

Amicus Curiae Guidelines

1.	Introduction.....	2
2.	Applicability of these Guidelines	3
3.	Netherlands Competition Authority: exercising the power of amicus curiae	4
3.1	Legal basis.....	4
3.2	When will NMa exercise this power?	4
3.3	Documents required from the file and the confidentiality of these documents.....	5
3.4	Specific: interlocutory proceedings	6
3.5	Relationship between NMa and the European Commission.....	6
3.6	Status of the amicus curiae intervention.....	7
3.7	Publication of the amicus curiae intervention	7
4.	Procedure/embedding in the organisation	8
5.	Amendment and revision	8

1. Introduction

1. These Guidelines govern the relationship between the Netherlands Competition Authority ("NMa") and the Dutch courts, in instances where the courts apply Articles 81 and 82 of the EC Treaty. The Guidelines apply to cases to which NMa is not a party.
2. Council Regulation Regulation 1/2003¹ modernises Community competition law by making it possible for national courts to apply Article 81 (3) of the EC Treaty directly. Consequently Articles 81 and 82 of the EC Treaty now apply directly in their entirety. These Articles may be applied by the European Commission, national competition authorities and the national courts.
3. The national courts may apply Articles 81 and 82 of the EC Treaty, but only if a case falls within their jurisdiction. According to case law of the Court of Justice of the European Communities (hereinafter "ECJ"), these Articles of the EC Treaty are fundamental provisions. They are indispensable for the fulfilment of the Community's tasks and, in particular, for the way the internal market operates.² Articles 81 and 82 of the EC Treaty therefore relate to rules of public policy within the European Community.
4. Article 15 (3) of Regulation 1/2003 makes it possible for the European Commission and the national competition authorities to "submit written observations to the national courts of their Member State". They may do so "on their own initiative" and on matters relating to the application of Article 81 or Article 82 of the EC Treaty. With the permission of the courts, observations may also be made orally. The European Commission and the national competition authorities may request the courts to provide them with all the documents relevant to the case or to require third parties to do so. This is necessary to enable the European Commission and the national competition authorities to formulate their views.
5. The role of an intervener in court proceedings is referred to as "*amicus curiae*" (friend of the court).
6. The submission of *amicus curiae* briefs is common practice in countries with common law systems. Dutch law of civil procedure does not provide such an instrument. To some extent, the position of the Dutch Public Prosecutor in civil proceedings is comparable to this. Section 44 of the Dutch Code of Civil Procedure allows the Dutch Public Prosecutor to intervene in civil proceedings. The legislature modelled its implementation of the power to make *amicus curiae* interventions on this. How the power to make *amicus curiae* interventions, as set out in Regulation 1/2003, should be implemented in practice has been left to national courts and administrative authorities.

¹ Council Regulation (EC) No 1/2003 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 1/1.

² ECJ, 1 June 1999, case C-126/97, *Eco Swiss/Benetton*, *ECR* 1999, I-3055.

7. In the light of the above, the Director-General of the Netherlands Competition Authority (hereinafter "the Director-General of NMa") considered it useful to clarify how NMa intends to exercise its power to intervene in court proceedings as an *amicus curiae*.
8. The unambiguous application of Articles 81 and 82 of the EC Treaty in the European Community is the shared responsibility of the national competition authorities and the European Commission. This is the point of departure in defining NMa's role as an *amicus curiae*, since the unambiguous application of Articles 81 and 82 of the EC Treaty is in the public interest.
9. The national courts determine the proceedings in cases in which NMa intervenes. They also ensure that the general principles of Community law are upheld in such proceedings.³

2. Applicability of these Guidelines

10. In principle, the Director-General of NMa's power to intervene as an *amicus curiae* only relates to observations concerning the application of Articles 81 or 82 of the EC Treaty. This power does not extend to the application of sections 6 or 24 of the Competition Act. However, the provisions of sections 6 and 24 of the Competition Act and Articles 81 and 82 of the EC Treaty correspond to a considerable degree. In most cases, observations made by the Director-General of NMa with regard to the application of Articles 81 and 82 of the EC Treaty will therefore also have consequences for the application of sections 6 and 24 of the Competition Act.
11. The power to make an *amicus curiae* intervention covers proceedings brought before an administrative court or a civil court, to which the Director-General of NMa is not himself a party.
12. In respect of administrative proceedings Article 15 of Regulation 1/2003 has been implemented in the Competition Act. In respect of civil proceedings, Article 15 has been implemented in the Dutch Code of Civil Procedure.
13. The Director-General of NMa submits his observations in the case in question to the court. These observations are not binding on the court.

³ In this regard, refer to the Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 of the EC Treaty, *OJEC* 2004, C101/54, paragraph 10 in conjunction with paragraph 35 in which these general principles are described briefly.

3. Netherlands Competition Authority: exercising the power of amicus curiae

3.1 *Legal basis*

14. Section 89h of the Competition Act and section 44a of the Code of Civil Procedure grant the Director-General of NMa the power to submit written observations in proceedings before an administrative court or a civil court, to which he is not a party, if he has expressed his wish to do so. The Director-General of NMa is also authorised, with the permission of the court, to make observations orally during the hearing.

3.2 *When will NMa exercise this power?*

15. The Director-General of NMa wishes to emphasise that he will exercise restraint in using his power to intervene as an amicus curiae in court proceedings. As far as possible, he aims to avoid any overlap with his normal regulatory duties under competition law. The Director-General of NMa expects to intervene as an amicus curiae mainly in civil proceedings.

16. In the light of this, the Director-General of NMa will, in principle, only intervene in appeal cases.

17. The Director-General of NMa will consider whether or not to exercise his power to intervene as an amicus curiae in court proceedings in accordance with his official function. If the Director-General of NMa decides to intervene, he will notify the court in writing of his intention to do so..

18. The Director-General of NMa will only exercise his power to intervene in court proceedings as an amicus curiae if:

- i) the Director-General of NMa is not himself a party to the proceedings; and
- ii) the case involves a legal issue regarding the interpretation of Article 81 and/or Article 82 of the EC Treaty.

19. One or all of the parties involved in court proceedings, or the court itself, may contact NMa to request an amicus curiae intervention. The parties and the court are free to inform the Director-General of NMa that a case has been brought before the court and to inform him of the legal questions at issue concerning Articles 81 and/or 82. An amicus curiae intervention by the Director-General of NMa, however, will not be guided by private interests. It is in the public interest that the national competition authority retain its shared responsibility for the unambiguous application of Articles 81 and 82 of the EC Treaty in the European Community. This will be the guiding principle of any intervention by the Director-General of NMa as an amicus curiae. In the light of this, the Director-General of NMa will assess whether an amicus curiae intervention is necessary on a case-by-case basis.

20. In addition to the criteria stated in paragraph 18, when the Director-General of NMa considers whether or not to make an intervention, he will take into account the resources such an intervention requires. An amicus curiae intervention is a power and not an obligation. NMa will not intervene in court cases at the expense of its key tasks.

21. If a court indicates that it wishes the Director-General of NMa to play a role in the proceedings before the court, for instance as a legal expert, the Director-General of NMa will consider whether there is sufficient reason for him to intervene as an amicus curiae. In doing so, the Director-General of NMa will take into account the provisions of this section of these Guidelines. If the Director-General of NMa sees no reason to intervene as an amicus curiae, the Director-General of NMa will not honour the court's request to appoint him as a legal expert.
22. If the Director-General of NMa exercises his power to intervene, he will do so, in principle, by drawing up an amicus curiae brief containing his observations.
23. If the amicus curiae brief drawn up by the Director-General of NMa gives rise to further questions, the Director-General of NMa will decide whether it is necessary to answer each of these additional questions individually. This decision will take into account the principles set out above.
24. The Director-General of NMa will suspend his intervention if the parties to proceedings decide to negotiate with each other in an attempt to reach a settlement. The Director-General of NMa will resume his intervention once the court in question notifies him that the parties involved have not reached an agreement.
25. The Director-General of NMa will cease to intervene in court proceedings from the moment that the court notifies him that the parties to the proceedings have reached an agreement or an amicable settlement.

3.3 *Documents required from the file and the confidentiality of these documents*

26. To formulate his observations, the Director-General of NMa requires all the documents necessary to assess the case. The court will send the Director-General of NMa all these documents and will grant him a period (of four weeks) to submit his written observations.
27. In principle, the Director-General of NMa is of the view that the necessary documents include all documents relating to the proceedings.⁴
28. The Director-General of NMa will treat the file compiled by the court as confidential information. On conclusion of the proceedings, NMa will return this file to the court. The Director-General of NMa will keep a copy of his amicus curiae brief and a copy of the documents on which his advice was based, in accordance with the Public Records Act [*Archiefwet*],
29. The documents which NMa receives in relation to the amicus curiae intervention may only be used to compile the amicus curiae brief.

⁴ This relates, in principle, to the notice of appeal, the notice of cross-appeal, the respondent's notice of appeal, this provisional rulings, further statements or, alternatively, the (supplementary) notice of appeal and the statement of defence, and not documents relating to incidents which have occurred during the respective proceedings, such as challenges, motions contesting jurisdiction, motions for consultation and collateral for the cost of the proceedings.

3.4 *Specific: interlocutory proceedings*

30. The presiding judge in interlocutory proceedings may need the Director-General of NMa to provide information and/or his expertise. For this reason, the Director-General of NMa will apply slightly different criteria for the time being in deciding whether or not to make an intervention in interlocutory proceedings.
31. Above all, an intervention in court cases may not be made at the expense of NMa's key tasks. The decision on whether or not to make an intervention is therefore at the discretion of the Director-General of NMa. However, where a presiding judge indicates that he requires an intervention, the Director-General of NMa will take this into account in making his decision. Any amicus curiae intervention by the Director-General of NMa will not be guided by private interests. As the national competition authority, NMa shares responsibility with other national competition authorities and the European Commission for the unambiguous application of Articles 81 and 82 of the EC Treaty. The Director-General of NMa will be guided by this public interest. The Director-General of NMa will therefore assess whether an amicus curiae intervention is necessary on a case-by-case basis.
32. The Director-General of NMa will answer questions which may be broader than the description given in paragraph 15 and the paragraphs following paragraph 15. However, the Director-General of NMa is only able to answer the questions put to him if the court provides him with sufficient information. The Director-General of NMa does not intend to exercise his investigative powers to obtain such information. The Director-General of NMa leaves it to the discretion of the presiding judge to decide whether an amicus curiae is desirable in the interlocutory proceedings in order to ensure the consistent application of Articles 81 and 82 of the EC Treaty.

3.5 *Relationship between NMa and the European Commission*

33. Both the European Commission and the national competition authority may submit observations concerning Articles 81 and 82 of the EC Treaty to the courts responsible for applying these provisions of the EC Treaty. This is set out in Article 15 (3) of Regulation 1/2003.
34. The way the Commission exercises this power is set out in the Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 of the EC Treaty.⁵
35. In the opinion of the Director-General of NMa, it is undesirable that both the European Commission and NMa exercise their power to intervene as an amicus curiae in the same proceedings. If the European Commission makes known that it wishes to intervene as an amicus curiae in particular proceedings, the Director-General of NMa will refrain from doing so.

⁵ , OJEC2004, C101/54 *et seq.*

3.6 *Status of the amicus curiae intervention*

36. An amicus curiae intervention is non-binding advice given to the court.
37. In formulating his observation, as far as possible the Director-General of NMa will take as his point of departure the evidence established by the court in the proceedings. The Director-General of NMa will not make an independent assessment of the evidence. If the Director-General of NMa does assess the evidence, he is free to deviate from this assessment at a large stage, regardless of the assessment made in the amicus curiae intervention. Other authorities, such as the European Commission or a national competition authority, are also not bound by the amicus curiae intervention made by the Director-General of NMa.

3.7 *Publication of the amicus curiae intervention*

38. In principle, an intervention by the Director-General of NMa in court proceedings focuses on the legal questions raised. The contents of these interventions are therefore of importance not only to the parties involved in the court proceedings (undertakings), but also to other undertakings. For this reason, the amicus curiae briefs will be published on NMa's website and on the intranet of the European Competition Network. They will be published in accordance with the applicable principles with regard to their confidentiality and only after the judgement or ruling of the court has been published.
39. The number of interventions made by NMa in a particular year and the topics dealt with in these interventions will also be reported in NMa's annual report for the respective year.

4. Procedure/embedding in the organisation

40. The Legal Service of NMa will be responsible for making amicus curiae interventions. The activities in relation to amicus curiae interventions will be carried out the staff of NMa's Legal Service.
41. All correspondence in relation to an amicus curiae interventions, as set out in these Guidelines, should be addressed to:

Netherlands Competition Authority
Legal Service
Appeals Coordinator
P.O. Box 16326
2500 BH The Hague
The Netherlands

or may be sent by email to amicus@nmanet.nl

5. Amendment and revision

42. These Guidelines set out the principles which the Director-General of NMa will apply in exercising his power to intervene as an amicus curiae in court proceedings. The Director-General of NMa reserves the right to make amendments to these Guidelines. After the Guidelines have been applied in a sufficient number of cases, the experience in applying the Guidelines will be evaluated. If necessary, the Guidelines will be amended or revised.

These Guidelines will come into force on the day following their publication in the *Netherlands Government Gazette*.

The Hague, 13 August 2004

P. Kalbfleisch
Director-General of the Netherlands Competition Authority