

NMa Agenda 2008

Netherlands Competition Authority
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Visible enforcement action leading the way


The second decade of NMa competition enforcement will see us continue our work in a consistent and reliable way. The image of the lighthouse, featured regularly in this NMa Agenda, symbolises our approach in 2008: leading the way by visible enforcement action. The lighthouse is a beacon of safety wherever danger threatens. Enforcement action must bring to light risks. It should establish authority. And it is to lead the way. Our message is clear and simple: we will act against infringements and contribute to solving competition problems. It is appropriate for the government to be judged by its results, in terms of efficiency and minimal administrative burdens. Giving out warnings, as well as providing focus and information strengthens the effectiveness of our enforcement programme. After all, we need to raise awareness in order to optimise compliance. The NMa Agenda outlines our plans for the coming year. It focuses on the (new) enforcement instruments at our disposal and the markets under scrutiny in 2008.

The future of the NMa Agenda

A present-day competition authority is in continuous dialogue with its environment. The consultation round preceding publication of the NMa Agenda provides us with an opportunity to test our plans. We set great value on doing so and would like to thank the dozens of consultees for submitting their valuable response. It generated a wealth of information and provided us with many useful signals relevant to the areas of attention prioritised by the NMa. In many cases, this may yield useful information for existing and future investigations at the NMa. You will not find any of these responses directly reflected in the NMa Agenda, though reactions may very well determine future results. Some reactions warranted further explanation or fine-tuning of our plans, leading to a revision of the text wherever appropriate.

The NMa Agenda has proved its worth. Yet, the NMa has come to realise that due to its annual nature the Agenda is somewhat out of step with standard case-processing cycles. Though we do our utmost to reduce case-processing times as much as possible – more information on this is forthcoming – the cycle leading to an actual change of behaviour within a sector spans substantially more than a year. The NMa is careful not to create false expectations and would therefore rather issue an Agenda setting out areas of attention in even years only.

On behalf of the Board of the Netherlands Competition Authority, I would like to express my wish for making markets work in 2008. Supported by you, politics, and business and consumers, I am confident we can do just that.



Pieter Kalbfleisch
Chairman of the Board

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Mission and tasks

The NMa's statutory task is straightforward: 'making markets work'. We monitor effective competition and contribute to markets functioning properly. The effects of this mission have become increasingly evident. Businesses know that the NMa will take action against anti-competitive restrictions that inhibit their chances of success. Innovation and creative entrepreneurship result in new products and methods of production, thus stimulating competition, while also boosting the competitive force of businesses. This will prove conducive to the competitive power of the Dutch economy in general. Consumers stand to profit by an improved price/quality ratio and a wider choice of products. In a word, competition generates prosperity.

NMa enforcement powers are laid down in the Competition Act, the Electricity Act 1998, the Gas Act, the Passenger Transport Act 2000, the Railway Act and the Aviation Act. In addition, the Market Monitoring Registered Pilotage Services Act [*Wet markttoezicht registerloodsen*] will come into force on 1 January 2008. Moreover, the NMa will apply Articles 81 and 82 EC Treaty within the Netherlands.

The NMa's industry-specific tasks relate to the energy and transport sectors. Industry-specific regulation and monitoring tasks lie with the Office of Energy Regulation (DTe) and the Office of Transport Regulation. Both are chambers within the NMa. As such, the NMa is characterised by 'unity in diversity': it takes care of general competition enforcement as well as industry-specific regulation. Though these tasks are diverse, a common, centrally important vision on markets and regulatory style is paramount. The organisational structure of the NMa, which is referred to as a 'chamber model', creates a valuable synergy. The effectiveness of NMa enforcement efforts further benefits from cooperation and coordination among market authorities at national level, including the Independent Post and Telecommunications Authority (OPTA), the Dutch Health Authority (NZa), and among international partners.

NMa enforcement action

Spontaneous compliance as an objective

Over the past 10 years, we have undertaken a considerable effort to make competition part of sound business practice. We stimulate forward-looking entrepreneurs to make use of opportunities presented by the Dutch economy and support them in their bid for innovation. Society at present highly values creating opportunities and choice for business and consumers. These should not in any way be curtailed unduly.

This requires an effective and efficient competition enforcement strategy, that allows the NMa to strike hard from time to time. This is being done by imposing sanctions for infringements of competition law. At other times, we try to effect a change in market behaviour through employing alternative enforcement instruments. We intervene in markets that have been prioritised – as will be the case again this year – though other markets too will be targeted. Due to industry-specific regulation, consumers can increasingly make a transparent choice of provider in markets that are in a transitional phase, as these develop towards a state of “practicable competition”. In this regard, the NMa’s tasks include the monitoring of price development.

Independence of approach and of judgment are of crucial importance here. Our status of autonomous administrative agency underlines this. Moreover, the recent extension of NMa powers under the Competition Act reflect the trust and importance invested in an independent enforcement authority on the part of politics. The NMa must be capable of decisive action whenever necessary. The importance of our work extends beyond law enforcement *per se*. Its main objective is to ensure that competition rules continue to play a role in business considerations. The NMa therefore aims at leading the way by means of its enforcement action. Though spontaneous compliance as an effect of NMa is hardly tangible, it is of utmost importance. After all, competition best guarantees liberty of choice for consumers.

Risk-oriented enforcement action

The NMa must achieve concrete results in order to meet its objectives. A well-functioning competition authority should be able to identify and solve the most important problems it encounters. The NMa focuses on sectors in which there is a risk of infringement and in which the ensuing damage to the Dutch economy may potentially be of serious proportions. The NMa acts by means of instruments that are both new and current. These include sanctions, though we regularly press for changes to certain professional rules and regulations at an early stage. The surprise factor remains an essential element of our enforcement strategy.

Increasingly, we can strike a more sophisticated balance between various enforcement instruments – resulting in greater efficiency – due to the fact that we gain better insight into the effects of what we do. Risk-oriented enforcement action on a proportional scale helps reduce redundant administrative burdens imposed on business. Our actions are underpinned by a sound knowledge of markets, resulting from tip-offs, complaints, pro-active market inquiries and innovative methods of detection. On the other hand, the NMa extends its trust to markets in which there are little or no problems and in which none are expected to arise. Trust is also the basis for providing *guidance* to business. This entails that we give out information on regulation and promote the introduction of compliance programmes.

Trust should not give way to naivety. We must not forget that up until ten years ago the Netherlands were regarded as Europe’s “cartel paradise”. The (perceived) risk of being caught is and remains a crucially important factor in realising an effective enforcement strategy. Recent changes to the Competition Act

provide for carrying out even more thorough investigations and imposing (increasingly) severe fines in some cases, on businesses as well as individuals violating the law.

Submitting *and* receiving information

In addition to imposing sanctions and other measures, the NMa focuses on providing clear information on the actual adverse effects of anti-competitive behaviour. Press and news releases are being used to this end, as is a quarterly report (published since 2007). Speeches and articles may further help develop understanding of competition rules. Business and consumers must be aware that statutory infringements result in a considerable financial burden on Dutch society.

The NMa operates at an appropriate distance, but aims to be transparent and accessible wherever possible. In order to perform well, it is important for us to give and receive as much as information as possible, for which we employ the NMa Agenda and our website at www.nmanet.nl. These provide an easy means of access for business, which should be able to rely on the fact that we deal with questions and complaints in a sound way. In a sense, this is important feeding ground to the NMa. The national helpline ConsuWijzer was established for consumers especially in a joint effort by the NMa, OPTA and the Consumer Authority. ConsuWijzer contributes to providing easy-access information to consumers, who may also submit complaints (see www.consuwijzer.nl). The vital role played by consumers can hardly be overrated. In essence the economy represents a game of supply and demand, in which the demanding party – consumers – may exercise sizeable influence on the behaviour of supplying parties, i.e. business active in the market.

Extending and strengthening the set of instruments at our disposal

All NMa activities are based on instruments provided for under various laws. In 2008 our focus will be on strengthening the set of instruments at our disposal. NMa powers were extended on 1 October 2007. We consider this a sign of trust in the NMa's work over the past 10 years. The statutory changes will augment the deterrent effect of competition law.

Amendment to the Competition Act

Merger control

The NMa's merger control policy has been further harmonised with European competition law. In assessing concentrations, the emphasis has shifted to whether a concentration actually restricts competition, rather than whether it creates or strengthens a dominant position. From now on, cooperative joint ventures will also be investigated, in addition to mergers and acquisitions. Also, merging parties may already propose remedies during the first phase of an NMa merger investigation in order to meet the competition concerns outlined by the Authority. Up until now, this course of action has been open to parties only after a second-phase investigation by the NMa. Moreover, the new Remedy Guidelines 2007 will facilitate businesses in submitting a proposal that aligns with NMa requirements. This will contribute to efficient procedures for the business concerned.

Commitments

The NMa may accept remedies offered by companies during an investigation into infringements of the Competition Act and include these as part of a decision. Parties commit to certain changes in conduct. The decision renders such commitments enforceable by law. An added benefit here is that anti-competitive behaviour can actually be prevented or terminated, without the need for long-winding, expensive procedures. As a rule, commitments are not accepted whenever business behaviour is established to be anti-competitive by object.

Entering private premises

This specific power allows the NMa to enter private premises. It is important to be able to do so, as it proves increasingly difficult to detect infringements, due to a greater knowledge and awareness of competition rules. As a result of extended powers, it has now become more difficult to hide documents from the NMa. The NMa will enter private premises only when authorised by the examining magistrate, who will in principle also be present at the investigation.

Administrative fines for natural persons who exert de facto leadership or give instructions

The NMa may impose fines on directors, managers and other company employees who exert *de facto* leadership or give instructions with regard to infringements of the Competition Act, including cartels. The maximum fine is EUR 450,000. The NMa takes into account the seriousness and duration of the infringement as well as the circumstances under which the infringement was committed. Sanctions are imposed provided the company too is being fined .

Transparency on the issue of fining

Recently, a new NMa Fining Code came into force, the effects of which will be appreciable in 2008. The fining code sets out how the NMa exercises its powers and tasks with regard to imposing fines. The NMa thus aims to provide insight into the factors taken into account when setting fines. The Code proposes a separate

methodology for fining natural persons. Also, the NMa may impose fines for non-compliance with a decision on commitments. Transparency on the issue of fining fits in with the idea that competition authorities extend trust to market parties, but take hard action whenever that trust is violated.

New leniency programme

Leniency entails that businesses and natural persons may be granted immunity or fine reduction, provided they inform the NMa of cartels in which they are or have been participating. It is a prerequisite that individual businesses/ natural persons contact the Leniency Office of the NMa and provide full cooperation. The first party to apply for leniency, whether it be a business or individual, may receive full immunity. On 10 October 2007 new leniency guidelines came into force. In addition to making an explicit reference to natural persons, the leniency programme provides for additional bonuses for early potential applicants. On behalf of a business or individual, lawyers may gauge whether their client is eligible for full immunity. This status may only be granted in the absence of a pre-existing NMa investigation. If full immunity proves available, the lawyer concerned must submit a leniency application immediately. If the NMa indicates this status cannot be granted, it is up to the lawyer and his client to decide whether or not to apply for leniency.

Civil enforcement

Within the European Competition Network (ECN), the NMa cooperates with the European Commission and NCAs with a view to raising efficiency and effectiveness in civil enforcement. In 2008, the European Commission is expected to publish a White Paper outlining a strategy for stimulating civil enforcement. Civil enforcement will be complementary to public enforcement and allows consumers the option of initiating proceedings of their own accord whenever competition rules are breached. This will reinforce the deterrent effect of competition law.

Advocacy as an instrument

In some cases, the structure of a particular market may give rise to concerns (in terms of competition) which the NMa cannot adequately address by deploying its regular enforcement instruments. In such cases, we choose to implement *advocacy* tools. This means that we identify problems as well as possible solutions, and submit these to the ministries concerned, working on the premises of analyses that result from our statutory tasks. In some cases, the introduction of new or improved professional regulation may be the key to enhancing market functioning. Often, however, the solution lies in a change of behaviour among market players. The NMa aims to realise such behavioural change. If appropriate, we consult with fellow market authorities in the markets concerned, as these often provide valuable knowledge and information. A series of collaboration protocols have already been concluded; the NMa and various partners are currently working towards a 'market monitoring code' due for 2008.

One of the NMa's tasks, as defined upon its appointment to the status of autonomous administrative agency, is to give out solicited and unsolicited advice. Advocacy will never develop into one of our prime tasks, though we expect to implement advocacy tools more frequently in future. The NMa takes the view that advocacy presents an effective and efficient approach, tackling potential competitive risks at root level. Reactions to the consultation document for the NMa Agenda attest to wide support for this approach. The NMa will take note of suggestions and incorporate them in future considerations.

Areas of attention in the field of general competition enforcement

Organisational changes

The NMa is planning to merge its Merger Control Department and Antitrust Department into a single new department. By creating one department for general competition enforcement, the NMa aims to contribute further to raising the level of transparency and improve accessibility towards businesses that are being subjected to enforcement regulation. The proposed organisational change is also related to the wish for a more efficient way of gathering market knowledge and improved securing of such knowledge. In addition, the merger will make it possible to improve the 'synchronisation' of merger control activities and conjunctural conditions. The NMa expects the merger of the abovementioned departments to be realised by mid-2008.

Areas of attention

Our approach aims to establish behavioural change and well-functioning markets by means of a pro-active, programme-based approach. Detection methods identify trends, recent developments, market behaviour and market structure and their potential risks for the sector. Markets showing a relatively small number of providers (oligopolies) still merit our attention, though competitive risks cannot be said to occur there by definition. We maintain contact with government agencies, branch associations and business in order to arrive at a realistic and balanced view of the markets concerned. The risks identified and the economic importance of markets are factors relevant to determining our priorities.

The NMa aims to be transparent in carrying out its statutory tasks. Particularly as concerns our general enforcement work, we need to balance transparency and investigatory interests. Maintaining a surprise effect is an essential part of our enforcement strategy. This means that the NMa does not specify all sectors and subsectors in which it expects to intervene in 2008, neither does it pinpoint specific activities. We would like to emphasise that we have also drawn up programmes involving sectors that have not been explicitly prioritised as areas of attention. You will notice overlap with priorities set in previous years, as changes can only be brought about over longer periods of time. It is also true that the removal of a particular area of attention from the list of priorities cannot be taken to imply that the NMa will no longer specifically monitor this sector; we will no less act against infringements.

Response to the consultation document

A relatively large number of reactions was submitted by the sector summarily referred to as 'the ICT sector'. This sector is part of the area of attention 'Media and Communication markets', which featured prominently on the NMa Agenda some years ago. In 2008 the NMa will continue to monitor this sector, intervening wherever necessary, though it will no longer feature as a prioritised area of attention. The independent, objective position which the NMa must occupy inherently involves making such choices.

Areas of attention for 2008

- Healthcare
- Financial services
- Food and agri-business
- Energy
- Postal services markets

Healthcare

An increasing number of healthcare sectors provide for (regulated) competition. This should give rise to improved quality, a demand-oriented approach, effectiveness and efficiency. Over the past few years, the NMa has focused on giving out information. Competition in healthcare, after all, is a relatively new phenomenon. In 2008 it will be necessary for the NMa to link these *guidance* activities to enforcement intervention. In the healthcare sector, changes in market structure have resulted in an increase in scale and a growing number of collaborative associations. In various sectors, including home care, the NMa has found indications of illegal agreements. In response to the NMa Agenda, various parties have pointed towards the buying practices of major market parties; in 2008 the NMa will make an estimate of the size of the problem and will intervene wherever necessary. The NMa will continue to cooperate intensively with the Dutch Healthcare Authority (NZA) and pay further attention to their mutual division of tasks. Of course, we will also continue investments in merger control – bearing in mind the lowering of statutory turnover thresholds in healthcare.

Financial services

Financial services have been prioritised since 2003. The Financial Sector Monitor shows the importance awarded to effective monitoring by the NMa. This may be explained by the significant economic importance of the sector and the market structure, in some cases featuring relatively few (major) market parties. The complex character of many products causes the sector to be relatively non-transparent. For this reason, the NMa must continuously be in touch with developments and maintain high standards of knowledge.

The NMa pays specific attention to the insurance sector. This may partly be explained by the fact that insurers cooperate closely in various fields. This may have its benefits and is therefore allowed, provided strict conditions are met. At the same time, the existence of a great number of collaborative associations harbours the risk of companies overstepping the mark. This would – also in the light of the important socio-economic position of the sector – prove very harmful.

The banking and stock trading sector also features close collaboration among companies, in particular as regards the development and maintenance of vitally important networks, such as the payments systems and exchange systems. Also, the sector is on the eve of major changes. National boundaries are fading away due to liberalisation measures implemented by the European Union. These will have tangible results over 2008, creating a Single European Payments Area (SEPA). The NMa cooperates with the sector-specific market monitoring authorities in the financial sector, the Financial Market Authority (AFM) and the Nederlandsche Bank (DNB).

Food and agri-business

Due to the global liberalisation of markets for agricultural products and drastic changes to the Common Agricultural Policy of the European Union, competition within the so-called food and agri-business has increasingly become part of daily practice. Various chains within the food and agri-business (the processing industry and supermarkets in particular) are characterised by a high degree of concentration, i.e.: relatively few players, unlike other chains (for instance, primary producers). Traditionally, the sector features many collaborative associations. Due to a large number of mergers and acquisitions in the sector, the number of players in various chains of the production column steadily decreases. Such a market structure poses an increased risk of collusive practices among businesses as regards prices and volumes, partly due to the homogeneous nature of the products involved. Ongoing signals received from market parties as well as economic analyses confirm this view of the sector. The NMa, therefore, will in 2008 focus its activities on the food and agri-business also.

Energy sector

In terms of competition law it is important to monitor competition in markets and submarkets in which the market structure as regards trade and supply is determined by one or only a limited number of players. Wherever market structure (historically rooted) gives rise to anti-competitive conduct, the NMa will specifically focus on this in 2008. Developments in the energy markets by way of changes to market structure and mergers and acquisitions will therefore be closely monitored by the NMa. Wherever possible, we will stimulate or adjust developments. Of course, this will be done in close keeping with general competition enforcement and industry-specific regulation.

Postal services markets

In 2008, the remaining part of the Dutch postal services markets, letters under 50 grams, will be liberalised, in anticipation of full liberalisation throughout the EU. Though the decision was not yet finalised at the time of drafting this NMa Agenda, the NMa is intent on closely scrutinising the postal services markets in the course of 2008. Complaints and signals of a possibly serious nature will be dealt with adequately. This already applied to all parts of the postal services markets that have already undergone liberalisation in the Netherlands: parcel post, unaddressed mail (via post office box), printed matter and letters above 50 grams. Two nation-wide competitors of the main current player have already established themselves in this market. As a result of liberalisation, day-specific products with a longer delivery time are being offered in addition to day-specific 24/48-hour delivery products, as well as deliveries throughout the week. Wherever possible or necessary, the NMa will cooperate with OPTA.

Areas of attention in industry-specific regulation

Industry-specific regulation with the NMa

The NMa houses the Office of Energy Regulation (DTe) and the Office of Transport Regulation. In the experience of the NMa, the combination of general competition enforcement and industry-specific regulation – the so-called chamber model – yields important additional value. Sharing market expertise is crucial to ensuring that the NMa performs well. Synergy prevents ambiguity and helps establish a minimal administrative burden on business. Moreover, this way of working produces an optimal mix of instruments. This will gain importance, whenever markets increasingly show features that are characteristic of ‘normal’ markets. Within these markets, the NMa prioritises a number of areas of attention.

Response to the consultation document

The NMa received response from parties that are under enforcement supervision as well as private persons. They point out possibilities for further explaining current plans and make suggestions for further research. Signals and questions are dealt with by DTe and the Office of Transport Regulation.

Energy: areas of attention

The NMa wants to be a reliable and trustworthy regulator. The central and overall aim is to establish trust in the energy market’s functioning and to safeguard security of supply.

To promote and improve a North-West European market for electricity and gas

Creating a larger playing field by further integrating wholesale markets is important in order to establish effective competitive relations, to realise a European internal market and to safeguard security of supply. In 2008 there will be a strong focus on active participation in regional initiatives set up by regulators and ministries in pursuit of a North-West and North European electricity and gas market. ERGEG, a cooperative platform for a number of European energy regulators, is one of the initiatives chaired by DTe.

Regulation of network operators

In the domestic market also, competition is important in order to continue providing benefits to users. Also, the Dutch electricity and gas markets must link up well with a North-West European market and the Netherlands aim to develop into a gas roundabout. In 2008, therefore, the regulation and monitoring of national gas and electricity network operators will be a prime focus. This focuses on 1) safeguarding security of supply and maintain the adequacy of infrastructure and 2) a further increase of efficiency and quality. The gas market, which is still lagging behind the electricity market, merits additional attention.

Regional network operators

In 2008 regulation activities with regard to regional network operators will focus on the quality of quality management systems and the implementation of so-called group prohibitions (also referred to as unbundling). This should provide insight into the level of control that network managers actually exert on the quality of their networks and into whether they signal the need for (replacement) investments in time. As regards the group prohibition, special attention will in 2008 go out towards creating so-called ‘fully-fledged/fat’ network operators. Running parallel to this, the NMa will advise the Minister of Economic Affairs on the so-called General Administrative Measure on Creditworthiness [*Algemene Maatregel van Bestuur Kredietwaardigheid*], further outlining the financial solidity of network operators. Both are important building blocks for the public and independent network management by regional operators.

Changes in the consumer market

In 2008 priorities with regard to the consumer market will focus on identifying risks. Proposed changes to the market model (in 2009) as well as the unbundling of energy companies (in 2011) may pose new challenges. The scheduled introduction of smart metering (in 2009) requires preparation. Setting tariffs and regulatory development on the basis of smart metering results will be at the centre of attention. In close keeping with these activities, we will draw up a plan of approach which explores ways of signalling and dealing with possible risks in the consumer market at an early stage. Also, the regulation of license conditions is to be reinforced.

Transport: areas of attention

An important part of the regulatory activities carried out by the Office of Transport Regulation relate to market monitoring and the realisation of structural behavioural changes. In order to forestall possible problems, the NMa tries to enter into contact with the sector at an early stage as much as possible.

Railway capacity

Railway capacity is increasingly scarce. In this respect, the NMa expects an increase in the number of disputes over capacity allocation for 2008. In 2008 the focus will be to provide accurate information on allocation in the Network Statement and to ensure that ProRail implements the statutory procedures for capacity allocation correctly. Special attention will go out towards capacity allocation for network management and maintenance also. There should be an efficient structure for consultation in case conflicting applications occur. A sound system to support the allocation system in a non-discriminatory way is also indispensable. Finally, an equal level of commitment among railway companies as well as transparency must be safeguarded during the entire process. The cooperation among European regulators in the field of capacity allocation focuses on the corridors Rotterdam-Lyon en Rotterdam-Genua.

User fees

In 2005 the NMa assessed the user fee system, as intended for ProRail, up until and including the calendar year 2008. The NMa will therefore in 2008 reassess the user fee system for the HSL-Zuid, the Betuwe route and remaining main railway tracks. This assessment will be valid for 2009 and later years.

Aviation activities

Schiphol is entitled to fix new tariffs for aviation activities as from 1 April 2008 and 1 November 2008. The NMa considers it likely that airline companies will request for an assessment of these tariffs by the NMa. The NMa will also monitor tariffs as part of its regular activities.

Conclusion

To the extent possible, the NMa Agenda 2008 provides insight into how the NMa would like to establish enforcement and investigatory activities. If changes were to occur over the course of the year, for instance, due to decisions at national or international level, the NMa will communicate whenever possible. For further information on the NMa and its work, as well as the latest news on developments, please consult our website at www.nmanet.nl.

The Hague, January 2008