

November 13, 2006

The Netherlands Competition Authority

Answers to sections A and B of the Unilateral Conduct Working Group Questionnaire

A. Objectives of unilateral conduct laws

1. With regard to your jurisdiction's unilateral conduct rules – *e.g.*, rules concerning the prohibition of abuse of dominance or monopolization - please state the objectives of these rules (*e.g.*, consumer welfare, efficiency, protecting the competitive process), and identify the source from the following, as applicable:

- a. Constitution
- b. Statutes
- c. Regulations
- d. Agency enforcement policy (*e.g.*, guidelines, speeches)
- e. Case law
- f. Other (please identify)

Section 24 of the Dutch Competition Act states:

- 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.

The Explanatory Memorandum states that the definition of the concept of dominance and the wording of article 24 correspond to the enforcement policy of the Commission and the European Court of Justice.

There is no explicit statement of the objectives of Section 24. Generally speaking, the NMa considers the protection of consumers through the protection of the competitive process as the objective of the enforcement of Section 24 as is stated in speeches and in a reaction to the Commission's discussion paper on Art. 82.

2. Are non-competition influences (such as promotion of industrial policy or distributive welfare) incorporated in these objectives? Please describe any such influences.

In terms of unilateral conduct, no.

3. If there are multiple objectives, how are these balanced or reconciled?

N/A

4. How has your jurisdiction balanced the risks associated with over-deterrence (deterring efficient, pro-competitive conduct as a result of excessive intervention) with the risks associated with under-deterrence (permitting anti-competitive conduct as a result of too little enforcement) in choosing its objectives for unilateral conduct rules? Is this choice affected by the nature of your economy?

Those risks are not balanced explicitly with an eye to choosing objectives, but they are considered in specific cases.

5. With regard to exemptions or exceptions to your laws specific to unilateral conduct (for example, for regulated sectors, government entities, purchasers, or exercise of intellectual property rights), please identify the exemption or exception and explain whether and how its goals differ from the objectives of your general unilateral conduct law and how the jurisdiction balances or reconciles these factors.

The Competition Act applies generally. There are however some sectors - such as collective agreements between employers and employees - that have been explicitly exempted. Government activities of a commercial nature are not exempt from the Competition Act. In general there are no exemptions or exceptions to the prohibition of abuse of dominance.

6. If the objectives of, or exemptions or exceptions to, your unilateral conduct rules are influenced by the nature of your economy (*e.g.*, small, transition, or recently-liberalized), please explain.

N/A

7. If the objectives of, or exemptions or exceptions to, your unilateral conduct rules have been substantially reviewed or revised, please describe any change and the reason.

N/A

8. Are there institutional features (*e.g.*, the possibility for a ministry to overrule competition agency decisions or the requirement the competition agency consult with other governmental agencies) that affect your agency's ability to achieve the objectives of the unilateral conduct rules? If so, please explain.

No.

9. Please describe any difficulties that your jurisdiction has experienced with its objectives for unilateral conduct rules. Based on your experience, what, if any, suggestions (including selection of other objectives) would you have for your or other jurisdictions, and why?

N/A

B. Assessment of Dominance/Substantial Market Power

1. Please provide a brief description of single-firm dominance/substantial market power as defined in the provisions of your jurisdiction's general competition law, relevant agency policy statements (*e.g.* guidelines, speeches) and/or case law that pertain to unilateral conduct. As appropriate, please also explain whether and how your agency categorizes different levels of dominance/substantial market power (*e.g.*, "super dominance").

Section 1 sub i of the Dutch Competition Act defines a dominant position as:

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

The NMa regards dominance to refer to the existence of significant market power. Market power in the general economic sense -defined by a positive Lerner-index- is not considered to be sufficient for dominance. The NMa considers market power significant when it implies the ability to harm the competitive process significantly or to put it differently when a firm's behaviour will have a significant impact on the whole (relevant) market (see OECD document DAF/COMP/WP3/WD(2006)29 for further details). The NMa also considers that market power should be durable (see below).

The NMa has not categorized different levels of dominance.

2. Under your general competition law governing unilateral conduct, at which stage(s) can your competition agency intervene against potentially abusive unilateral conduct?

- If dominance/substantial market power is present yes/no
- Acquisition or creation of dominance/substantial market power yes/no
- Attempt to acquire or create dominance/substantial market power yes/no
- Other (please identify)

Why did your jurisdiction choose these stages?

The Dutch Competition Act requires the existence of a dominant position.

3. Does your law contain or do you use a market share threshold at which you presume single-firm dominance/substantial market power and/or as a "safe harbour"?
- yes/no

There is no statutory market share threshold in the Act. The NMa examines the existence of dominance on a case-by-case basis.

If so, please respond as applicable:

- What is the market share level of the dominance presumption? _____
- Is the dominance presumption rebuttable?
yes/no
- What is the market share level of the safe harbour?

- Is the safe harbour absolute (*i.e.*, dominance/substantial market power cannot be found below the specified percentage level)?
yes/no
- What is the legal basis of the presumption statute /case law/guidelines
- What is the legal basis for the safe harbor? statute /case law/guidelines

4. Does your competition law enable the competition agency to intervene against unilateral conduct at a level below the dominance/substantial market power threshold ? yes/no

If so, please explain why and in which circumstances.

There is no statutory market share threshold in the Competition Act. The NMa can not intervene against unilateral conduct in the absence of a dominant position.

5. Does your jurisdiction's analysis of dominance/substantial market power first require that a relevant product and geographic market be defined?

yes/no

If a statement of objections is formulated the answer is 'yes'. But in deciding the case the NMa is free to first consider, for instance, abuse. If there is no abuse (given the assumption of dominance), there is no need to first define markets and (the absence of) dominance. The case will be decided solely on the absence of abuse.

6. Which of the following criteria do you use for the assessment of single-firm dominance/substantial market power?¹

- Market share of the firm and its competitors yes/no
- Market position and market behavior of competitors yes/no
- Durability of market power yes/no
- Barriers to entry or expansion yes/no
- Economies of scale and scope/network effects yes/no
- Buyer power yes/no
- Access to upstream markets/vertical integration yes/no
- Access to essential facilities yes/no
- Market maturity/vitality yes/no
- Financial resources of the firm and its competitors yes/no
- Profits of the firm yes/no
- High prices (at absolute or comparative level) yes/no

Please specify any other criteria that you use to assess single-firm dominance/substantial market power. The development of market shares over time and the process of the acquisition of the (possibly) dominant position.

7. Of the criteria that you use to assess single-firm dominance/substantial market power, which are the most important criteria?

The NMa acknowledges the use of market share analysis as a legitimate first step in the assessment of dominance. However, the NMa does not believe that a market share analysis is sufficient while assessing dominance. The analysis of the related issues of entry barriers and durability are considered essential elements in the establishment of dominance.

As stated above the NMa considers dominance to refer to the ability to harm the competitive process in a significant way. This not only implies a significant level of market power at a given time but also the ability to maintain this level of market power over time. It is unlikely that this will be the case when there are no (or low) entry barriers since any attempt to earn supra competitive profits will not be durable and will be eroded by entry.

¹ The answer "yes" should be provided if you use this criterion (amongst other criteria) at least in some of your cases. Conversely, the answer "no" should be provided if in practice you have not ever used that criterion.

The levels of innovation and actual entry are criteria that the NMa would also consider while evaluating the durability of market power. The NMa would not readily intervene in sectors characterized by high levels of innovation and entry.

8. Please explain how your authority evaluates each of the criteria that you use, and also how it weighs the different factors.

The NMa does not have a strict weighted approach. However, as stated above durability and the analysis of entry barriers would carry a heavy weight. The weight of the other criteria will be largely dependent on the specifics of the particular case.

9. How do you evaluate the competitive significance, if any, of intellectual property rights (patents, trademarks, copyrights, etc.) in assessing dominance/substantial market power?

“New products” or “new ways of doing things” often lead to increased consumer welfare and have been engines of growth for individual firms. The NMa therefore believes that competition policy should not solely concentrate on short term price/output issues but should also be carried out with a dynamic perspective taking due account of innovation.

The NMa realises the important role that intellectual property rights may play in encouraging and rewarding innovation by granting the firms IPR's. The NMa therefore would only in exceptional situations – situation in which it is very clear that the competitive process itself would not suffer from intervention (for instance with regard to investment incentives) and consumers (also in the long run) will, in all likelihood, be better off – intervene with the use of rightfully gained intellectual property rights.

Granting intellectual property rights does not in all cases lead to significant market power. Exclusive rights would only confer market power if the claims cover a significant portion of an economically relevant market.

Is intellectual property presumed to create dominance/substantial market power in your jurisdiction? yes/no

10. Does the assessment of dominance/substantial market power differ in a small or isolated economy from the assessment in a large or integrated economy? For example, might dominance in small markets be presumed at lower (or higher) levels of market share than in other jurisdictions? Do free trade agreements alter the assessment of dominance/substantial market power? If so, please explain why. [**NB:** Jurisdictions that do not consider themselves “small” economies are welcome to skip this question.]

N/A

11. Please explain briefly the link between the definition and assessment of dominance/substantial market power in your jurisdiction and the objectives of your unilateral conduct laws.

There is no explicit statement of the objectives of Section 24. The NMa considers the protection of consumers through the protection of the competitive process as the objective of

the enforcement of Section 24. This comes back in NMa's interpretation of the notion of dominance since dominance is linked to the capability of firms to harm the competitive process significantly.