

# VISIT FROM THE NETHERLANDS COMPETITION AUTHORITY (NM<sub>a</sub>)

GUIDE



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# PREVENTION IS BETTER THAN CURE

'I didn't know' is not a valid excuse. An effective compliance programme is therefore essential.

Houthoff Buruma's EU & Competition practice group can test your current compliance policy and, if required, implement a compliance programme which will minimise the likelihood of competition infringements by your undertaking. We aim to ensure you will no longer need this brochure after we have completed our work.

Houthoff Buruma's EU & Competition practice group consists of approximately 20 lawyers located at our offices in Amsterdam and Brussels. This unit is managed by Weijer VerLoren van Themaat, Gerard van der Wal and Jaap Doeleman.

Houthoff Buruma's 'Dawn Raid Team' consists of approximately 30 lawyers based in our offices in Amsterdam, Rotterdam and Brussels. This team has been set up with the aim of providing your undertaking with specialised and appropriate assistance as soon as possible, anywhere in the Benelux, in the event you are visited by the Netherlands Competition Authority (NMa) or the European Commission.

# INTRODUCTION

The Netherlands Competition Authority (NMa) and the European Commission monitor and enforce compliance with the competition rules in the Netherlands. These rules prohibit the making of cartel agreements and abuse of a dominant position. The NMa or the European Commission may visit your undertaking in order to conduct an inspection on their own initiative or following a complaint. This is referred to as a company visit or inspection or, more commonly, a dawn raid. A visit of this nature is generally unannounced, can span several days and may be carried out simultaneously at more than one location. This brochure deals primarily with inspections conducted by the NMa.

An inspection can occur where there is a suspicion that your undertaking or association of undertakings has infringed the competition rules. The aim of an inspection is to gather (further) additional information. This may be oral or written information, including digital information. An inspection may also be conducted in the context of an investigation of the entire industry or sector, without a specific suspicion that your undertaking has committed any infringement.

Frequently, the NMa has already gathered a significant amount of information concerning a certain agreement or specific conduct by the time it conducts an inspection. For example, in the context of a request for leniency, where one of the members of the cartel has reported its existence (*see also page 52: Request for leniency*).

A cooperative attitude is recommended at all times. This does not mean, however, that your undertaking cannot invoke the rights vested in it. If the inspectors exceed the scope of their powers, you may, politely but firmly, make your objections known, possibly after consulting your lawyer.

Being well prepared requires you to be aware of your rights and obligations. Which requests to inspect documents and data files must you comply with? And do you have to answer all the questions? This brochure gives a brief summary of your rights and obligations and is intended to serve as a guide on how to act when receiving a visit from the NMa. The text of this guide is based on the situation as per June 2011.

Houthoff Buruma has a team of lawyers available in Amsterdam, Rotterdam and Brussels to provide your undertaking with quick and efficient assistance anywhere it may be established in the Benelux.

For further questions regarding your preparation or concerning your rights and obligations, you can contact the following persons at the EU & Competition practice group:

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## INTERNAL ORGANISATION

Inspections are generally conducted unannounced. Adequate preparation is therefore advisable:

- Appoint a 'spokesperson' to represent the undertaking for the duration of the inspection. Together with the lawyers, the spokesperson should ensure the smooth progress of the investigation. It is advisable to appoint one or more deputies in case the spokesperson is not present. The spokespersons must be aware of all the procedures as well as the rights and duties of the undertaking in relation to the inspection (*see appendix 2*).
- Provide the reception with a checklist containing instructions and a list of names of people who must be informed (*see attachment 1*). This list must always include the names of the spokesperson, his/her deputy, the members of the board, corporate counsel and lawyers. This will ensure smooth communication between all parties.
- It is also advisable to appoint a 'contact secretary' within the undertaking who (i) acts as the contact person for the lawyers, (ii) assists the NMa officials with the process of copying documents and (iii) keeps the lists of requested documents and other matters.

# THE INSPECTION

## Who conducts the inspection?

NMa officials may conduct an inspection on the instructions of the Board of the NMa, at the request of the European Commission or at the request of a competition authority of another EU Member State.

In the first case, the investigation is concerned with possible infringements of the Dutch Competition Act and/or European competition rules. In the second case, the inspection is concerned solely with possible infringements of European competition

rules. European Commission officials are therefore (also) involved in this type of inspection. Finally, a competition authority of another EU Member State can request the NMa to conduct an inspection on its behalf in case of possible infringements that affect domestic economic activities, on the one hand, and cross-border economic activities with that Member State, on the other.

In all cases, the officials may be assisted by experts in a specific field, such as ICT, for example. These experts have no independent powers. They may not, therefore, request to inspect data or question employees. Nor is the undertaking obliged to show an expert documents that contain business secrets.

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*An expert assisting in a dawn raid does not have the right to access business secrets.*

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## Cooperation

An undertaking and its employees are required to cooperate fully with an inspection. Failure to cooperate or obstructing an inspection may be penalised in several ways.

Firstly, the NMa can penalise a failure to cooperate with a maximum fine of € 450,000, or 1% of the annual turnover of your undertaking or the joint annual turnover of the undertakings that are part of the association of undertakings if this represents a larger amount. A maximum fine of € 450,000 can be imposed on any employee failing to cooperate with an inspection. Secondly, the NMa can issue a cease and desist order under penalty. Finally, the NMa can – if it concludes that the law has been infringed – consider any obstruction of the NMa's investigation by the undertaking or its employees as an aggravating circumstance when determining the amount of the fine.

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*An employee can be fined personally for not cooperating.*

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# RECEPTION OF THE INSPECTION TEAM

The inspection team must be given a smooth and prompt reception in order to leave no doubts as to the willingness of your undertaking to cooperate with an investigation.

## **Reception by the reception desk**

The receptionist asks the officials for their official proof of identity and requests them to wait briefly until they can be further received by the undertaking. The receptionist then immediately informs the spokesperson or his/her deputy as well as the management.

The proof of identity displays the name, photo and position of the official concerned. All the information on the various identity documents should be carefully recorded, or copies of the identity documents should be made.

It is also important to ask whether the inspection is taking place at the request of the NMa or the European Commission. In the latter case, the officials must always be able to present a written instruction (*see also appendix 1*).

## **Reception by the spokesperson**

The spokesperson should take the team to a meeting room and ask for the reasons and the purpose of the investigation. At the commencement of the visit, the NMa officials will present a written description of the purpose and the subject of the investigation. It is recommended to check this description carefully and to ask for clarification in case anything is unclear.

## **Consult your legal specialists (in-house or external)**

The spokesperson will then inform the inspection team that he/she wishes to contact the undertaking's in-house and/or external legal counsel. A list with the names of these lawyers, their mobile and/or landline numbers, fax numbers and e-mail addresses should therefore also be made available in advance. Once the inspection team has stated the reason for the inspection, this must immediately be notified to the lawyers.

## **Awaiting the arrival of the legal specialists**

The spokesperson can ask the inspection team to await the arrival of the legal specialist(s) who has/have been alerted before commencing the inspection (including interviews with the directors, the corporate lawyer(s) and other members of staff).

While awaiting the arrival of (external) legal assistance, the NMa will generally want to implement measures to prevent the deletion of data and documents. Inspectors may demand, for instance, that all external e-mail and telephone communication be halted, that cabinets or rooms be sealed, or they may position themselves in areas to observe all movements and activities. If the inspection team does not wish to wait (any longer) for the arrival of the legal specialists, the spokesperson should try to contact a lawyer and/or corporate counsel by phone. Houthoff Buruma can provide specialised lawyers from Amsterdam, Rotterdam and Brussels at short notice.

*Appendix 2 includes a checklist for the spokesperson.*

As soon as the legal specialists have arrived, the possibility and desirability of submitting a request for leniency to the NMa should be discussed without delay. The question of whether other requests for leniency may possibly have already been submitted (by competitors or employees) will also be addressed during this discussion.

*(see also page 52: Request for leniency)*

# THE POWERS

## Two types of powers

The NMa has both supervisory and investigative powers.

Supervisory power entails the general monitoring of compliance with the Competition Act. This general monitoring does not usually involve specific investigations arising from suspicions that the law has been infringed. The NMa may monitor a certain industry or sector, for example.

Investigative power is used to determine whether an infringement has or has not occurred. This investigative power is exercised where there is a suspicion of an infringement. This implies, amongst other things, that the officials must advise the spokespersons of an undertaking of their right to remain silent during an interview (the so-called 'caution').

Based on their *supervisory* duties, officials have the following powers:

- to enter and search locations, if necessary with police assistance, with the exception of private homes if permission has not been granted by the resident;
- to demand information, including from staff members who have knowledge of possible infringements;
- to demand access to business data and documents and to make (digital) copies of such data and documents; and
- to examine vehicles and other means of transport.

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*A dawn raid can extend to private residences.*

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Based on their *investigative* duties, officials have the following additional powers:

- to enter and search private homes, if necessary without permission from the resident, after obtaining authorisation from the examining magistrate responsible for handling criminal cases at the Rotterdam District Court (the examining magistrate);
- the power to seal business premises, spaces and objects; and
- to exercise their powers, if necessary with police assistance.

The European Commission has comparable investigative powers:

- to enter all buildings, premises and vehicles and other means of transport of the undertaking;
- to request oral information;
- to inspect the books and documents of the undertaking;
- to make copies of or extracts from these books and documents;
- to request police assistance in case of resistance;

- to take measures to prevent the removal, disappearance, rendering unfit for use, disabling or damaging of data;
- to search storage spaces or possible hiding places in order to trace data whose existence is not known in advance, after obtaining authorisation from the examining magistrate responsible for handling criminal cases at the Rotterdam District Court;
- to seal rooms, premises and books or other documents for the duration of, and as far as required for, the inspection;
- to request representatives or staff members of the undertaking or association of undertakings to clarify facts or documents related to the subject and purpose of the inspection, and to record their response; and
- to enter the private homes, premises and means of transport/vehicles of directors, board members and other staff members of the undertaking when there is a reasonable suspicion that books or other documents of the company and the subject of the inspection that are relevant to proving an infringement are stored there, after a decision to that effect and having authorisation from a 'national judicial authority or court' (in this case the examining magistrate responsible for handling criminal cases at the Rotterdam District Court).

### **General limitations of the powers**

The inspection powers of the NMa are subject to an important limitation in the sense that an official may only use his/her powers 'insofar as this is reasonably necessary for the performance of his/her duties'. The investigation should therefore be proportional relative to the purpose. In the case of an investigation conducted independently or an investigation conducted at the request of a competition authority of another EU Member State, the powers of the NMa are more precisely limited by the purpose and the subject of the inspection as stated in the written description that is issued at the commencement of the investigation (the investigation description).

In the case of inspections conducted by the NMa at the request of the European Commission, the limitations of the purpose and subject of the investigation are laid down in the written instruction, or decision or order presented in advance to the spokesperson.

If it is evident from the written description or instruction that the inspection only relates to one of the markets on which the undertaking is active, for instance, the officials involved cannot investigate the activities on other markets as well. This means that no verbal information or documents concerning other activities need be provided. If they are nonetheless provided – under duress – you may ask for them to be returned at a later date.

# THE INVESTIGATION: GATHERING ANALOGUE AND DIGITAL INFORMATION

The gathering of analogue and digital information by NMa officials takes place in two stages. First, information is collected on site, in company buildings or private residences, for example. This information is then processed at the NMa's offices. The undertaking can inform the NMa that certain data must be excluded from the data collection.

## STAGE 1: GATHERING INFORMATION ON SITE

### Access to all business data and documents

In principle, the officials may have access to all business data and documents. This is a very broad concept. It allows the officials to request and inspect all official and unofficial documents and records that are related to the purpose and subject of the investigation, for example. This applies not only to paper files, diaries and records, but also to digital files. The officials may therefore also inspect cameras, USB sticks, notebooks and other (digital) data carriers. Password-protected equipment and materials must be made accessible. In principle, the undertaking's buildings, areas and cars will be inspected. The officials are also authorised to inspect the contents of drawers, desks and filing cabinets.

The NMa as well as the European Commission can also order an inspection of other buildings, areas and vehicles (including private residences and private vehicles). Where such an order comes from the European Commission, permission from an examining magistrate will be required for such an inspection. The NMa only requires this permission in order to enter and search private residences. The examining magistrate assesses whether such an inspection is not indiscriminate or disproportionate. The officials must be able to present the authorisation from the examining magistrate.

In the case of an inspection conducted by the NMa, the officials must inform the undertaking which data they wish to inspect. The NMa is not permitted to take files out of any filing cabinet itself and must limit its inspection to potentially relevant documents. In the case of an inspection conducted on the orders of the European Commission or the searching of a private residence by the NMa, the officials are permitted also to look for data whose existence and location are unknown. This is the so-called 'search authorisation'. Such a search requires the prior authorisation of an examining magistrate.

If the officials ask specifically to inspect certain data, work spaces or archives, the undertaking must provide these data or make the spaces and archives accessible. In order to ensure the NMa's activities remain within the scope of the investigation, it is advisable only to allow access to the

records and areas explicitly requested and which could actually be relevant to the investigation, as evident from the investigation description. If the requested documents and/or other data carriers are not

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***Business secrets are not a reason to refuse inspection.***

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immediately available, the undertaking is obliged to search for them. If documents and/or other data carriers contain company secrets, this is no reason to refuse the inspection (unlike in the case of experts accompanying the NMa). This is because the officials are bound by an obligation of secrecy. If an undertaking refuses to allow access to cabinets or areas, the NMa may summon assistance from the police in order to forcibly access these cabinets or areas.

While inspecting data and records, the officials will determine on site whether they are relevant. They will assess whether the data and records (in terms of their nature and/or content) may reasonably fall within the scope of the stated purpose and subject of the investigation. This may also include data and records that fall outside of the specified period to which the investigation relates.

### **Making copies of documents**

The officials will generally make copies of the documents that they have reviewed and which they consider to be relevant. An inventory will be made of these documents. In the case of inspections conducted on the orders of the NMa, officials may also take away original documents for a limited period of time. If they do so, they must provide written proof that the undertaking has surrendered these original documents. The inventory must also show which records and/or other data carriers have been taken away, and where they were taken from.

It is advisable to ensure that three copies are also made of all documents that are to be removed so that your undertaking and the lawyer also have copies at their immediate disposal. The same also applies to the inventory. All copies that are made must be carefully checked and numbered on the officials' departure. The three sets of copies must be identical. You should ensure that the officials sign the inventory at the end of the investigation.

### **Data and records that are out of scope**

The NMa does not have access to privileged data and records, and to data and records that fall outside the scope of the investigation. This latter relates not only to data and records that cannot (reasonably) fall within the scope of the purpose and subject of the investigation, but also to private data and documents. Such data and documents will only be inspected by the official in order to determine that they do indeed qualify as such. If this is the case, the NMa will not make a copy of them (see also: 'Access to digital files').

However, if data and/or records are in a subset with a description that is directly connected with the purpose and subject of the investigation, the official concerned will nonetheless qualify the data and records as within scope. This may relate to a physical or digital folder with a particular title, for example.

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*The NMa is not permitted to make copies of privileged information.*

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The NMa is not permitted to make copies of 'privileged' data and records. Documents (in digital and analogue format), letters, faxes, etc. between the undertaking and a lawyer concerning the application of competition rules, concerning the subject of the investigation or otherwise, are deemed to be privileged. This therefore also covers documents in which an undertaking requests legal advice from a lawyer concerning the application of competition rules. Internal company documents containing a summary of advice from a lawyer or that have been prepared for the purpose of obtaining such advice (irrespective of whether or not they have been sent) also qualify as privileged information. It should be noted that correspondence between the undertaking and its own corporate counsel will only be considered as privileged by the NMa if the corporate counsel concerned is also a lawyer and it is apparent from the document that the corporate counsel was acting in his/her capacity as a lawyer (signature accompanied by *'lawyer'*).

Unlike the Dutch Competition Act, the European Commission does not recognise the privileged nature of the (internal) correspondence between the in-house lawyer and the undertaking. The European Court of Justice has upheld this position of the Commission. Nonetheless, internal summaries of external advice from lawyers that are recognisable as such are deemed to constitute privileged correspondence. It is generally advisable to use privileged correspondence as much as possible for internal reporting purposes.

Officials may, in principle, 'cursorily' inspect the data and/or records that are considered as 'privileged' in order to check whether they are indeed privileged. Officials can request further substantiation. If the privileged nature is not apparent from a cursory inspection, the official will place the data and/or records in a sealed envelope.

The undertaking has the right to assert that even the cursory inspection by the NMa violates the privileged nature. If the undertaking does this, the official will demand further substantiation from the undertaking. If the official considers the substantiation to be adequate, he/she is required to place the data and/or records in a sealed envelope in this case also. The 'Legal Professional Privilege official' of the NMa will review the contents of the sealed envelope(s).

## Access to digital files

The NMa has the right to examine computer files, e-mails, the data stored in the memories of mobile telephones, faxes and photocopying machines, photographic material and (electronic) diaries during an investigation. The undertaking must provide computer passwords and access codes and must facilitate the examination of other digital files, such as the SIM card memories of mobile phones or of electronic diaries. It is recommended that the officials be assisted in making copies and prints of files of non-confidential documents. Officials may request to copy files onto CD ROM or other data carriers (for example e-mails and Excel files). It is then advisable to accurately log the details of such files (such as the size in Kbs and the date that the file was most recently edited or updated). You should also ensure that copies are made of files that are taken away.

The NMa currently uses 'digital selection methods' when conducting an examination of relevant digital data and records: search queries are formulated based on the preliminary investigation. These search queries (including keywords relating to the subject of the investigation) are connected with the stated purpose and subject of the investigation and can be supplemented on the spot during the investigation. The NMa will provide a list with the search queries used on the conclusion of the on-site investigation.

The official marks all digital data that he/she found by using (one of) the search queries as 'within scope'. He/she collects these data in the data set '*original, within scope*'.

The collection of digital data in respect of which the official cannot rule out that these include data which fall outside the scope of the investigation is included in the '*possibly out-of-scope*' data set. These may also include files that the official cannot search digitally, such as some PDF or TIFF files. During this search the undertaking can point out the presence of private data in either data set, giving its reasons for this assertion. The official may then exclude these data from the examined data.

On the conclusion of the on-site investigation, the NMa will provide a list with the search queries used and an overview of (the origin of) the digital data gathered per data set.

The official must comply with the rules concerning privileged data and documents throughout the duration of the digital search (described above).



## STAGE 2: PROCESSING GATHERED INFORMATION IN THE NMA OFFICE

### Filtering data sets

Following the conclusion of the on-site investigation, the NMa may have two possible data sets at its disposal: (i) the '*original, within scope*' data set and (ii) the '*possibly out-of-scope*' data set. It will provide the undertaking with an overview as well as a copy of the files in these data sets.

If necessary, the NMa will remove material from the (extracted) data sets that it considers in advance to be irrelevant.

### Further selection of files

For both data sets, the undertaking has the possibility to indicate, giving reasons, within ten working days after their provision which digital data and documents are privileged (see below).

In addition, with respect to the data set '*possibly out-of-scope*', the undertaking has the possibility to indicate, giving reasons, within ten working days after its provision which digital data and records it considers to fall outside the scope of the investigation. In response to the request, an official from the NMa investigation team will allow the undertaking to be present when the accuracy of the request is assessed. During this assessment also, the official will only inspect the data and documents in order to determine whether they fall outside the scope of the investigation.

Eventually, the undertaking receives notification in writing of the opinion of the official of the investigation team. If the official is of the opinion that the request is justified, he/she will not add the data and documents to the file. If, on the other hand, he/she is of the opinion that the request was wrongly made, the data and documents will be added to the file. Following the completion of the entire procedure, all digital data that were not included in the report file will be destroyed, in so far as legally permitted.

### Treatment of privileged data and documents

A separate procedure, for which the NMa has appointed a 'Legal Professional Privilege official', applies to the assessment of privileged (digital) files. This Legal Professional Privilege official is an official who is not and will not be involved in the relevant investigation as a supervisory official.

With regard to the data and/or documents that have been placed in (a) sealed envelope(s) during the investigation, the Legal Professional Privilege official concerned will request the undertaking to give reasons in writing, within ten working days, why these data and/or documents are privileged.

This same official will then consider this claim as well as any other claim relating to the presence of privileged data and/or documents in (one of) the two data sets. The undertaking will receive written notification of the opinion of this official. If the official is of the opinion that the request is justified, he/she will return or destroy the data and documents. If, however, he/she is of the opinion that the request is not justified, he/she must give reasons for his/her opinion. The undertaking is then given the opportunity (once again) to explain the claim in further detail.

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***A separate procedure will assess what data is privileged information.***

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Following this last explanation, the undertaking will once again be notified in writing of the opinion of the official. If the official is now of the opinion that the request is justified, he/she will return or destroy the data and documents at that stage. If, however, he/she maintains his/her earlier opinion, the official will state in his/her written notification that the supervising official of the NMa will not subsequently add the data and documents to the investigation data until five working days after the notification is sent. This period can be used to have recourse to legal remedies. After the completion of the entire procedure, all the correspondence concerning the privileged data and documents will be destroyed, in so far as legally permitted.

# OBTAINING ORAL INFORMATION

## Giving an oral explanation on site

The NMa may ask oral questions. A distinction is made in this regard between, on the one hand, questions that are necessary for the smooth, practical running of the investigation (for example the location of documents, passwords, the functionality of software, positions and activities of staff members) and, on the other, questions which relate to the subject of the investigation (the behaviour of the undertaking). You must always answer the first type of question in order to avoid you (or your undertaking) being accused of non-compliance with the obligation to cooperate as to the second type of questions, you always have the right to legal assistance when answering questions concerning the behaviour of the undertaking and, depending on the nature of the question, the right to remain silent.

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*Interviews are also part of a dawn raid.*

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In the case of inspections conducted on the orders of the European Commission, the officials may enquire about the location of certain documents and information carriers. They may otherwise only ask questions concerning the documents and information carriers which they have obtained on the basis of their investigative powers. This also applies, on the basis of the principle of proportionality, to inspections conducted by and for the NMa. You are not required, in any event, to answer any incriminating questions. See also the section headed 'the right to remain silent'.

## Only answer in the presence of a legal representative

In order to ensure that the officials do not overstep their powers during the interview, it is advisable only to answer questions in the presence of a legal representative. If this is absolutely impossible, the person being interviewed must document the questions and answers. Interviews should preferably take place in a secured area.

## Only authorised staff members should answer questions

It is also recommended that only authorised staff members with adequate knowledge of matters should answer questions put by the NMa. The other members of staff should be aware of this and know which of their colleagues will speak with the officials, so that they can refer the officials to them. In order to avoid incorrect answers being given, questions should not be answered in case of doubt. The person being interviewed may always state that he/she will return to a question at a later time.

The NMa may, in principle, interview anyone within the undertaking. Anyone with knowledge of an infringement of the Competition Act must be available to provide information. A refusal to cooperate with an interview may result in the imposition of fines up to € 450,000 or, in the case

of an undertaking or an association of undertakings, 1% of the turnover of the undertaking or the joint turnover of the undertakings that are part of the association of undertakings in the financial year prior to the decision or order, if this represents a larger amount.

### **The right to remain silent**

Where there is a reasonable suspicion that the Competition Act has been infringed, the duty to caution and the right to remain silent will apply.

The duty to caution means that the official must inform the persons who are involved in the investigation on behalf of the undertaking that they have the right to remain silent. This right to remain silent means that the undertaking is not required

to make any incriminating statement against itself concerning the suspected infringement that is being investigated. In principle, all persons within the undertaking have the right to remain silent, so not only the civil-law representatives. However, this does not mean that you are not required to answer any questions at all: the right to remain silent is explicitly not a licence to refuse to provide incriminating material. Documents and other information carriers must be surrendered at the request of the officials.

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***Providing oral information is a balance between the duty to cooperate and the right to silence.***

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### **Sealing**

If the investigation is not completed by the end of the day, the NMa officials have the power to 'seal' company areas and rooms (such as the director's office and company secretariat) and items (such as cabinets). This is done in order to prevent the manipulation or removal of material which still has to be inspected by the NMa.

It is the responsibility of the undertaking to ensure that the sealing remains intact. It is therefore advisable to inform the cleaning services, security and other third parties about the existence of the seals. They are also strictly prohibited from entering these areas at any time. If a third party nonetheless breaks a seal, the NMa has the power to impose a (hefty) fine (*see also page 51: Sanctions*).

The NMa can also impose this fine if the seal has been unintentionally broken. An undertaking or natural person can only avoid a fine if no blame can be attributed to them. This only occurs in exceptional circumstances, such as an emergency.

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***The NMa can impose a fine even if a seal is broken unintentionally.***

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# THE CONCLUSION OF THE INSPECTION

On the conclusion of the inspection , the inspection team will usually prepare a short report that includes:

- an overview of the documents that have been taken away and/or copied;
- a summary of the documents that were requested, but were not handed over or provided, together with the reasons for this;
- the questions asked and the answers that were given in response to them, as well as the refusal to answer certain questions, including the reasons for this.

The person who is responsible for assisting the inspection is required to carefully read and sign the report drawn up by the officials. A copy should be made for the undertaking. Any objections to the contents of the report must be noted in writing at the time of signing. The report must always be signed, with a reservation where applicable.

The undertaking itself must also compile a report of the inspection for internal purposes.

The following should be clearly set out in this report:

- which documents and other information carriers were requested, copied or studied by the officials concerned;
- where the documents and other information carriers concerned were located;
- which requested documents and other information carriers were refused, with a statement of the reason for this refusal (for example, the privileged correspondence with a lawyer or, in the case of an investigation by the NMa, in-house legal counsel);
- the name(s) of the official(s) with whom there was contact, the questions put by him/her and the answers given to these questions;
- each incident which gave rise to comments or responses from the inspection team.

During the subsequent evaluation, immediately following the conclusion of the inspection, the question of whether a request for leniency should (then) be submitted should be re-considered. *See appendix 3 for the checklist during and after the inspection.*

## OVERVIEW OF SANCTIONS

The maximum sanction that can be imposed on an undertaking or an association of undertakings for infringing the provisions relating to the formation of cartels or for abusing a dominant position under the Competition Act is a fine of € 450,000, or a fine of no more than 10% of the annual turnover of the undertaking if this represents a larger amount. In the case of an association of undertakings, this is 10% of the joint turnover of the undertakings that are part of the association. The maximum sanction that can be imposed on a person is a fine of € 450,000. Prison terms can also be imposed in some Member States of the European Union and in certain non-EU countries.

The maximum sanction that can be imposed on an undertaking or an association of undertakings for a breach of the obligation to cooperate with an investigation is a fine of € 450,000, or a fine of no more than 1% of the annual turnover of the undertaking if this represents a larger amount. In the case of an association of undertakings, this is 1% of the joint turnover of the undertakings forming part of the association. Here, too, the maximum sanction that can be imposed on a person is a fine of € 450,000.

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*Lack of cooperation is nearly as severely sanctioned as the anti-cartel violation itself.*

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The maximum sanction for breaking an NMa seal is € 450,000 or, if an undertaking or an association of undertakings is responsible for such breach, 1% of the total (combined) annual turnover if this represents a larger amount.

# THE REQUEST FOR LENIENCY

## Reduction of fines in return for cooperation with the authorities

The sanctions for infringement of the competition rules can be reduced or set at zero by requesting leniency. Leniency can be obtained by submitting a detailed statement to (the leniency office of) the NMa concerning a 'hardcore' cartel in which one has participated. A request for leniency can be made by an undertaking involved in the cartel or a natural person who is involved with the cartel.

Full immunity from any fine (100%) is granted to the party that is the first to provide information that enables the NMa to start an investigation. A party that is the first to provide information of substantial

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***A whistleblower can receive leniency or exemption from a fine.***

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additional value after the NMa has started an investigation is granted a 60% to 100% reduction of any fine. A party that is the second to provide information of substantial additional value, or the first to provide information, but which has forced other parties to join the cartel, is granted a 10% to 40% reduction of any fine. The percentage of reduction ultimately granted depends on the priority and the value of the information provided. The party that is the first to provide new information showing that the cartel was more serious or persisted for longer than was originally assumed will be granted immunity from fines for this 'additional' infringement.

The party requesting leniency should contact the leniency office. This can be done anonymously on a 'no names' basis, by asking a lawyer to what extent immunity from fines is (still)available. In this case, a request for leniency should be submitted immediately thereafter.

- Note: a request for leniency can only be submitted to the leniency office. If, during a visit or dawn raid carried out by the NMa or the European Commission, information is submitted to the members of the inspection team that the inspection team would not have found or that the inspection team was not looking for, this information will not be considered as having being submitted in the context of a request for leniency. This information cannot be subsequently submitted in the context of a request for leniency, and can (and will) be used against the undertaking.

The request for leniency must include very detailed information on all aspects of the cartel and its members (products and/or services involved, geographic scope, duration, working methods, market volumes involved, data, locations, contents of and participants in meetings and agreements, etc.). The party submitting the request is required to cooperate fully with the investigation at any time subsequent to the request for leniency.

If a cartel has or has had an impact in several countries, it may be necessary for a request for leniency to be submitted in several countries. It is of the utmost importance that the submission of the various requests for leniency be carefully coordinated.

**Contact details of the NMa leniency office**

Telephone: +31 (0)70 330 1710

Fax: +31 (0)70 330 1700

E-mail: [clementie@nmanet.nl](mailto:clementie@nmanet.nl)

**Contact details regarding leniency requests to the European Commission**

Fax: + 32 2 299 45 85

Telephone: + 32 2 298 41 90 or + 32 2 298 41 91 (only available on working days between 9 a.m. - 5 p.m., outside these hours only the fax line is available)



# APPENDIX 1

Checklist for the reception desk:

- request the officials to show proof of identity and to fill in a visitor's form. Ask about the purpose of their visit. If possible, make a copy of the officials' proof of identity;
- request the officials to take a seat in the waiting area to await the arrival of the responsible person within the undertaking; and
- immediately summon the responsible spokesperson for the undertaking using the telephone list below. If the officials request a particular member of staff of the undertaking then you should contact that person as well.

## APPENDIX 2

Checklist for the spokesperson for receiving an inspection team:

- accompany the officials to a meeting room;
- request the officials to show proof of identity and ask about the purpose of their visit;
- if the officials state the purpose of their visit, make a note of this;
- contact your corporate counsel, board and lawyer;
- contact a secretary who can assist the inspection team;
- ensure that a delegation from your IT department assists the inspection team; and
- request the officials to wait until the lawyer has arrived before commencing their inspection.

## APPENDIX 3

Checklist during and after the inspection:

- make sure that the officials are always accompanied by a lawyer, corporate counsel or a member of the board;
- make sure that people from your own IT department keep an eye on the officials who conduct an examination of your computers;
- if a copy is made of a document, check whether the document contains company secrets and should therefore be considered as confidential. Check also whether the document is privileged;
- if something needs to be copied for the officials, also make a copy for yourself and for the lawyer. In addition, make an inventory of all copies that are made and the location of the original documents;
- ensure that only suitably authorised people answer oral questions from the officials, preferably in the presence of the lawyer and/or corporate counsel. Refer to appendix 2 for the list of people who are authorised to answer questions from inspectors;
- read the report that has been compiled by the officials carefully, and sign it. Make a written note of any objections to the contents of the report at the time of signing. Make a copy for the undertaking;
- check whether you have received the CD ROM with forensic images and digital copies. Check also whether you have received the HASH values belonging to the forensic images or the full copies;
- you must also compile a report yourself of the inspection for internal purposes;
- together with the lawyer evaluate the consequences of the investigation and discuss possible further steps to be taken. The desirability of submitting a request for leniency should also be discussed at this stage;
- ensure you have an external strategy in place (report to the board, shareholders, exchange authorities and press).

# APPENDIX 4

## Relevant legislation

### Dutch legislation

Dutch Competition Act (*Nederlandse Mededingingswet*)– Sections 6, 24, 50-55c, 69, 70, 70a and 70b

General Administrative Law Act (*Algemene wet bestuursrecht*)– Title 5.2

Monitoring of compliance and Title 5.4 administrative fine NMa - The procedure in relation to the inspection and copying of analogue and digital data and documents

Dutch Procedure for Requesting Leniency

### European legislation:

Regulation 1/2003, chapters V and VI

European Procedure for Requesting Leniency

The main sections of the Dutch Competition Act and the Treaty on the Functioning of the European Union

*Section 6(1) of the Competition Act prohibits agreements between undertakings, decisions by associations of undertakings or conduct mutually agreed by undertakings that are intended to bring about, or that result in, the disruption or restriction of fair completion on the Dutch market or a part of this market or the creation of unfair competition on this market or a part thereof. Article 101(1) of the Treaty on the Functioning of the European Union (TFEU) includes a similar prohibition of such agreements, decisions and conduct affecting the trade between Member States.*

*Section 24 of the Competition Act prohibits the abuse of a dominant position. If this affects the trade between Member States, Article 102 of the TFEU applies.*

*The NMa and the Commission can impose hefty fines for any infringement of these provisions.*

## ADDITIONAL INFORMATION

Houthoff Buruma is a long-established Netherlands based full-service law firm with over 300 lawyers, civil-law notaries and tax advisers worldwide. The firm's lawyers in each practice area and across its offices work together to help clients assess new opportunities and manage risk.

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