsection (1), shall be published in the Netherlands Government Gazette.

### **Section 38**

1. If the provisions of section 35(1) have not been met and the Board has, within five working days after the day of receipt of the notification, requested the notifying party to submit the missing information or documents, the said term of four weeks, as referred to in section 34 and section 37(1) and (5), shall commence on the day on which that information or those documents are provided.
2. Without prejudice to the matters set out in subsection (1), the said term of four weeks, as referred to in section 34 and section 37(1) and (5), shall be suspended from the day on which the Board requests further information, pursuant to section 35(2), until the day on which such information is provided by each of the parties from which further information is requested.
3. The Board may also suspend the term once, based on a substantiated request from each of the notifying parties, if the Board is of the opinion that such serves to further the handling of the notification.

4. Notifications are deemed not to have been made if further information, as referred to in subsection (2), has not been provided within six months following the date on which the last request for further information was made and the term has not been suspended pursuant to subsection (3).

#### **Section 39**

1. Section 34 shall not apply in the case of a public acquisition or exchange bid aimed at the acquisition of a share in the capital of an undertaking, provided that the Board is notified of this immediately and the acquiring party does not exercise the voting rights attached to the said share in the capital.
2. If the Board gives notice that a license is required, pursuant to section 37(1), in respect of a notification, as referred to in subsection (1), the concentration:
  - a. shall be reversed within thirteen weeks, if an application for a license is not submitted within four weeks after the aforementioned notice is given, or if a license is refused;
  - b. shall be brought into compliance with any such restrictions or conditions, if a license is issued subject to restrictions or conditions, within thirteen weeks after the said license is granted.
3. At the request of the notifying party, as referred to in subsection (1), in derogation from subsection (1), the Board may decide that the voting rights, as referred to in subsection (1), may be exercised in order to maintain the full value of the said party's investment.

#### **Section 40**

1. At the request of the notifying party, the Board may, on important grounds, grant an exemption from the prohibition of section 34.
2. Exemption may be granted subject to restrictions; conditions may be attached to an exemption.
3. If, after granting an exemption, as referred to in subsection (1), in respect of the aforesaid notification, the Board gives notice that a license is required, pursuant to section 37(1), and the concentration has been implemented before such notice has been given, the concentration:
  - a. shall be reversed within thirteen weeks, if an application for a license is not submitted within four weeks after such notice is given, or the application for a license is withdrawn, or if a license is refused;
  - b. shall be brought into compliance with any such restrictions or conditions, if a license is issued subject to restrictions or conditions, within thirteen weeks after the said license is granted.

### **§ 4. Licenses**

#### **Section 41**

1. The effecting of a concentration, in respect of which a license is required pursuant to section 37, is prohibited without a license.
2. A license shall be refused if, as a result of the proposed concentration, effective competition on the Dutch market or a part thereof would be appreciably impeded, specifically as a result of the creation or strengthening of a dominant economic position. Section 37(3) shall apply *mutatis mutandis* if the application for a license concerns a concentration, as referred to in section 27(2), aimed at or resulting in coordination of the competitive behavior of the effecting undertakings.
3. If at least one of the undertakings involved in the concentration is entrusted with the provision of services in the public economic interest, by law or by an administrative body, a license may be refused only if such refusal does not obstruct the performance of the duties entrusted to the undertaking or undertakings in question.

4. A license may be issued subject to restrictions; conditions may be attached to a license.

#### **Section 42**

1. An application for a license shall be submitted to the Board.
2. The information to be provided with an application may be stipulated in an Order-in-Council.
3. Information, which the undertaking deems to be confidential, provided by an undertaking with the notification, shall not be made public until one week has passed after the announcement of a decision of the Board to this effect.
4. If an application is made for a provisional injunction, as referred to in section 8:81 of the General Administrative Law Act, in relation to the decision of the Board, as referred to in subsection (3), the term, as referred to in section 44(1), shall be suspended until the day on which the written ruling of the court of interlocutory proceedings, as referred to in section 93(1), is handed down.
5. The Board shall announce applications received in the Netherlands Government Gazette at the earliest opportunity.

#### **Section 43**

An undertaking shall provide the Board, on request, with such explanations of the information regarding its business as are deemed necessary, within reason, for the assessment of a license application.

#### **Section 44**

1. The Board shall issue its decision on the application within thirteen weeks of receipt of the said application. Failure to issue a decision within thirteen weeks shall be equated with the granting of a license.
2. If an application is submitted before the Board gives notice that a license is required for the said concentration, the application shall not be processed until such notice has been given. The term, as referred to in subsection (1), shall commence on the date that such notice is given.
3. The decision shall be available for inspection at the offices of the competition authority following its announcement. Information which does not qualify for publication, pursuant to section 10 of the Dutch Act on Public Access to Government Information [Wet openbaarheid van bestuur], shall not be made available for inspection.
4. The decision shall be published in the Netherlands Government Gazette.

#### **Section 45**

The Board may revoke a license if the information provided is inaccurate to the extent that a different decision would have been made in respect of the license if the correct information had been known.

#### **Section 46**

1. For important reasons, at the request of an applicant for a license, the Board may grant an exemption from the prohibition of section 41(1) until an irrevocable decision is issued on the license application.
2. An exemption may be granted subject to restrictions; conditions may be attached to an exemption.
3. If the license application is withdrawn or a license is refused after the exemption, referred to in subsection (1), has been granted, the concentration, insofar as it has been implemented, shall be reversed within thirteen weeks.
4. If the license is granted subject to restrictions or conditions, the concentration, insofar as it has been implemented, shall be brought into compliance with such restrictions or conditions within thirteen weeks.

**Section 47**

1. After the Board has refused a license for the implementation of a concentration and following an application requesting such, Our Minister may decide that the license shall be granted if, in the Minister's opinion, this is necessary for important reasons in the public interest, which outweigh the expected impediment to competition.
2. An application, as referred to in subsection (1), may be submitted up to four weeks after the Board's decision to refuse a license has become irrevocable.
3. If an application, as referred to in subsection (1), is made, the consideration of administrative and judicial appeals against the Board's decision shall be suspended until an irrevocable decision is issued on the said application.

**Section 48**

The information that must be provided with an application for a license submitted to Our Minister may be specified in an Order-in-Council.

**Section 49**

1. Our Minister shall take his decision on an application, in accordance with the views of the Cabinet, within twelve weeks of receipt of the application.
2. Section 44(3) and (4) shall apply mutatis mutandis.

## CHAPTER 5A. Commitment decision

### Section 49a

1. For the purposes of preparing a report, as referred to in section 59, or if a report has been adopted, an undertaking or association of undertakings may, until the moment that a decision, as referred to in section 62, has been made, apply to the Board for a decree in which the Board declares a commitment set out in that application to be binding for the undertaking or association of undertakings, in order:
  - a. to prevent any violation of section 6(1) or section 24(1); or
  - b. to ensure the discontinuation of a violation of section 6(1) or section 24(1).
2. The Board may issue a decision, as meant in subsection (1), if it is of the opinion that:
  - a. it is ensured that the undertaking or association of undertakings will act in accordance with section 6(1) or section 24(1) as a result of that decision;
  - b. the undertaking or association of undertakings shows, within reason, that it will comply with the decision in such a manner that that compliance can be verified; and
  - c. it is more effective in a specific case, for the purposes of enforcing the law, to issue such a decision than to impose an administrative fine or an order subject to a penalty.
3. In a decree, as referred to in subsection (1), the Board shall also decision that it will not launch an investigation, will discontinue a previously initiated investigation, will refrain from drawing up a report or will refrain from imposing an administrative fine or an order subject to periodic penalty payments. The decision shall not set out any opinion as to whether the behavior of the undertaking or association of undertakings can be reconciled with the provisions set out in or pursuant to this Act.
4. Once the Board has issued a decision, as referred to in subsection (1), the undertaking or association of undertakings shall behave in accordance with that decision.
5. A decree, as referred to in subsection (1), shall be issued for a specific term. The Board may decide to renew any such decision for a specific term.

### Section 49b

Part 3.4 of the General Administrative Law Act shall apply to the preparation of a decision, as referred to in section 49a(1), or a ruling to renew such a decision, as referred to in the second sentence of section 49a(5).

### Section 49c

1. After having issued a decision, as referred to in section 49a(1), or a ruling renewing such a decision, as referred to in the second sentence of section 49a(5), the Board may still initiate an investigation if:
  - a. the facts on which the decision was based have undergone a material change;
  - b. the decision was based on incomplete, incorrect or misleading information provided by the undertaking or association of undertakings; or
  - c. the undertaking or association of undertakings acts in breach of section 49a(4).
2. During the course of the investigation, as referred to in subsection (1), the Board may revoke or amend a decision, as referred to in section 49a(1), or a ruling renewing such a decision, as referred to in the second sentence of section 49a(5).
3. Part 3.4 of the General Administrative Law Act shall apply to the preparation of a ruling to amend a decision, as referred to in subsection (2).

**Section 49d**

1. After having been announced, a decision, as referred to in section 49a(1), or a decision renewing such a decision, as referred to in the second sentence of section 49a(5), shall be made available for inspection at the offices of the competition authority. Information that does not qualify for provision, pursuant to section 10 of the Dutch Act on Public Access to Government Information [Wet openbaarheid van bestuur], shall not be made available for inspection.
2. The decision shall be published in the Netherlands Government Gazette.

## CHAPTER 6. Enforcement and Investigations

### § 1. Enforcement

#### Section 50

1. The officials of the competition authority, as appointed in accordance with a decision of the Board, shall be responsible for enforcing compliance with the provisions of or pursuant to this Act.
2. With a view to the exercising of the Board's powers, as referred to in section 9(1), section 13(2), section 15(2) and section 89a(1), the officials, appointed pursuant to subsection (1), shall hold the powers assigned to them for the performance of their enforcement duties.
3. Notice of a decision, as referred to in subsection (1), shall be given by the publication thereof in the Netherlands Government Gazette.

#### Section 51

1. Section 5:17 of the General Administrative Law Act shall not apply to documents relating to the application of competition rules, exchanged between an undertaking and a lawyer admitted to the Bar, which are in the possession of the undertaking, but which, had they been in the possession of the lawyer, would have been subject to section 5:20(2) of the General Administrative Law Act.
2. Section 1 shall apply mutatis mutandis to those meant in section 51(2)(2) of the Netherlands Criminal Code.

### § 2. Investigations

#### Section 52

1. The officials appointed, pursuant to section 50(1), shall be responsible for investigations.
2. For the purpose of investigations, they shall have the powers assigned to them in this paragraph, as well as the powers assigned to them for the performance of their enforcement duties, as referred to in section 50(1), taking account of the restrictions in this respect imposed in this paragraph.

#### Section 53

1. If the officials, referred to in section 52(1), have reason to suspect that a certain undertaking or association of undertakings has committed a violation, the undertaking or association of undertakings shall not be obliged to make a statement. The parties concerned shall be notified of this prior to an oral request for information on the matter in question.
2. Section 1 shall apply mutatis mutandis to those meant in section 51(2)(2) of the Netherlands Criminal Code.

#### Section 54

The officials, referred to in section 52(1), are authorized to seal off business premises and objects, insofar as this may be deemed necessary, within reason, for exercising the powers referred to in section 5:17 of the General Administrative Law Act.

#### Section 54a

The activities relating to imposing an administrative fine or an order subject to periodic penalty payments shall be carried out by persons who were not involved in the preparation of the report, as referred to in section 59(1) or section 77(1), as applicable, and the investigation that preceded that report.

### Section 55

1. The officials, referred to in section 52(1), shall be authorized to enter and search a home without the resident's permission, insofar as such is, within reason, necessary for the purpose of exercising the powers assigned to them under section 5:17 of the General Administrative Law Act.
2. The officials, referred to in section 52(1), shall, if necessary, exercise the powers assigned to them under section 5:17 of the General Administrative Law Act, as well as the power to enter and search a home as referred to in subsection (1), with the assistance of the police.

### Section 55a

1. Entering or searching a home, as referred to in section 55(1), shall require a prior warrant from the examining magistrate entrusted with handling criminal proceedings before the District Court of Rotterdam. Such a warrant may be requested as a precautionary measure. If possible, the warrant shall be presented.
2. Section 171 of the Netherlands Code of Criminal Procedure shall apply mutatis mutandis. The examining magistrate may request the Dutch Public Prosecution Service's opinion before making any decision.
3. Insofar as the request for a warrant was rejected, the Board may appeal the examining magistrate's decision before the District Court of Rotterdam within two weeks.
4. Any entry into or searching of a home shall be supervised by the examining magistrate.
5. Sections 2 and 3 of the General Act on Entry of Dwellings [Algemene wet op het binnentreden] shall not apply.

### Section 55b

1. A warrant, as referred to in section 55a, shall be substantiated and signed, and shall state the following:
  - a. the name of the examining magistrate who issued the warrant;
  - b. the name or id-number and capacity of the person to whom the warrant was issued;
  - c. the statutory provisions on which the search and entry are based;
  - d. the purpose and subject of the investigation;
  - e. the date.
2. If the entry or search is of such an urgent nature that the warrant cannot be issued in writing in advance, the examining magistrate shall ensure that it is set out in writing as soon as possible.
3. The warrant shall remain valid no longer than up to and including the third day after the day on which it was issued.
4. Section 6 of the General Act on Entry of Dwellings [Algemene wet op het binnentreden] shall not apply.

### Section 55c

1. The official who has entered a home or conducted a search, as referred to in section 55, shall draw up a written report on the entry or the search, under oath of office or solemn affirmation.
2. In that report, he shall state the following:
  - a. his name or id-number and his capacity;
  - b. the date of the warrant and the name of the examining magistrate who issued the warrant;
  - c. the statutory provisions on which the search and entry were based;
  - d. the place entered or searched and the name of the person whose home was entered or in whose

- home the search was conducted;
- e. the manner of entry and the times at which the search started and was completed;
  - f. all acts performed during the search and any other incidents during the search;
  - g. the names or numbers and the capacities of the other persons who entered the home or who participated in the search.
3. The report shall be sent to the examining magistrate who issued the warrant no later than on the fourth day following the day on which the home was entered or the search was completed.
  4. A copy of the report shall be issued or sent to the person whose home was entered or in whose home the search was conducted, no later than on the fourth day following the day on which the home was entered or the search was completed. If the purpose of the investigation so necessitates, this issuing or sending may be deferred. In that case, the report shall be issued or sent as soon as the interests of that purpose so permit. If it is impossible to issue or send the report, the examining magistrate or the official who entered the home or conducted the search shall ensure that the copy is available for the person whose home was entered or in whose home the search was conducted for a period of six months.
  5. Sections 10 and 11 of the General Act on Entry of Dwellings [Algemene wet op het binnentreden] shall not apply.

## **CHAPTER 7. Violation of the Prohibition on Competition Agreements and Prohibition on the Abuse of a Dominant Position**

### **§ 1. Administrative fines, orders subject to periodic penalty payments, and binding instructions**

#### **Section 56**

1. In the event of a violation of section 6(1) or section 24(1), the Board may:
  - a. impose an administrative fine;
  - b. impose an order subject to periodic penalty payments;
  - c. impose a binding instruction to comply with this Act
2. In the event of a violation of a binding instruction, as referred to in subsection (1)(c), the Board may impose an administrative fine or an order subject to periodic penalty payments on the violator.

#### **Section 57**

1. The administrative fine shall amount to a maximum of €450,000 or, to a maximum of 10 per cent of the turnover of the undertaking, or, if the violation is committed by an association of undertakings, the said fine shall amount to a maximum of 10 per cent of the combined turnover of the undertakings that are members of the association, in the financial year preceding the decision. If section 51(2)(2) of the Netherlands Criminal Code applies pursuant to section 5:1, paragraph 3, General Administrative Law Act, the fine shall amount to a maximum of €450,000.
2. The turnover, as referred to in subsection (1), shall be calculated in accordance with the provisions of section 377(6) of Book 2 of the Netherlands Civil Code in respect of net turnover.

#### **Section 58**

1. Conditions relating to the provision of information to the Board may be attached to an order subject to periodic penalty payments.
2. An order shall apply for a period, not exceeding two years, to be determined by the Board.

#### **Section 58a**

1. The order subject to periodic penalty payments may be imposed in the form of a structural measure, as referred to in Article 7 of Regulation 1/2003, if that measure is proportionate to the violation committed and is necessary in order to actually end the violation. A structural measure may only be imposed if no corrective measure is available that would be as effective or if such a measure would impose a greater burden on the undertaking or association of undertakings in question than the structural measure.
2. Section 58(2) shall not apply.

### **§ 2. Proceedings**

#### **Section 59**

1. If the Board has a reasonable suspicion, after the conclusion of an investigation, that a violation, as referred to in section 56, has been committed and that an administrative fine or an order subject to periodic penalty payments should be imposed in this regard, it shall draw up a report as referred to in Section 5:48, paragraph 1, General Administrative Law Act.

Effective as of July 1st, 2009

2. Insofar the report shall be used in the preparation of imposing an administrative fine or an order subject to periodic penalty payments, section 5.4.2. of the General Administrative Law Act shall also apply.
3. Any oral comments made in connection with giving an opinion on the report will be recorded in writing.

#### **Section 59a**

1. Before an administrative fine is imposed, the accounts and records of the undertaking or association of undertakings may be investigated by officials of the competition authority appointed by a decision of the Board in order to determine the financial data to be taken into account for the purposes of imposing the administrative fine.
2. For the purposes of the investigation, as referred to in subsection (1), the officials, as referred to in subsection (1), may engage the assistance of an auditor, as referred to in section 393(1) of Book 2 of the Netherlands Civil Code.
3. The undertaking or association of undertakings shall cooperate in an investigation, as referred to in subsection (1).

#### **Section 60**

[Repealed as of July 1, 2009]

#### **Section 61**

[Repealed as of July 1, 2009]

### **§ 3. Decisions**

#### **Section 62**

In derogation from Section 5:51, paragraph 1, General Administrative Law Act, the Board shall issue a decision on whether to impose a fine or an order subject to periodic penalty payments within eight months after the report's date.

#### **Section 63**

The operation of a decision, as referred to in section 56, insofar as the said decision imposed an administrative fine, shall be suspended until the term for judicial appeals has expired or, if a judicial appeal has been lodged, until a ruling on the judicial appeal has been handed down.

#### **Section 64**

1. The time limitation, as referred to in Section 5:45, General Administrative Law Act, shall be interrupted by any act on the part of the competition authority aimed at conducting an investigation or initiating proceedings concerning the violation, and by any such act on the part of the Commission of the European Communities or of the competition authority of another Member State of the European Union concerning an violation of Articles 81 and 82 of the Treaty.
2. The interruption of the time limitation shall commence on the first day on which at least one undertaking or association of undertakings that was party to the violation, or one of the persons, as referred to in section 51(2)(2°) of the Netherlands Criminal Code, is notified in writing of the act.
3. The time limitation commences anew at the moment of the interruption. However, the power, as referred to in subsection (1), shall lapse no later than ten years after the violation is committed, plus the period during which the time limitation is suspended pursuant to Section 5:45, paragraph 3, General Administrative Law Act.

#### **Section 65**

1. A decision imposing an administrative fine or an order subject to periodic penalty payments, as referred to in section 56, shall be available for inspection at the competition authority after it has been announced. The decision shall not be made available for inspection before five days have passed since the decision was announced.
2. The decision shall be published in the Netherlands Government Gazette. Information which does not qualify for publication, pursuant to section 10 of the Dutch Act on Public Access to Government Information [Wet openbaarheid van bestuur], shall not be available for inspection. The decision shall not be published in the Government Gazette before five days have passed since the decision was issued.

#### **§ 4. Amendment or revocation of the order subject to periodic penalty payments**

#### **Section 66**

1. The Board may amend or revoke an order subject to periodic penalty payments.
2. In derogation from paragraph 4.1.2 of the General Administrative Law Act, the Board shall afford the violator an opportunity to state its opinion, orally or in writing, before applying subsection (1).

#### **§ 5. Collection of the fine**

#### **Section 67**

A fine shall be paid within thirteen weeks of the date on which the fining decision was announced.

#### **Section 68**

The execution of the writ concerning collection of the administrative fine shall be suspended in case of objection.

#### **Section 68a**

1. If the administrative fine was imposed on an association of undertakings, and that association defaults in the payment thereof within the term as referred to in Section 4:112, General Administrative Law Act, as a result of insolvency on the part of the association of undertakings, the Board may collect the administrative fine from each undertaking of which a representative was part of the decision-making body of the association of undertakings when the decision to commit the violation was made.
2. If the administrative fine has not been paid in full following collection in accordance with subsection (1), the Board may collect the outstanding amount from each of the undertakings belonging to the association of undertakings that operated on the market on which the violation was committed during the period in question.
3. If subsections (1) and (2) apply, no amount shall be collected from any undertaking that exceeds 10% of the turnover of that undertaking for the financial year preceding the decision.
4. An undertaking from which an administrative fine is collected pursuant to subsection (1) or (2) shall not be obliged to pay that fine if it can demonstrate that it did not carry out the decision of the association of undertakings to commit the violation and that either it was not aware of that decision or actively distanced itself from that decision before the investigation into the violation commenced.

## CHAPTER 8. Other Violations

### § 1. Violation of the obligation to cooperate

#### Section 69

1. The Board may impose on a party that acts in contravention of section 59a(3), section 77a(3) or section 5:20(1) of the General Administrative Law Act in respect of the officials, as referred to in section 50(1), section 52(1) or section 89g(1), a fine not exceeding €450,000 or, if this relates to an undertaking or an association of undertakings, and if this amount is greater, an administrative fine not exceeding 1% of the turnover of the undertaking or, respectively, the joint turnover of the undertaking comprising the association of undertakings, in the financial year preceding the decision.
2. Section 184 of the Netherlands Criminal Code shall not apply to a violation, as referred to in subsection (1).

#### Section 70

If the violation, referred to in section 69(1), involves a refusal to cooperate in the application of section 5:17(1) of the General Administrative Law Act, the Board may impose an order subject to periodic penalty payments, ordering the business information and documents specified in the order to be made available for inspection.

### § 1a. Violations of the obligations in respect of financial transparency

#### Section 70a

In the event of a violation of section 25b(1) or (2), or of the first sentence of section 25e, the Board may impose on the violator:

- a. An administrative fine not exceeding €450,000 or, if the violation is committed by an undertaking or an association of undertakings and if this is greater, a fine not exceeding 1 per cent of the turnover of the undertaking or of the combined turnover of the undertakings that are members of the association in the financial year preceding the decision;
- b. an order subject to periodic penalty payments.

### § 1b. Breach of a seal

#### Section 70b

1. The Board may impose an administrative fine not exceeding €450,000 or, if the breach is committed by an undertaking or an association of undertakings and if this is greater, a fine not exceeding 1 per cent of the turnover of the undertaking or of the combined turnover of the undertakings that are members of the association in the financial year preceding the decision, that breaks, cancels or damages a seal, as referred to in section 54(1), or circumvents the closure intended by the seal in any other fashion.
2. Section 199 of the Netherlands Criminal Code shall not apply to breaches as referred to in subsection (1).

### § 2. Violations of concentration oversight

#### Section 71

In the event of non-compliance with the conditions attached to an exemption, pursuant to section 40(2) or section 46(2), as referred to in the respective section, the Board may impose an administrative fine not exceeding €450,000 on the violator or, if this is greater, an administrative fine not exceeding 10 per cent of the turnover of the undertaking

or, if the violation is committed by an association of undertakings, of the combined turnover of the undertakings that are members of the association in the financial year preceding the decision.

#### **Section 72**

The Board may impose an administrative fine not exceeding €450,000 or, if this is greater, an administrative fine not exceeding 1 per cent of the turnover of the undertaking or, if the violation is committed by an association of undertakings, of the combined turnover of the undertakings that are members of the association in the financial year preceding the decision on a party that acts in contravention of section 43.

#### **Section 73**

The Board may impose an administrative fine not exceeding €450,000 or, if this is greater, an administrative fine not exceeding 1 per cent of the turnover of the undertaking or, if the violation is committed by an association of undertakings, of the combined turnover of the undertakings that are members of the association in the financial year preceding the decision on a party that provides inaccurate or incomplete information in the notification of a concentration, pursuant to section 34, or in an application for a license to implement a concentration, as referred to in section 41(1).

#### **Section 74**

In the event of a violation of:

- i. section 34,
- ii. section 39(2)(a) or (2)(b),
- iii. section 40(3)(a) or (3)(b),
- iv. section 41(1),
- v. section 46 (3) or (4),

the Board may impose on the violator:

- a. an administrative fine not exceeding €450,000 or, if this is greater, an administrative fine not exceeding 10 per cent of the turnover of the undertaking or, if the violation is committed by an association of undertakings, of the combined turnover of the undertakings that are members of the association in the financial year preceding the decision;
- b. an order subject to periodic penalty payments.

#### **Section 75**

In the event of non-compliance with the conditions imposed pursuant to section 37(4) or of non-compliance with the conditions attached to a license pursuant to section 41, the Board may impose on the violator:

- a. an administrative fine not exceeding 450,000 or, if this is greater, an administrative fine not exceeding 10% of the turnover of the undertaking or, if the violation is committed by an association of undertakings, of the combined turnover of the undertakings that are members of the association in the financial year preceding the decision;
- b. an order subject to periodic penalty payments.

#### **Section 75a**

The administrative fine imposed on the violator shall not exceed €450,000 in case, pursuant to Section 5:1, paragraph 3, General Administrative Law act, Section 51, paragraph 2 (2), Dutch Criminal Code has been applied to violations as referred to in sections 69, 70a, 70b and 71 through 75.

Effective as of July 1st, 2009

### **Section 76**

When imposing an administrative fine pursuant to section 69, paragraph 1, section 70a, 70b, 71, 72, 73, 74, 75 or 75a, section 57, paragraph 2 shall apply.

## **§ 2a. Violation of a commitment decision**

### **Section 76a**

In the event of violation of section 49a(4), the Board may impose, upon the violator, an administrative fine not exceeding €450,000 or, if the violation is committed by an undertaking or an association of undertakings and if this is greater, a fine not exceeding 10 per cent of the turnover of the undertaking or of the combined turnover of the undertakings that are members of the association in the financial year preceding the decision.

## **§ 3. Procedure**

### **Section 77**

1. If an official, as referred to in section 52(1), determines that an violation, as referred to in section 69(1), sections 70a(1), 70b(1), 71, 72, 73, 74(1), section 75(1) or section 76a has been committed, the official shall draw up a report as referred to in Section 5:48, paragraph 1, General Administrative Law Act.
2. Insofar the report shall be used in the preparation of imposing an order subject to periodic penalty payments, section 5.4.2. of the General Administrative Law Act shall also apply.

### **Section 77a**

1. Before an administrative fine is imposed, the accounts and records of the undertaking or association of undertakings may be investigated by officials of the competition authority appointed by a decision of the Board in order to determine the financial data to be taken into account for the purposes of imposing the administrative fine.
2. For the purposes of the investigation, as referred to in subsection (1), the officials, as referred to in subsection (1), may engage the assistance of an auditor, as referred to in section 393(1) of Book 2 of the Netherlands Civil Code.
3. The undertaking or association of undertakings shall cooperate in an investigation as referred to in subsection (1).

### **Section 78**

[Repealed as of July 1, 2009]

### **Section 79**

[Repealed as of July 1, 2009]

### **Section 80**

Sections 63, 67, 68, 68a apply to the administrative fine as referred to in this chapter.

### **Section 81**

[Repealed as of July 1, 2009]

Effective as of July 1st, 2009

**Section 82**

1. The time limitation, as referred to in Section 5:45, General Administrative Law Act, shall be interrupted for two years by the launch of an investigation, as referred to in section 52.
2. The interruption of the time limit shall commence on the first day on which at least one undertaking or association of undertakings that participated in the violation, or one of the persons, as referred to in section 51(2)(2°) of the Netherlands Criminal Code, is notified in writing of the act.

**Section 82a**

The power to impose an order subject to periodic penalty payments, as referred to in section 70a(1), shall lapse five years after the violation is committed.

## CHAPTER 9. Provisional Order Subject to Periodic Penalty Payments

### Section 83

1. The Board may impose a provisional order subject to periodic penalty payments if, in its provisional opinion, it is probable that section 6(1), section 24(1) or section 41(1) have been violated and immediate action is required, in view of the interests of the undertakings affected by the violation or in the interest of preserving effective competition.
2. A provisional penalty obliges the violator to perform or refrain from the actual or legal action described in the said order.
3. Section 5.3.2 of the General Administrative Law Act shall apply to the order subject to periodic penalty payments.

### Section 84

1. The Board shall notify the violator in writing of its intention to impose a provisional order, stating its reasons for this.
2. In derogation from paragraph 4.1.2 of the General Administrative Law Act, the Board shall afford the violator the opportunity to present their views verbally or in writing before subsection (1) is applied.

### Section 85

The provisional order shall in any event expire:

- a. if a report, as referred to in section 5:48, General Administrative Law Act, is not prepared within six months of the date on which the decision is issued, on the date when those six months have expired;
- b. as soon as a decision imposing an administrative fine or an order subject to periodic penalty payments has been issued, if the report is drawn up within the term referred to in subsection (a).

### Section 86

Section 65 shall apply mutatis mutandis to a decision imposing a provisional order.

### Section 87

1. The Board may revoke or amend a provisional order.
2. Sections 84, 85 and 86 shall apply mutatis mutandis.

## CHAPTER 10. Application of European Community Competition Rules

### Section 88

The Board is designated as the competition authority for the Netherlands, as referred to in Regulation 1/2003, and as the authorized authority, as referred to in Regulation 139/2004, and shall exercise the existing powers, pursuant to the Regulations based on Article 83 of the Treaty, to apply Article 81 and Article 82 of the Treaty, as well as the existing power, pursuant to Article 84 of the Treaty, to determine the admissibility of competition agreements and the abuse of a dominant position on the common market.

### Section 89

Chapters 5A and 6, 7 and 9 shall apply mutatis mutandis to the exercising of the powers, as referred to in section 88.

### Section 89a

1. The Board shall exercise existing powers, pursuant to Article 29(2) of Regulation 1/2003, in declaring a block exemption inoperative.
2. In preparing the decision, paragraph 3.4 of the General Administrative Law Act shall apply.
3. A decision, pursuant to subsection (1), shall not come into force earlier than six weeks after the date on which it is made available for inspection.

### Section 89b

1. The officials, designated pursuant to section 50(1), are charged with providing assistance in an inspection by the Commission of the European Communities, pursuant to a competition regulation.
2. Section 5:12 of the General Administrative Law Act shall apply mutatis mutandis.
3. In the event of resistance to the inspection, the designated officials shall provide the necessary assistance to enable the Commission of the European Communities to carry out the inspection, if necessary with the assistance of the police.

### Section 89c

1. If an undertaking or association of undertakings resists an inspection by the Commission of the European Communities, pursuant to a competition regulation, insofar as the inspection includes extensive searching, a prior warrant issued by the examining magistrate, responsible for processing criminal cases brought before the Court of Rotterdam, is required for providing the necessary assistance. If possible, the warrant shall be presented.
2. In assessing the application for a warrant, the examining magistrate shall ensure that the proposed compulsory measures are not arbitrary or disproportionate in relation to the object of the inspection, as set out in the competition regulation and in community law. Section 171 of the Netherlands Code of Criminal Procedure shall apply mutatis mutandis. The examining magistrate may consult the Dutch Public Prosecution Service before taking a decision.
3. Insofar as the request for a warrant was rejected, the Board may appeal against the examining magistrate's decision before the District Court of Rotterdam within two weeks.
4. The examining magistrate may be present during the inspection.

### Section 89d

1. A prior warrant, issued by the examining magistrate responsible for processing criminal cases brought before the Court of Rotterdam, is required for an inspection, as referred to in Article 21(1) of Regulation 1/2003, carried out by the Commission of the European Communities in buildings, premises and vehicles other than those of companies and association of companies, including the private residences of directors, managers

and other personnel. If possible, the warrant shall be presented.

2. The examining magistrate shall assess the application for a warrant, pursuant to Article 21(3) of the Regulation. Section 171 of the Netherlands Code of Criminal Procedure shall apply *mutatis mutandis*. The examining magistrate may consult the public prosecution service before taking a decision.
3. Insofar as the request for a warrant was rejected, the Board may appeal against the examining magistrate's decision before the District Court of Rotterdam within fourteen days.
4. The examining magistrate may be present during the inspection.
5. Insofar as this relates to the inspection of a private residence, this section shall apply in derogation from sections 2, 3 and 8 of the General Act on Entry of Dwellings [Algemene wet op het binnentreden].<sup>9</sup>

#### **Section 89e**

1. A warrant, as referred to in section 89c(1) or section 89d(1), shall include the reasons for which it was issued, shall be signed and shall state:
  - a. the name of the examining magistrate who issued the warrant;
  - b. the name or the number and the capacity of the person to whom the warrant has been issued;
  - c. the decision, in which the Commission of the European Communities has ordered the inspection;
  - d. the date of issue.
2. If an inspection is of such an urgent nature that the warrant cannot be issued in writing in advance, the examining magistrate shall ensure that it is set out in writing as soon as possible.
3. The warrant shall remain in force at the latest up to and including the third day following the date on which it was issued.
4. Insofar as this relates to the inspection of a private residence, this section shall apply in derogation from section 6 of the General Act on Entry of Dwellings [Algemene wet op het binnentreden].

#### **Section 89f**

1. The official, who provides assistance in the inspection of a private residence or in the extensive searching of a place other than a private residence, shall draw up a written report on the inspection under oath or solemn promise of office.
2. In the report, he shall state:
  - a. his name or number and his capacity;
  - b. the date on which the warrant was issued and the name of the examining magistrate who issued the warrant;
  - c. the decision, in which the Commission of the European Communities has ordered the inspection;
  - d. the place of the inspection and the name of the person, in respect of whom the inspection was carried out;
  - e. the manner in which entry was obtained and the time at which the inspection commenced and was concluded;
  - f. the actions undertaken during the inspection and all other occurrences;
  - g. the names or numbers and capacity of other persons who participated in the inspection.
3. The report shall be sent to the examining magistrate that issued the warrant at the latest on the fourth day

following the day on which the inspection was concluded.

4. A copy of the report shall be issued or sent to the person on whose premises the inspection was carried out at the latest on the fourth day following the day on which the inspection was concluded. If the aim of the inspection so requires, the issuing or dispatching of this report may be postponed. In such cases, the issuing or dispatching of the report shall take place as soon as this is permissible in the interests of the aforementioned aim. If it is not possible to issue or dispatch the copy, the examining magistrate or the official, who has provided assistance, shall ensure that the copy is available to the person, on whose premises the inspection was carried out, for a period of six months.
5. Insofar as this relates to an inspection of a private residence, this section shall apply in derogation from sections 10 and 11 of the General Act on Entry of Dwellings [Algemene wet op het binnentreden].

#### **Section 89g**

1. The officials, designated pursuant to section 50(1), are responsible for providing assistance in an inspection, pursuant to a competition regulation, by the competition authority carried out at the request of the Commission of the European Communities or at the request of the competition authority of another Member State of the European Union.
2. In carrying out the inspection, the designated officials shall exercise the regulatory and investigative powers assigned to them, pursuant to chapter 6.

#### **Section 89h**

1. The Board or the Commission of the European Communities, without acting as a party, may present written submissions in the proceedings before the Administrative Court in respect of a judicial appeal, pursuant to the first paragraph of Article 15(3) of Regulation 1/2003, if the Board or the Commission of the European Communities has expressed its wish to do so. The Court may set a deadline for this. With the permission of the Court, they may also make verbal submissions during the hearing.
2. Following an application, pursuant to the second paragraph of Article 15(3) of Regulation 1/2003, the Court shall provide the Board and the Commission of the European Communities with all documents referred to in the aforementioned provision. The parties may give their opinions on the documents to be issued within a term to be determined by the Court.
3. The parties may respond to submissions presented by the Board or the Commission of the European Communities within a term to be determined by the Court. The Court may provide the parties with an opportunity to respond to each other's submissions.

#### **Section 89i**

1. If the Administrative Court wishes to request information or advice, pursuant to Article 15(1) of Regulation 1/2003, it shall notify the parties in writing of the questions to be asked and the documents to be sent.
2. The parties may give their opinion on the questions to be asked and the documents to be sent in writing within a term to be determined by the Court.
3. The Clerk of the Court shall send a copy of the answer to the request for information or advice to the parties.
4. The parties may give their opinion on the answer or advice within a term to be determined by the Court. Section 8:29 of the General Administrative Law Act shall apply mutatis mutandis.

#### **Section 89j**

Pursuant to Article 15(2) of Regulation 1/2003, the Clerk of the Court shall issue a copy of the ruling of the Administrative Court in respect of the application of Articles 81 and 82 of the Treaty to the Commission of the European Communities at the earliest opportunity. Except where this relates to rulings or decisions of the Dutch Supreme Court or rulings of the Administrative Law Division of the Council of State, the ruling shall be issued with the intervention of the Council for the Administration of Justice. If, in the opinion of the Administrative Court, the protection of important interests of parties or third parties gives cause for this, the Clerk of the Court may issue an anonymous copy of the ruling.



## CHAPTER 11. Use of Information

### Section 90

Information or data relating to an undertaking, obtained in the course of any activity in relation to the implementation of this Act, may be used solely for the purpose of the application of this Act, for the competition regulations, the Electricity Act 1998, the Gas Act and the Interim Act on Media Concentrations [Tijdelijke wet mediaconcentraties] with the exception of information, as referred to in Article 28(1) of Regulation 1/2003 and Article 17(1) of Regulation 139/2004.

### Section 91

In derogation from section 90, the Board is authorized to provide information or data, obtained in the performance of the duties assigned to him by this Act, to:

- 1° a foreign institution which is responsible, pursuant to national statutory provisions, for the application of competition rules, insofar as such information or data are, or could be, of significance for the performance of the duties of that institution and, in the Board's opinion, the provision of such information or data is in the interests of the Dutch economy, provided that:
- 2° an administrative body which is responsible for duties relating, or partly relating, to the application of competition rules, pursuant to statutory provisions other than this Act, in as far as such information or data are, or could be, of importance in the performance of the duties of that body,

provided that:

- a) the confidentiality of the information or data is sufficiently protected; and
- b) sufficient assurances are given that the information or data will not be used for any purpose other than that for which they are provided.

## CHAPTER 12. Legal Protection

### Section 92

1. A commission, as referred to in section 7:13 of the General Administrative Law Act, shall advise on any administrative appeals against a decision in connection with the imposing of an administrative fine or order subject to periodic penalty payments.
2. The members of the advisory commission, as referred to in subsection (1), shall not be employees of the Dutch Ministry of Economic Affairs, nor can a member of the Board be part of such an advisory commission.

### Section 93

1. In derogation from section 8:7 of the General Administrative Law Act, the Court of Rotterdam shall be the competent court in respect of judicial appeals against decisions pursuant to this Act.
2. Section 7:1 of the General Administrative Law Act shall not apply to decisions, as referred to in sections 37(1), 44(1) and 47(1).
3. Consumer organizations shall be deemed to be stakeholders in decisions based on this Act.
4. Upon application of section 3.11(2) of the General Administrative Law Act in cases in which a consumer organization, as referred to in subsection (3), is a stakeholder, the Board may, based on serious considerations, make a distinction between the legal entities or natural persons, as referred to in section 59(3), and the said consumer organization for the purposes of judging the question of whether documents or parts of documents pertaining to the case are to be made available for inspection.

## CHAPTER 12a. Contributions

### Section 93a

1. In accordance with regulations to be set under or pursuant to order in council, a fee is due for issuing a decision as referred to in sections 25, 37, 40, 44, 46 and 47, which should not exceed the costs resulting from the issuance of decisions.
2. A fee as referred to in subsection (1) is due by the applicant or, in case of a decision under sections 37 or 40, by the one that had made the notification.
3. Insofar it did not already apply, part 4.4 of the General Administrative Law Act also applies to the fees as referred to in subsection (1), except Sections 4:85 and 4:95.
4. The fee that is due can be collected by writ. Section 68 is also applicable.

### Section 93b

[Repealed as of July 1, 2009]

### Section 94

[This section amends the Economic Offences Act.]

### Section 95

The Economic Competition Act is repealed.

### Section 96

[This section amends the Income Tax Act of 1964.]

### Section 97

[This section amends the Maritime Transport Act.]

### Section 98

[This section amends the Administrative Organizations Administrative Jurisdiction Act.]

### Section 99

[This section amends the Council of State Act.]

## CHAPTER 14. Transitional Provisions

### Section 100

1. Section 88 shall apply mutatis mutandis in the application of Regulation (EEC) No. 4064/89 of the Council of the European Communities of 21 December 1989 in relation to the regulation of concentrations of undertakings (OJEC 1990, L 257), pursuant to Article 26(2) of Regulation 139/2004.
2. Section 89g or sections 89b, 89c, 89e and 89f respectively shall apply mutatis mutandis in the application of Article 12(1) or Article 13(5) and (6) of Regulation (EEC) No. 4064/89 of the Council of the European Communities of 21 December 1989 in relation to the regulation of concentrations of undertakings (OJEC 1990, L 257), pursuant to Article 26(2) of Regulation 139/2004.

### Section 101

[Repealed as of August 1, 2004]

### Section 102

[Repealed as of August 1, 2004]

### Section 103

[Repealed as of August 1, 2004]

### Section 104

[Repealed as of October 1, 2007]

### Section 105

[Repealed as of October 1, 2007]

### Section 106

Punishments and measures imposed for violations of provisions of or pursuant to the Economic Competition Act, constituting economic offenses and committed before the date on which section 94 comes into force, shall remain in force.

## CHAPTER 15. Final Provisions

### Section 107

1. The chapters of this Act shall come into force as of a date to be determined by Royal Decree, which date may vary for each chapter or paragraph thereof.
2. [Repealed]
3. Section 32 shall be repealed two years after the date on which it comes into force.

### Section 108

[This section amends this Act.]

### Section 109

[This section amends this Act.]

### Section 110

This Act shall be cited as: the 'Competition Act'.

We order and command that this Act shall be published in the Bulletin of Acts and Decrees, and that all ministerial departments, authorities, bodies and officials whom it may concern shall diligently implement it.

Done at The Hague, 22 May 1997.

Beatrix

The Minister of Economic Affairs,  
G. J. Wijers

Promulgated on 24 June 1997,

The Minister of Justice, W. Sorgdrager