Chapter 9 The Netherlands

A Market Definition in Competition and Media Law in The Netherlands

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The aim of this Chapter is to examine the current methodology, legal framework and corresponding case law concerning market definition in the Netherlands media sector. After having given an overview of the relevant regulatory framework, legal provisions and regulatory authorities we will investigate the relevant markets as they were defined by the Dutch competition authorities in the publishing, music, film, broadcasting and Internet areas, presenting the market definitions, the methodology and reasoning in details. Comparing these markets with the relevant markets as upheld by the EC Commission in the media sector in application of the EC competition rules, the analysis will show that in the Netherlands in most of the cases the same market definition methodology is used and the same principles are shared. Finally, the examination will give an insight into the differences between the competition authorities and the regulatory authorities in the media sector, the sector-specific legislation and the work of the media-specific regulatory authorities in the Netherlands with regard to the effects of the market definitions.

A Market Definition in Competition and Media Law in The Netherlands

I. Introduction

1. Regulatory Framework

The most important piece of legislation covering Dutch competition law is the Dutch Competition Act.

a) The Competition Act¹.

The Dutch Competition Act entered into force on 1 January 1998. It replaced the Act on Economic Competition of 1956² and provided a completely new legislative basis for competition policy. EC competition law has a considerate influence on the Dutch competition law³: In general, Dutch competition law uses the same system of prohibitions and exemptions as EC competition law. By introducing the new Dutch Competition Act, an equivalent to EC antitrust provision has been created. The Act applies to all undertakings active in all sectors of the economy. Its object is to promote a system of effective competition, thereby avoiding the

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² The Act of Economic Competition was based on an abused system, i.e. cartels were allowed unless prohibited for being contrary to the public interest. See E. Meerdink, “Supervision of Concentrations in the Netherlands: Convergence with the European Model”, [1999] ECLR 109 (109).

³ It is explicitly argued in the Explanatory Memorandum that it is in the interest of Dutch business and of the Netherlands in general to harmonise national competition law with community law. Explanatory Memorandum to the Competition Act, Second Chamber 24707, No. 3, 1995 – 1996, at p. 10. See also E. Meerdink (supra note 2), pp. 109 et seq.
undesired economic affects of anti-competitive behaviour⁴. It is enforced under administrative law: there is no role for penal law to play. As part of the enforcement of the Dutch Competition Act, the Dutch Competition Authority can impose fines, which makes Dutch competition law consistent with EC Competition Law. In addition to the imposition of administrative fines, the Netherlands Competition Authority is authorised to impose interim measures subject to penalties. Decisions of the NMa are open to appeal before the District Court of Rotterdam (Chamber for Administrative Law). Higher appeals can be filed with the Court of Appeal for Trade and Industry (CBB)⁵. The Dutch Competition Act may also be raised in proceedings between market players. These cases are often heard by the civil courts in summary proceedings.

b) The Telecommunications Act

The Netherlands was one of the first European countries to privatise its national communications operator, PTT Telecom, in 1989. Liberalisation of the sector and the rapid development of telecommunications systems have led the Dutch government to adopt a new telecommunications law⁶. These rules amending the Media Act included the licensing of local and regional level private broadcasters and the provision of new services by public broadcasters. On 7 March 2002, the European Parliament and the Council adopted a new regulatory framework for electronic communications and services⁷. This new framework comprises five directives, which contain rules on the authorisation and licensing of services, access to and interconnection of networks, universal services and users’ rights, data protection and radio spectrum allocation. The Dutch Ministry of Economic Affairs has given a Draft Bill with regard to the Implementation of the EC Directive to the OPTA and the OPT. Their reactions were published in December 2002⁸.

The non-competition regulatory frameworks affecting the markets in the media sector, especially the Media Act with all amendments and the Media Decree, will be examined at the end of this Chapter.

With regard to the relevant market definitions in the media sector, the Dutch competition authorities published a great number of cases, reports and consultation documents on their homepages. Besides, the annual reports published by the Dutch competition authorities from 1999 to 2002 provide a summary from the Dutch competition authorities of the subjects and

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⁴ For more details see para. 2.12; See also F. O. W. Vogelaar/J. Stuyck/B. L. P. van Reeken, “Competition Law in the EU, its Member States and Switzerland”, pp. 425 et seq. See also J. A. H. Maks, “The Dutch Competition Act from an International Perspective, the European Union, Germany and the United Kingdom”, [2000] pp. 4 et seq. This article can be downloaded from the WWW at http://www.fdewb.unimaas.nl/eurecom/Scientific%20publications/EnglishTBA.PDF. See also P. J. Slot, “Limits and Control of Competition with a View to International Harmonisation”, Electronic Journal of Comparative Law, [2001] 171 (173). The article can be downloaded from the WWW at: http://www.ejcl.org/64/art64.html.

⁵ College van Beroep voor het bedrijfsleven.


⁷ The proposed Draft Bill, the Reasoning of the Draft Bill, the Council’s Advice with regard to the proposed Draft Bill and the concepts defined by OPTA and OPT with all wordings of the law can be downloaded from the WWW at: http://www.ivir.nl/dossier/wijziging-Tw/wijzinging-Tw.html.
cases they dealt with in the previous years. As regards the numerous decisions, particular importance was given to decisions of the last three years that include detailed market definitions and market definition methodology.

2. Relevant Competition and Regulatory Authorities in the Media Sector

The relevant Dutch competition authorities in the media sector are the following:

a) The Dutch Competition Authority (NMa)\(^9\).

Responsibility for the implementation of the Dutch Competition Act has been assigned to the Dutch Competition Authority (NMa). Although the NMa is an agency of the Ministry of Economic Affairs, it makes its decisions independently. The NMa started its activities on 1 January 1998. It is headed by a Director-General\(^10\) and consists of several separate directorates and staff departments under responsibility of the Director-General. The office of energy regulation (DTe) and the Netherlands transport regulatory authority have been included within the NMa as a chamber. The NMa enforces the prohibition of cartels, rules on the abuse of a dominant position and assesses mergers and acquisitions. Since the NMa is charged with the administrative enforcement of the competition rules, it is empowered to initiate proceedings, to terminate infringements, to take administrative measures and to grant individual exemptions\(^11\). It has extensive investigation powers, comparable to those of the EC Commission. In the event of a violation of the Dutch Competition Act, the NMa may impose a fine or penalty sanctions. If companies concerned disagree with the NMa’s administrative decision before lodging a judicial appeal with the District Court of Rotterdam, the NMa deals with the complaint. This procedure is, however, not necessary in merger control cases when the parties can lodge a juridical appeal directly\(^12\).

According to Article 88 of the Dutch Competition Act, the NMa is competent to apply Article 81(1) and Article 82 EC\(^13\).

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\(^9\) Nederlandse Mededingingsautoriteit. The Dutch abbreviation, NMa, is used here.

\(^10\) On 15 September 2000 the Dutch Council of Ministers has accepted a proposal of the Minister of Economic Affairs to change the status of the Netherlands Competition Authority into a so-called autonomous administrative organisation. In 2001 a draft act by which the NMa would become an independent governmental agency was send to parliament. The act granting increased autonomy to the NMa has been approved by the lower House in January 2002 and is now before the Upper House of the Parliament. The Upper House has however on request of the new Minister of Economic Affairs decided to stay the pending procedure. The House would like to have more insight into the position that the new Government is going to take towards the NMa having decided on the results of the evaluation of the Competition Act. When the new Bill enters into force, the Minister of Economic Affairs may no longer issue instructions in individual cases. A further important change is that the head of NMa will no longer be a Director-General, but a board of directors with a chairman and two members.


\(^13\) Art. 88 states: “The director general of the competition authority shall exercise the power, as afforded pursuant to the Regulations based on [ex-] Article 87 of the EC Treaty, to apply Article 81 paragraph 1 and Article 82 of the Treaty, as well as the existing power, pursuant to Article 84 of the Treaty, to determine the admissibility of competition agreements and the abuse of a dominant position in the common market.”
b) The Post and Telecommunications regulatory body (OPTA)\textsuperscript{14}

The OPTA is the Dutch regulatory authority of the post- and telecommunications market in the Netherlands. It is an independent regulatory body that started its activities on 1 August 1997. The head of the OPTA consists of a board of three directors\textsuperscript{15}. The OPTA’s tasks and competitions are laid down in the Telecommunications Act. Besides, there exists an advisory board Post and Telecommunications (OPT)\textsuperscript{16}.

c) The Dutch Ministry of Economic Affairs

The Dutch Ministry of Economic affairs is the responsible ministry for both the NMa and – since 22 July 2002\textsuperscript{17} – the OPTA.

As mentioned above, the NMa is independent in its organisation and performs its tasks independent from the Ministry of Economic Affairs. The independence of the authority is, however, qualified, because the Minister of Economic Affairs has the power to issue instructions to the Director-General of the NMa to preserve the Minister’s responsibility and accountability to the Dutch Parliament. He may issue general instructions in policy guidelines and instruct the Director-General in individual cases (Article 4 of the Dutch Competition Act)\textsuperscript{18}.

The OPTA is completely independent from the Ministry of Economic Affairs. The Minister is politically responsible for parts of the OPTA’s performance but he has no direct right of disposal with regard to the OPTA’s decisions.

NMa and OPTA cooperate with each other in several areas. They jointly work out reports\textsuperscript{19} and consultation documents\textsuperscript{20} that deal with regulation and market definition. By publishing periodical cooperation protocols they define the areas regulated by each organisation\textsuperscript{21}.

The authority in charge of media regulation is the \textit{Dutch Media Commission} (Commissariaat voor de Media), an independent regulatory authority that works in cooperation with the competition regulatory authorities. Its work will be examined in detail at the end of this Chapter.

\textsuperscript{14} Onafhankelijke Post en Telecommunicatie Autoriteit. The Dutch abbreviation, OPTA, is used here.
\textsuperscript{15} Directorate Telecommunications and Post. The Dutch abbreviation, DGTP, is used here.
\textsuperscript{16} Advisory board Post en Telecommunications. The Dutch abbreviation, OPT, is used here.
\textsuperscript{17} The former responsible ministry was the Dutch Ministry of Transport, Public Works and Water Management.
\textsuperscript{18} When the new Bill (supra note 10) enters into force, the Minister of Economic Affairs may no longer issue instructions in individual cases.
\textsuperscript{19} See for example NMa/OPTA Internet team, Report Internet Access, 14 December 2001. This report can be downloaded from the WWW at http://www.nmanet.nl/nl/nieuws_en_publicaties or http://www.opta.nl/download/rep_internet_nma_141201.pdf.
\textsuperscript{20} See for example NMa/OPTA, Consultation Document Internet, 20 March 2001. This document can be downloaded from the WWW at http://www.nmanet.nl/nl/nieuws_en_publicaties or http://www.opta.nl/download/coda_internet_access_110401.pdf.
\textsuperscript{21} See for example OPTA/NMa, Cooperation Protocol, 22 December 2000. The protocol can be downloaded from the WWW at http://www.opta.nl/download/protocol_nma_opta_uk.pdf or http://www.nmanet.nl/nl/nieuws_en_publicaties/publicaties_samenwerkingsprotocol_van_de_opta_en_nma.asp.
II. The General Approach to Market Definition in Competition Law in the Netherlands

The Dutch Competition Act is based on and closely linked to EC law, with a prohibition system resembling the system of Articles 81 and 83 of the EC Treaty. It includes a system of preventive concentration control very similar to the EC Merger Regulation\(^\text{22}\). The substantive provisions of the Dutch Competition Act contain the prohibition of anti-competitive agreements and concerted practices (Article 6), the prohibition of the abuse of a dominant position (Article 24) and the control on concentrations (Articles 26-49). The articles of this Act refer to EC competition law on a regular basis. The Articles 6, 13 and 14 of the Dutch Competition Act consist of nearly identical regulations as those established by the European Community. The Dutch rules ban exactly the same competition-restricting agreements and conduct banned under Article 81 EC.

As regards the relevant market definitions the Dutch competition authorities, like the EC Commission, consider the major importance of the correct definitions. These definitions are necessary to deal with anti-competitive behaviour and changes in market structure. In the absence of economic analysis to provide key information about market power, market shares are the closest proxy readily available to demonstrate the existence of market power\(^\text{23}\). As mentioned above, the criteria relied upon to identify the relevant product and geographic markets at EC level are explained in various EC materials, including in particular the EC Commission’s 1997 Notice on the definition of the relevant market for the purposes of Community competition law\(^\text{24}\). This Notice as well as the EC case law is essential for the Dutch Competition Act\(^\text{25}\).

In their jointly submitted “Report Internet Access” the Dutch competition authorities provide a general definition of what is meant by “relevant markets”. According to the NMa and OPTA, “the analysis as explained in this report can serve as a guideline for the manner in which NMa and OPTA deal with market definition questions in concrete cases”. “For the record”, they continue, “in defining markets, NMa/OPTA apply the same principles as the EC Commission”\(^\text{26}\). Like the Commission, they consider both the product and the geographic dimension of the relevant market. The Dutch Competition authorities use this methodology dealing with agreements and abuse of dominant positions as well as in merger control cases. In most of the cases the NMa deals explicitly with market definitions in respect to the products offered within the markets and the geographic dimension of markets.

The following analysis therefore splits the relevant criteria into 1. definitions with regard to the relevant product market (product market definitions), using the demand-side substitution criteria, the supply-side substitution criteria and other criteria; and 2. definitions with regard to the geographic dimension of the market (geographic market definitions).


\(^{24}\) Commission Notice on the Definition of Relevant Market for the Purposes of Community Competition Law, [1997] OJ C 372/5, hereafter referred to as the “1997 Notice on Market Definition”. For more details see Chapter 1, B. II., paras. 1.5 et seq.


\(^{26}\) NMa/OPTA Internet team, Report Internet Access (supra note 19), para. 121.
The 1997 Notice on Market Definition\(^\text{27}\) as well as the EC Commission’s decisional practice\(^\text{28}\) define the concept of “relevant product markets” as comprising “all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products’ characteristics, their prices and their intended use”\(^\text{29}\).

As regards the process of defining relevant markets, the Commission summarises that “on the basis of the preliminary information available or information submitted by the undertakings involved, the Commission will usually be in a position to broadly establish the possible relevant markets within which, for instance, a concentration or a restriction of competition has to be assessed”\(^\text{30}\). When analysing which competitive constraints a company under investigation faces, the Dutch competition authorities, like the Commission, take into account the constraints posed by demand substitutability, supply substitutability and potential competition\(^\text{31}\).

Based on this, the Dutch competition authorities, NMa and OPTA, held that companies are subject to three forms of competitive pressure:

- Alternatives for customers offered by direct competitors (substitution on the demand side)
- Possibilities for suppliers to enter the market (substitution on the supply side); and
- Potential competition\(^\text{32}\).

a) Demand Side Substitution

Like the EC Commission, NMa and OPTA emphasize that from an economic perspective, for determining the relevant market, demand substitution constitutes the most important, immediate and effective disciplining factor for the suppliers of a particular product, especially with regard to their price policy\(^\text{33}\).

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\(^{29}\) See 1997 Notice on Market Definition (supra note 24), paras. 69 and 70.

\(^{30}\) See 1997 Notice on Market Definition (supra note 24 ), para. 28. See also Chapter 1 B. II. 1., paras. 1.05 et seq.

\(^{31}\) See NMa/OPTA Internet team, Report Internet Access (supra note 19), paras. 122 et seq.; NMa, Case 3052/150, 6 November 2002, Liberty Media/Casema, para. 26.

\(^{32}\) NMa/OPTA Internet team, Report Internet Access (supra note 19), para. 126.

\(^{33}\) NMa/OPTA Internet team, Report Internet Access (supra note 19), para. 126. See also NMa, Case 3052/150, 6 November 2002, Liberty Media/Casema, para. 26; NMa, “Marktscan CD-sector”, 1 April 2003, para. 13. The “Marktscan” can be downloaded from the WWW at: http://www.nmanet.nl/nl/nieuws_publicaties/.
Substitution on the demand side is determined in particular by the comparison between the products and services offered from the perspective of the consumer. Products and services belong to the same market if customers consider them interchangeable. In appraising the substitutability between products the product’s price, its characteristics and its intended use. Corresponding with the EC Commission’s Notice on market definition, the Dutch competition authorities’ statements and decisional practice show that the price is often regarded as the most important criterion.

Like the Commission the Dutch competition authorities use the tests relating to the price of products. In merger cases Wegener Arcade/VNU Dagbladen and De Telegraaf/De Limburger the NMa relied upon the SSNIP or hypothetical monopolist test as it is described and analysed in Chapter 1 of the present study and can be summarised as follows: The test assesses the own price elasticity of a product of the parties under investigation. When applied correctly it will reveal whether a firm would profit from a small but permanent increase of the price for its products or services. The hypothetical monopolist test is a two-pronged test. Firstly, it needs to be established whether the parties’ customers would switch to readily available substitutes in response to a permanent price increase in the range 5% to 10% in the products and areas being considered while the prices of other products are held constant. Secondly, one has to analyse how the switching of customers to other products would affect the profits of the party under investigation. If it turns out that substitution is enough to make the price increase unprofitable because of the resulting loss of sales, additional substitutes and areas are included in the relevant market. This will be done until the set of products and geographical areas is such that small, that permanent increase in relative prices would be profitable. Thus, a market is defined as being the smallest set of products and geographical areas meeting the hypothetical monopolist test.

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34 It can be derived from the Notice on Market Definition that the Commission regards some criteria to be more important than others, see e.g. 1997 Notice on Market Definition (supra note 24), para. 36 (product characteristics and intended use) and para. 15 (price). For more details see Chapter 1, B. II. 1. b., paras. 1.07 et seq. In the Dutch authorities’ decisional practice, these are the mostly used criteria, see e.g. NMa, Case 1528/313, 13 March 2000, Wegener Arcade/VNU Dagbladen; Case 1538, 12 May 2000, De Telegraaf/De Limburger, Case 3052/150, 6 November 2002, Liberty Media/Casema.

35 On EC level see Chapter 1, B. II. 1. a. aaa. (1), para. 1.09 referring to the 1997 Notice on Market Definition (supra note 24), para. 15; see also Commission, Decision 2000/276/EC, Airtours/First Choice, [2000] OJ L 93/1, paras. 9 and 22 et seq.


37 For more details with regard to the EC level see Chapter 1, B. II. 1. b. aa. aaa. (1), paras. 1.09 et seq.

38 SSNIP means Small but significant non-transitory increase in price.

39 NMa, Case 1528/313, 13 March 2000, Wegener Arcade/VNU Dagbladen, para. 42; Case 1538, 12 May 2000, De Telegraaf/De Limburger, para. 34. For more details with regard to the SSNIP see Chapter 1, B. II. 1. b. aa aaa. (1), paras. 1.09 et seq.

40 See Chapter 1, B. II. 1. b. aaa. (1), paras. 1.11 et seq.


42 1997 Notice on Market Definition (supra note 24) para. 17.
As also mentioned in Chapter 1 of the present study, the hypothetical monopolist test comes up against limiting factors. In consequence, the NMa uses the test just “as far as possible.” Where sufficient data on the considered product is available, the test can be an important instrument. When data is missing or incomplete, the Dutch competition authorities, like the EC Commission, are forced to employ other criteria in order to assess demand and supply substitution.

In determining the demand side substitutability the NMa – like the EC Commission - also takes into consideration the product characteristics and the intended use of a product. Products which have the same characteristics may be possible substitutes. Since differences in product characteristics are not in themselves sufficient to exclude demand substitutability, the competition authorities take other factors into account as well. In its decisional practice the NMa usually examines the product characteristics as one of several criteria.

The intended use of a product may also help to establish a basis for a further analysis of the relevant market. If a product is needed for a specific purpose and other products satisfy the same need, this appears to be an indication that the product will be within the same market.

As already mentioned above, apart from these main criteria the Dutch competition authorities use some other criteria which can be applied where the specific characteristics of the case allow doing so, such as Potential competition, future market development, availability, functionality of services, technical differences, costs of switching from one service to another etc.

For instance, in case Liberty Media/Casema, the NMa examined whether technical differences between products or services may have a decisive impact on the assessment of product substitutability. In that case the NMa concluded that in principle it is not important to the consumer with which type of infrastructure a particular service is offered. What matters is which services are actually being offered to the consumers using a particular infrastructure. In its UPC/Eneco K&T-Group as well as in its Liberty Media/Casema decision the NMa concluded that because of technical differences a distinction can be made between the radio and television programs according to their distribution over the air, by satellite or by cable.

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43 See Chapter 1, B. II. 1. b. a.a. (1) (a), para. 1.13, “Cellophane Fallacy”, B. II. 1. b. a.a. (1) (b), para. 1.15, “Missing or incomplete Data”.
44 See NMa, Case 1528/313, 13 March 2000, Wegener Arcade/VNU Dagbladen, para. 34; Case 1538, 12 May 2000, De Telegraaf/De Limburger, para. 42.
45 See 1997 Notice on Market Definition (supra note 24), para. 36.
46 See, for instance, NMa, Case 1781, 27 March 2000, UPC/Eneco K&T-Group; Case 3052/150, 6 November 2002, Liberty Media/Casema.
47 With regard to the EC level see Chapter 1, B II. 1. b. a. a.a. (3), para. 1.21. See also 1997 Notice on Market Definition (supra note 24), para. 36; Commission, Decision 98/526/EC, Hoffmann La Roche/Boehringer Mannheim (Case IV/M.950), [1998] OJ L 234/14, para. 10; Commission, Case IV/M.2517, 9 August 2002, Bristol Myers Squibb/Du Pont.
48 See NMa, Case 1781, 27 March 2000, UPC/Eneco K&T-Group, paras. 14 et seq., NMa Internet team, Report Internet Access (supra note 19), paras. 120 et seq. See also T. R. Ottervanger/S. J. van der Voorde (supra note 11), p. 244.
49 NMa, Case 3052/150, 6 November 2002, Liberty Media/Casema, paras. 307 et seq.
50 NMa Case 1781 27 March 2000, UPC/Eneco K&T-Group, paras. 14 et seq.; Case 3052/150, 6 November 2002, Liberty Media/Casema, paras. 307 et seq.
To delineate markets the authorities also consider evidence relating to recent past events in the market that offer actual examples of substitution between two products. In a number of decisions, the markets and/or prices in the respective industries were taken into consideration with regard to past as well as to future developments. In several reports and decisions the Dutch competition authorities emphasised that, when defining relevant markets, technological developments have to be taken into account. Referring again to the EC Commission, NMa and OPTA held that on the one hand, innovation may result in a product or technology which competes in an existing product or technology market. On the other hand, innovation may result in an entirely new product which creates its own new market. In such a case, existing markets are only relevant if they are somehow related to the innovation in question. However, NMa and OPTA continue, most of the cases probably concern situations in between those extremes, i.e. situations in which innovation efforts may create products (or technology) which, over time, replace existing ones.

Moreover, the views of the main customers and competitors of the companies under investigation are also taken into account. Dealing with merger and joint venture cases, the NMa may request both the notifying parties and third parties for information in addition to the information submitted in the notification form and, where applicable, the application form. NMa officials are also entitled to conduct investigations at a company’s premises and examine books and other records. Violation of the duty to co-operate or the submission of incorrect or incomplete information may be punished.

Consumer preferences and the motivation of the consumer are regarded as yet another important criterion in market definition. Despite the existence of substitutes at similar prices, consumer loyalty can limit substitution away from one product concerned following a price rise. The preferences of consumers may be influenced according to the brands used for the same product or by other factors. Since it may be difficult to gather the direct views of end consumers about substitute products the NMa often relies on marketing studies. These are used to determine consumer usage and purchasing patterns and the views of retailers thereupon in order to establish whether an economically significant proportion of consumers consider two products as substitutable. With regard to the media sector, the Wegener Arcade/Dagbladen and De Telegraaf/De Limburger decisions may serve as an example. In

56 1997 Notice on Market Definition (supra note 24), para. 41.
57 In the Dutch decisional practice see for instance NMa, Case 1538, 12 May 2000, De Telegraaf/De Limburger, para. 78. See also Chapter 1, B. II. 1. b. aa. aaa. (5), para. 1.24; 1997 Notice on Market Definition (supra note 24), para. 41. See also Commission, Decision 94/893/EC, Procter&Gamble/Schickedanz (Case IV/M.430), [1994] OJ L 354/33, paras. 43 et seq.
both cases the NMa carried out investigations to define to which extent different kinds of newspapers should be distinguished from each other. The different consumer groups and the consumers’ habits and preferences were one of the most important factors relied upon.

b) Supply Side Substitution

The substitution on the supply-side can also play an important role for determining the relevant markets. If the consequences of this factor are, in their effect and directness, comparable to substitution on the demand side, one can also take into account substitution on the supply side. This requires that suppliers are able to switch to production of the relevant products and are able to bring them to market in the short term without incurring significant additional costs or running any risks in response to small and long-term changes in the prices involved. When determining whether or not and to what extent suppliers pose a constraint on the producer under investigation, a set of criteria - equal to those assessing demand side substitutability - can be used. Criteria that are used to examine the potential of demand side substitution, such as, for instance, existence of barriers and costs associated with switching demand to potential substitutes, can also define the opportunities of potential producers to compete with the actual producers in a given market. The hypothetical monopoly test is also taking into consideration both demand as well as supply side substitution.

In most decisions, when delineating the relevant markets, the Dutch competition authorities take into account supply side as well as demand side substitution, stressing that both perspectives are necessary.

As regards the potential competition factor, the Dutch competition authorities obviously distinguish between supply side substitutability and potential competition and assess the two criteria at different stages of the competition analysis when they note that “The competitive constraints arising from potential competition and factors other than the above-mentioned supply side substitutability are in general less immediate”.

It is stressed in Chapter 1 that the EC Commission seems to have adopted a flexible, non-dogmatic approach in how national regulatory authorities should deal with the issue at question but seems to have upheld the approach followed in the 1997 Notice on Market Definition, stating that potential competition from other sources than demand-side and supply-side substitutability is generally taken into account only once the relevant market has been defined, when the degree of market power is being analysed in the light of competitive restraints. Following this approach, the NMa regards the competitive constraints an undertaking faces as an important criterion.

58 NMa/OPTA Internet team, Report Internet Access (supra note 19), para. 128. See also 1997 Notice on Market Definition (supra note 24), para. 41.
59 See Bird&Bird (supra note 54), para. 80.
60 See Chapter B. II. 1. b. aa. aaa. (1), para. 1.11. See also D. Hildebrand, The Role of Economic Analyses in the EC Competition Rules, at p. 328.
61 NMa/OPTA Internet team, Report Internet (supra note 19), para 129.
62 For more details see Chapter 1 B. II. 1. b. bbb., paras. 1.27 et seq, para. 1.33. See also Commission, Decision 1999/641/EC, Enso/Stora, [1999] OJ L 254/9, para. 40; 1997 Notice on Market Definition (supra note 24), para. 23.
63 See NMa, Annual Report 2001 (supra note 12), pp. 24 et seq as well as the NMa’s decisional practice. On the EC level see Form A/B (supra note 27), Section 10; Form CO (supra note 27), Section 5.4.;
c) Other Criteria

As already mentioned, according to the Dutch competition authorities, the competitive constraints arising from potential competition and factors other than the above-mentioned supply side substitutability are in general less immediate for the Dutch competition authorities and in any case require an analysis of additional factors. In the NMa’s decisional practice as well as in statements and documents several other factors which influence the market definitions can be found. Various criteria employed in order to identify a joint dominant position are also used to identify the relevant markets. Among them are the degree of concentration, market transparency, homogenous products, competitive pressure, degree of market saturation, symmetry between large market players with regard to their market share and cost structure, high barriers to entry, the relationships between the market players etc. These criteria can be taken into account at the stage of market definition as well as at a later stage of interpreting the market share.

2. Geographic Dimension of the Market

In spite of the fact that the Dutch Competition Act applies to a significant restriction on the Dutch market or “a part thereof”, whereas the EC merger regulation applies to the “common market or a substantial part of it”, the Dutch competition authorities’ approach to geographic market definition corresponds with the Commissions approach. The relevant geographic market is therefore defined as comprising

“the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas.”

The relevant geographic market is defined with reference to the competitive constraints which firms located in one region pose for those firms located in the same region as the firm or those firms under investigation. In accordance with the EC Commission, the NMa’s approach of the geographic dimension of the market can be summarised as follows:

“It will take a preliminary view of the scope of the geographic market on the basis of broad indications as to the distribution of market shares between the parties and their competitors, as well as preliminary analysis of pricing and price differences at national and Community or EEA level. This initial view is used basically as a working hypothesis to focus the authorities’ enquiries for the purposes of arriving at a precise geographic market definition.”

Like the EC Commission, the Dutch competition authorities determine the scope of the geographic market by various criteria, such as national or regional preferences, preferences...
for national or regional products or brands, language, culture and life style, the need for a local presence, transporting costs and other circumstances. Consumer and retailer preferences are regarded as strongly influencing the geographic scope of competition. The Dutch competition authorities also contact the main customers and competitors of the parties in its enquiries in order to gather their views on the boundaries of the geographic market\textsuperscript{69}.

3. \textit{Summary}

When defining the relevant markets, the Dutch competition authorities apply the same principles as the EC Commission. Therefore, the relevant market is established by the combination of the product markets and the geographic markets\textsuperscript{70}. In its reports as well as in its decisional practice, the Dutch competition authorities rely on demand side as well as supply side substitution. As far as sufficient data on the product considered is available\textsuperscript{71}, the SSNIP-test is used. Various criteria are considered as a complement or an alternative to the SSNIP-test. These are, among others, availability, functionality of services, technical differences, consumer preferences and the reason for competitive pressure. The NMa often carries out investigations to establish the views of the main customers and competitors of the companies under investigation. Consumer preferences, the motivation of the consumer and competitive pressure between the market players are regarded as important criteria in market definition. The NMa closely follows the developments on the EC level as well as the EC case law.

B. \textbf{Relevant Markets in the Media Sector}

I. \textit{Publishing}

In the Dutch publishing sector, several specific features can be found that are unique compared to other systems. In the Netherlands there are no Sunday papers, no party press, no sports papers and no tabloid press\textsuperscript{72}. There are quite a lot of national newspapers, all broadsheets, not including daily specialist papers. Moreover, nearly 30 regional newspapers are found, from which the largest are Dagblad de Limburger and de Gelderlander\textsuperscript{73}. Some of the world’s top professional publishers – Elsevier, Wolters Kluwer and VNU - are Dutch.

\footnotesize{\textsuperscript{69} See for instance NMa, Case 1528/313, 13 March 2000, \textit{Wegener Arcade/VNU Dagbladen}; Case 1538, 12 May 2000, \textit{De Telegraaf/ De Limburger}.}
\footnotesize{\textsuperscript{70} See NMA/OPTA Internet team, Report Internet Access (supra note 19 ), para. 124; 1997 Notice on Market Definition (supra note 24), para. 9.}
\footnotesize{\textsuperscript{71} Moreover, there may not be signs of supra competitive prices caused by market dominance, see Chapter 1, B. II. 1. b. aa. aaa. (1), paras 1.09 et seq.}
\footnotesize{\textsuperscript{72} For more details see P. Bakker, Dutch Media. The article can be downloaded from the WWW at: http://users.fmg.uva.nl/pbakker/werk/dutchmedia.pdf. See also S. Burke, “The Dutch media landscape”. The article can be downloaded at WWW: http://www.ejc.nl/jr/emland/netherlands.html. See also the Decree of 15 December 1997 on the temporary exemption of price fixing agreements in the daily newspaper, Statue Book 1997, 705.}
\footnotesize{\textsuperscript{73} For more details see P. Bakker (supra note 72), S. Burke (supra note 72).}
Within the last years, the NMa had to cope with quite a lot of mergers and joint ventures in the publishing sector. Especially three decisions seem to be of particular relevance to appraise the criteria upheld to define markets in the publishing sector. The NMa defines relevant markets in this sector as follows:

1. Readers’ Markets/Newspapers

a) Distinction between Daily Newspapers and Other Media

First of all, in its Nederlandse Dagbladpers decision the NMa - like the EC Commission - differentiates between daily newspapers and other information media, such as magazines, radio and television and Internet. In its following decisions Wegener Arcade/VNU Dagbladen, De Telegraf/De Limburger and recently in the decision Liberty Media/Casema the NMa repeated this conclusion. The NMa stressed that daily newspapers differ from the above-mentioned media in relation to a number of characteristics. Those are – among others - price, quantity and depth of information, topicality, actuality, frequency of publication, method of presentation etc. From the reader’s perspective, these characteristics are not substitutable. Therefore, the NMa concluded that daily newspapers constitute a separate product market.

b) Distinction between Regional Newspapers and National Newspapers

In the case Wegener Arcade/VNU Dagbladen and in the case De Telegraaf/De Limburger the NMa distinguished several separate markets in the publishing sector. The cases dealt with the Dutch publisher Wegener Arcade, who intended to take over VNU-Dagbladen. Furthermore, it was intended to sell the newspaper De Limburger to N.V. Holdingmaatschappij De Telegraaf immediately after the acquisition. The NMa, having to assess the position of the new entities, had to define several different markets in the

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75 See for example NMa, Case IV/M.1401, 1 February 1999 Recoletos/Unedisa; Decision 2001/98/EC, Telia/Telenor (Case IV/M.1439), [2001] OJ L 40/1.

76 NMa, Case 528, 9 February 1999, Nederlandse Dagbladpers.

77 NMa, Case 1528/313, 13 March 2000, Wegener Arcade/VNU Dagbladen, paras. 31 et seq.

78 NMa, Case 1538, 12 May 2000, De Telegraaf/De Limburger.

79 NMa, Case 3052/150, 6 November 2002, Liberty Media/Casema.


81 Case 1538, 13 March 2000, De Telegraaf/De Limburger.
publishing sector. One of the main questions arising was whether the national and regional daily newspaper markets have to be regarded as separate markets.

\textit{aa. Product Market}

In both cases the NMa\textsuperscript{82} examined whether from the consumer’s perspective the relevant products can be regarded as substitutable by reasons of the products’ characteristics, their prices and their intended use. An investigation was carried out by the NMa to establish the extent up to which national daily newspapers should be distinguished from regional daily newspapers. The director-general of NMa concluded that both types of daily newspapers fall within the same product market but noted that on assessing the consequences of the concentration, it had to be taken into account that regional daily newspapers constituted a separate market segment and that both types are each others closest competitors\textsuperscript{83}.

The NMa could not identify enough arguments supporting a market definition including both types of daily newspapers. Concerning demand-side substitution, the NMa acknowledged that consumers often chose a regional daily newspaper because of its special combination of information. Besides, the investigations revealed that there are few consumers who would accept the costs involved in switching from regional daily newspapers to national daily newspapers if the costs would be limited.

On the other hand, investigations discovered significant competition pressure between regional and national daily newspapers. The NMa attached importance to the fact that news and information are presented in a similar way by both types of daily newspapers and that in the past many readers went over from regional to national daily newspapers and vice versa. Compared with national daily newspapers, the regional ones recently declined. According to investigations, readers of regional daily newspapers regard national daily newspapers as the best alternative. Also, the types of readers are similar.

Using the hypothetical monopolist test the NMa carried out investigation to establish whether a reader of regional daily newspapers would switch to a national daily newspaper in response to a (permanent) price increase. It was investigated that a significant number of customers would switch so that less regional daily newspapers would be sold and bought. Finally, internal documents of the parties as well as of other market parties, point to competition pressure.

Therefore, the director-general concluded that in principle national and regional daily newspapers fall within the same market.

\textit{bb. Geographic Market}

With regard to the geographic dimension, in the cases \textit{Wegener Arcade/VNU Dagbladen} and \textit{De Telegraaf/De Limburger}, the NMa attached weight to the fact that regional daily newspapers have a special regional orientation and are therefore predestined for readers living in that region. Competition exists in these different regional areas. Concerning these facts, besides the competition in the different regional areas, a broader market in the Netherlands with conditions of competition sufficiently homogeneous was not identified. The relevant

\textsuperscript{82} The Director-General decides in the NMa’s cases. In the present study the Director-General hereafter is referred to as the “NMa”.

markets were regional ones\(^8^4\). Thereby, for the assessment of the case, the daily newspapers coverage and the area of overlap\(^8^5\), were of major importance.

2. Advertising Market

With regard to the newspapers, the NMa furthermore distinguishes between the readers’ market and the advertising market.

a) Product Market

The NMa concluded in *Wegener Arcade/VNU Dagbladen* and *De Telegraaf/De Limburger* that a distinction had to be made between regional newspapers and house-to-house newspapers on the one hand and other advertising media on the other. In demarcating the advertising market, the NMa took into consideration the coverage that advertisers wished to achieve, the various media that could be used to advertise and the target groups that advertisers wished to reach with a particular advertisement. According to an investigation carried out by the NMa, 43% of advertisers would switch to other advertising media in response to a permanent price increase of 10% of the advertising space in regional daily newspapers. As regards advertisers in - regional and local - house-to-house papers and specialist topic papers, 38% and 50% would switch. About 50%-60% of those advertisers would switch to another regional newspaper. Whereas, with regard to advertising space, regional newspapers and house-to-house newspapers are good substitutes for each other, they could not readily be substituted by other advertising media. Therefore, according to the NMa, advertising media with national coverage belong to a different market than regional and local advertising media. As a further argument for this distinction between advertising space in regional newspapers and other media the NMa referred to the EC Commission’s decisions *Newspaper Publishing, Receletos/Unedisa* and *Telia/Teleonor*\(^8^6\). Finally, in relation to this, the NMa stressed that on assessing the consequences of the concentration, separate market segments and existing competition pressure of folders, direct marketing and the Internet have to be taken into account.

b) Geographic Market

Regarding the geographic scope of the market, the NMa stated that for the advertisers the advertising area they cover up is of major importance\(^8^7\). The relevant area can, for instance, be national, regional or local. The NMa assumed that written media often has an advertising area that corresponds with the area in which the media is available itself. In regional and house-to-house newspapers with their often different editions, the advertisers can choose in which edition they want to place their advertisements. The publishers therefore can offer different advertising areas - regional or local - with just one newspaper. Therefore, according to the NMa, the regional and the local areas for advertising space have to be taken into account in

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85 In the Case 1528/313, *Wegener Arcade/VNU Dagbladen* the area of overlap was Gelderland and Zeeland; in the Case 1538, *De Telegraaf/De Limburger* it was Limburg.


order to deal with the concentrations in the case *Wegener Arcade/VNU Dagbladen* and in the case *De Telegraaf/De Limburger*. Taking the area of overlap as a starting point, differences of regional and local competition pressure that depend on the publishers’ market position can be taken into consideration.

3. Press Markets

Finally, the NMa had to examine the possible consequences of the concentration of press services, that is to say the supply of information and copy to the media. At the time of the decision, three “full-line press services” were active in the Netherlands; APN, Geassocieerde Pers Dienst (GPD) and Zuid-Oost Pers (ZOP). They all supplied a comprehensive package of press services. GPD and ZOP were editorial press services. ANP only competed to a limited extent with the other two press services and was largely complementary.

Based on the differences between so-called full-line editorial press services and other kinds of press services, the director-general of NMa concluded that full-line editorial press service form a national separate market. Since these services, in contrary to other kinds of press services, offer a comprehensive package of general national and international information and press services the different services are not regarded as substitutable from the customers’ point of view.

With regard to the geographic dimension, the market is national. The NMa attached great weight to the fact that the Dutch language is necessary for offering full-line editorial press services. Besides, press services have to provide with national information.

4. The Court’s Point of View

In the case *Wegener Arcade/VNU Dagbladen*, the NMa concluded that the acquisition of the companies involved created dominance on the readers’ market for national daily newspapers and regional daily newspapers in the Provinces of Gelderland and Zeeland, on the market for advertisements in local and regional newspapers in these Provinces and on the national market for press services. Wegener appealed the NMa’s decision. In the following proceedings, the NMa’s decision was overruled by the District Court of Rotterdam but upheld by the Court of Appeal for Trade and Industry (CBB) in second appeal. In its decision, the CBB confirmed the NMa’s market definitions.

5. Magazines

In the cases *VNU/Geomatic* and *VNU/Jaarbeurs* and *Veen Uitgevers Beheer B.V./Bosch & Keuning N.V.* the question arose if a distinction had to be made between magazines with different topics. The NMa, however, left aside the question of the necessity to identify

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88 Among others: politics, economics, culture, media etc., see NMa Case 1528/313, 13 March 2000, *Wegener Arcade/VNU Dagbladen*, para. 127.
89 District Court of Rotterdam, Case MEDED 00/573 SIMO, MEDED 00, 20 September 2000.
90 Court of Appeal for Trade and Industry, Case AWB 00/867, 00/870, 5 December 2001. See also T. R. Ottervanger/S. J. van der Voorde, (supra note 11), pp. 239 et seq.
91 NMa Case 768, 20 August 1998, *VNU/Geomatic*.
92 NMa Case 2770/16, 14 February 2002, *VNU/Jaarbeurs*.
93 NMa, Case 2415, 31 May 2001, *Veen Uitgevers Beheer B.V./Bosch & Keuning N.V.*
separate markets, as this did not have an influence on the assessment of the merits of the cases.

6. Books

In the merger decision *Veen Uitgevers Beheer B.V./Bosch & Keuning N.V.*\(^{94}\) the assessment of the case focused on book markets.

a) Distinction between Books with General Topics, Schoolbooks and Academic Publications

Concerning demand side and supply side substitution, NMa distinguished books with general topics, school- and textbooks and academic publications. The fact was emphasised that - from the demand side point of view of the consumer - , these books are not interchangeable. In assessing supply side substitutability it was stressed that the publishers’ activities depend on the books’ categories. In contrary to a publisher of general books, a publisher of schoolbooks and academic publications takes part in the process of the books’ creation. Moreover, from the publisher’s point of view, consumers’ choices and a high distribution rate are characteristic for the general book market, whereas the market for schoolbooks and academic publications can be regarded as business-to-business markets.

Therefore the mentioned books can not be regarded as substitutes. They constitute separate markets. The decision corresponds with the EC Commission’s opinion in *Bertelsmann/Wissenschaftsverlag Springer*\(^{95}\).

Regarding the geographic dimension of the general book market it was noted that this is national. In *Veen Uitgevers Beheer B.V./Bosch & Keuning N.V.*\(^{96}\) the NMa did not confirm the parties’ assumptions that a broader geographic market was to identify, for this did not have an influence on the assessment of the merits of the case.

b) Further Distinctions

The NMa also considered whether the general book market can be further subdivided according to the different genres, different prices or different ways of distribution. With regard to the different genres he identified various arguments supporting a market definition including or separating different genres and finally noted that for assessing the relevant concentration a distinction was not necessary\(^{97}\). Different prices or different ways of distribution appear also to be no reason for distinguishing different markets. Publishers sell books of different price categories without significant differences in distribution.

The question of the possibility to constitute a separate market for the exploitation of copyright was left aside as well as the question whether different magazine markets could be identified.

\(^{94}\) NMa, Case 2415, 31 May 2001, *Veen Uitgevers Beheer B.V./Bosch & Keuning N.V.*

\(^{95}\) Commission Decision Case IV/M.1377, 15 February 1999, *Bertelsmann/Wissenschaftsverlag Springer*. In this decision, the Commission decided to assess the markets for specialised publications from the supply side. For more details see Chapter 1, C. II. 4. a., paras 1.133 et seq.

\(^{96}\) NMa, Case 2415, 31 May 2001, *Veen Uitgevers Beheer B.V./Bosch & Keuning N.V.*

\(^{97}\) The NMa attached weight to the fact that publishers usually can chose between different genres without difficulties. See NMa, Case 2415, 31 May 2001, *Veen Uitgevers Beheer B.V./Bosch & Keuning N.V.*, para.20.
6. Summary

In the NMa’s merger decisions Wegener Arcade/VNU Dagbladen and De Telegraaf/De Limburger, market definition was crucial for dealing with competition issues relating to the publishing sector. In both cases the NMa had to cope with newspapers, advertising and press market issues. In order to define the relevant markets, the wide range of criteria was used, taking into consideration demand and supply side substitution including the hypothetical monopolist test, consumers’ behaviour and preferences, causes of competition pressure etc. In the case Veen Uitgevers Beheer b.v./Bosch&Keuning N.V., the NMa – having to define book markets - based its decision basically on the same criteria. Whenever relevant for the individual case, the NMa uses the EC Commission’s decisions as further arguments.

II. Music

As regards the music area there are not many cases relevant to market definition. This lack of cases is possibly due to the fact that two thirds of the Dutch market is dominated by the same few record companies which as well dominate the music industry worldwide. As to those, the NMa was not the authority to deal with anti-competitive behaviour or merger control. However, single decisions and a recent analysis submitted by the NMa give insight into the music sector and some relevant market definitions. Those as well as different reports dealing with the music industry in the Netherlands show that in the music sector the different economic activities surrounding music - such as music recording and distribution, music publishing and music retailing - all play a key role in defining markets. This situation corresponds with the EC Commission’s decisional practice. As outlined in Chapter 1, the EC Commission defined several markets following these activities and subdivided the markets into different sub markets.

1. Radio Advertising and Radio Exploitation Markets

In its SBS en Streng Holt/Publimusic decision the NMa had to deal with a joint venture which should operate in the field of exploitation of commercial radio stations in the Netherlands. SBS was already active in this field in different countries. Streng Holt published audiovisual media including music productions and advertising.

The NMa assumed that - apart from the market for a radio advertising market – the existence of a separate market for exploitation of radio stations cannot be excluded. Even if the assessment of the merits of the case was not influenced by the answer of this question, the NMa mentioned this distinction as a possibility.

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98 Universal Music Group, Sony Music, Emi Music, Bertelsmann Music Group (BMG), Warner Music/EMG.
99 NMa, Case 1682, 6 March 2000, SBS en Streng Holt/Publimusic. See also Case 1901, 7 June 2000, Dixons/Mega Media; Case 1561, 27 June 2002, Free Record Shop versus KVB;
100 NMa, Marktscan CD-sector (supra note 33);
102 Chapter 1, C. II. 3., paras. 1.121 et seq.
103 NMa, Case 1682, 6 March 2000, SBS en Streng Holt/Publimusic.
From a geographic standpoint, the NMa concluded that because of the national regulation and the different languages, it is probable that the mentioned markets are national. Whether there were also regional markets to identify was not decided.

2. CD-Markets

In its report “Marktscan CD-sector” the NMa, defining the relevant markets, takes as a starting point that sound media (CD, MC, vinyl, DVD etc.), radio music and live music do not belong to the same market. Furthermore, sound media and other “entertaining products” have to be distinguished because these are not substitutable for each other from the consumer’s point of view.104

a) Distinction between Different CD-Albums

In its analysis, the NMa examines whether separate CD-markets can be identified with regard to different album titles. Taking into consideration both different artists and different genres, the NMa differentiates between national pop albums, international pop albums and classical albums. Concerning demand-side substitution, these are regarded as separate markets because for the consumers they are not interchangeable. In many cases, a CD album is unique. If a consumer considers a chosen CD as being too expensive, he will usually not buy a CD (of another genre) instead.105 With regard to this, a lot of very small markets could be distinguished. On the other hand, according to the NMa, the wholesalers’ and the retailers’ possibilities to add music genres to their assortment can lead to significant competition. With regards to substitutability on supply-side, a broader market could be identified. The NMa concluded that in any case a distinction has to be made between very different genres such as international pop, national pop and classical music. In several decisions, the EC Commission made the same differentiation106.

b) Distinction between CDs and other sound media

In its report, the NMa also answers the raised question whether distinction has to be made between different sound media. The NMa states that, from a consumer’s point of view, CDs on the one hand and other sound media such as vinyl, MC, DVD, SACD107 and digital media downloaded from the Internet on the other hand are not interchangeable. The NMa attaches importance to the fact that there are significant differences with regard to prices, the necessary hardware and product characteristics (quality, use, (technical) possibilities)108.

Concerning supply-side substitution, the director-general of NMa concluded that a separate market for CDs can be identified but noted in relation to this aspect that in the near future, DVDs appear to become the CDs close competitors. Moreover, music downloaded from the Internet can lead to significant competition pressure.

104 NMa, Marktscan CD-sector (supra note 33), para. 14.
105 NMa, Marktscan CD-sector (supra note 33), para. 16. The NMa recognises that the consumer will eventually buy another CD including some of the chosen songs. Buying no CD at all is another alternative.
106 See e.g. Commission Decision, Case COMP/M.2883, 2 September 2002, Bertelsmann/Zomba, para 10. For more details see Chapter 1, C. II. 3. a., para. 1.123.
107 Super Audio Compact Disc.
108 NMa, Marktscan CD-sector (supra note 33), para. 18.
c) National versus Regional Markets

As regards the geographic dimension, the NMa states that consumers usually buy their CDs in music shops not too far away from their place of residence. Therefore, music shops located in another part of the Netherlands can not be regarded as real alternatives.

Presently, recorded music is mostly distributed to consumers on physical media, mainly CDs\textsuperscript{109}. As long as on-line distribution is not used to a great extend, CD markets can be regarded as local or regional ones\textsuperscript{110}. The NMa, however, will have to take into consideration the fact that digital recordings can now be distributed easily over the Internet, so that, with regard to distribution, the Internet will probably lead to growing competition\textsuperscript{111}. In most of the other EC member states this is already the case. Moreover, as regards supply side substitution, the NMa concluded that a broader geographic market can be identified: The fact that the CD-retailers’ so-called “catchment areas” generally overlap leads not only to competition between retailers but also to conditions of competition sufficiently homogeneous in all overlapping areas. This area does however not appear to be international.

As a result, the NMa defines CD-markets in principle as national ones.

III. Broadcasting

The Netherlands has a dual system of public and commercial broadcasting with numerous local public radio and TV stations. In order to supplement domestic public broadcasting, \textit{Radio Netherlands International} broadcasts Dutch-language radio programs on short-wave, aimed specifically at listeners abroad. The broadcasting sector comprises a multitude of trading relations.

In the broadcasting sector, the recent case \textit{Liberty Media/Casema}\textsuperscript{112} appears to be a very significant decision appraising the criteria upheld to define markets. In that case, the NMa concluded that a distinction has to be made between upstream markets and downstream markets. Within upstream markets, another distinction can be made between the distribution of TV and the distribution of radio signals. The (upstream and downstream) market for the distribution of radio and TV signals can further be subdivided according to the different technical means of distribution, i.e. the distribution via cable networks or via satellite or terrestrial frequencies. Furthermore, with regard to both upstream and downstream markets, a distinction can be made within the market for distribution via cable between the transport of signals and program packages offered. Finally, within the market for offering program packages the market of standard program packages can be distinguished from special content packages. Various cases\textsuperscript{113}, advices\textsuperscript{114} and documents\textsuperscript{115} dealing with the broadcasting sector confirm and complete the market definition practice in this sector.

\textsuperscript{109} NMa, Marktscan CD-sector (supra note 33), para. 21. See also M. Poel/P. Rutten (supra note 101), p. 3.
\textsuperscript{110} See also M. Poel/P. Rutten (supra note 101), p. 3.
\textsuperscript{111} See also M. Poel/P. Rutten (supra note 101), p. 3.
\textsuperscript{112} NMa, Case 3052/150, 6 November 2002, \textit{Liberty Media/Casema}.
\textsuperscript{113} In particular there have to be named NMa, Case 2425, 4 July 2001, \textit{UPC/Primacom}; Case 1781, 27 March 2000, \textit{UPC/Eneco K&T-Groep}; Case 3052/150, 6 November 2002, \textit{Liberty Media/Casema}.
1. Product Markets

a) Market for the Distribution of Information?

The broadest possible relevant product market relating to the TV broadcasting sector taken into consideration by the NMAs is the market for the distribution of information. In *UPC/Eneco K&T-Groep* and *Liberty media/Casema* the NMAs examined whether, as regards the recent convergence trends in the communications sector, such a broad market can be identified. Finally it was concluded that this is not the case. In its *Liberty media/Casema* decision the NMAs noted that the new EC Regulatory Framework for Electronic Communications Networks and Services adopted by the European Parliament and the Council will not influence future decisions. The framework aims to establish a harmonised regulatory framework for networks and services across the EC, and it seeks to respond to convergence trends by including all electronic communications networks and services. There are, however, no hints that one single market including all communications services and information distribution shall be created.

b) Distinction between Upstream Markets and Downstream Markets

In case *Liberty Media/Casema* the NMAs assumes as its basic premises that a differentiation has to be made between upstream markets and downstream markets.

On the upstream market radio and TV signals are distributed to program suppliers and then to suppliers of program packages. Only afterwards, the program package can be offered to the distributor who then becomes a supplier. The downstream market’s characteristic is the transmission of radio and TV signals and the offering of contents to the consumers. The NMAs noted that, even if there are different trading parties involved within two different markets, these markets can influence each other with regard to offers and prices.

c) Separate Markets for the Distribution of TV Signals and Radio Signals

Within the upstream market, a further distinction can be made between TV signals and radio signals. The NMAs based this conclusion on the fact that TV and radio signals are separate products. From the consumers’ as well as from the program suppliers’ point of view, these signals are not interchangeable. The NMAs identified differences in product characteristics, intended use and price that appear to be the most important criteria in the definition of distributing TV signals and radio signals as separate product markets. Moreover the fact that usually the suppliers of television signals form another group than the suppliers of radio signals was taken into account. Therefore, distribution of TV signals and radio signals belong to different product markets.

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115 See OPTA, Consultation Document Cable Access, 16 May 2002.
117 NMAs, Case 3052/150, 6 November 2002, *Liberty media/Casema*, paras. 23 et seq.
118 See NMAs *Liberty Media/Casema*, paras. 23 and 24. See also Case 2425, 4 July 2001, *UPS-PrimarCM*, para. 41.
119 NMAs, Case 3052/150, 6 November 2002, *Liberty Media/Casema*, paras. 29 et seq.
Since the offered program packages via cable networks include radio- as well as TV channels, a distinction within the downstream market is not necessary.\(^{120}\)

d) Separate Markets according to the Technical Means of Distribution

The NMa concluded that the (upstream and downstream) market for the distribution of radio and TV signals can be further subdivided according to the different technical means of distribution, i.e. the distribution by cable networks, via satellite or via terrestrial frequencies.

The NMa stated that Radio signals are usually distributed via terrestrial frequencies\(^{121}\); therefore a separate market for distribution via cable networks may be possible.

More important, the operation of TV cable networks constitutes a separate product market\(^{122}\).

In the *UPC/Eneco K&T Group* the NMa considered the technical differences and different costs of distribution as the most important criteria. Though not mentioned explicitly it becomes clear that the NMa regarded those factors as having decisive impact on the assessment of product substitutability, taking into consideration both the consumers’ and the suppliers’ point of view. In the case *UPC/PrimaCom*\(^{123}\) the NMa stressed that the market for the distribution of radio and TV signals through cable networks must be viewed from the perspective of the consumer and from the perspective of the suppliers of television programs and other services.

In the case *Liberty Media/Casema* the NMa explicitly referred to the corresponding case *MSG Media Service* in which the EC Commission decided that the operation of TV cable networks constitutes a separate relevant market\(^{124}\). At the same time, the NMa took notice of the Commission’s – partly different - arguments in its *British Interactive Broadcasting* and *TPS I* decisions\(^{125}\). Like the EC Commission the NMa based its decision on the fact that - from the demand side point of view of the TV supplier - the transmission of programs by cable is not interchangeable with satellite transmission\(^{126}\). Distribution via cable and satellite are not interchangeable from the consumers’ point of view since they face considerable obstacles when switching from cable to satellite or vice versa, inter alia because of the cost

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\(^{120}\) See NMa, Case 3052/150, 6 November 2002, *Liberty Media/Casema*, paras. 23 and 24.

\(^{121}\) NMa, Case, 6 November 2002, *Liberty Media/Casema*, paras. 66 et seq; Case 2425, *UPC/PrimaCom*, para 48.

\(^{122}\) These conclusions were already made in former decisions: NMa, Case 439, *UPC/ Nuon*; Case 1396, *UPC/A 2000*; Case 1530, 14 October 1999, *Casema- CAI Bussum*, dealing with cable companies.

\(^{123}\) NMa, Case 2425, *UPC/PrimaCom*. See also NMa, Annual Report 2001 (supra note 12), p. 88.


involved\textsuperscript{127}. The NMa noted that distribution via digital video broadcasting terrestrial is not yet a relevant competitor but in future significant competition might be possible.\textsuperscript{128}

e) Distinction between the Transport of Signals via Cable and Program Packages offered via Cable

Furthermore, the NMa concluded that within the market for distribution via cable there is a separate market for the transport of radio and TV-signals that can be distinguished from offering content packages. In \textit{Liberty Media/Casema} the NMa focused the assessment of this question essentially on the OPTA’s Consultation Document Cable Access, a draft for the new Telecommunications Act and the EC New Regulatory Framework for Electronic Communications and Services\textsuperscript{129}. In the mentioned Dutch documents, infrastructure suppliers, suppliers of standard program packages and suppliers of special services are distinguished. The NMa further stressed that with regard to the New Regulatory Framework for Electronic Communications\textsuperscript{130} a wholesale market of broadcasting transmission services and distribution networks can be distinguished as far as they have the possibilities to provide the consumers with signals.

f) Distinction between Standard Program Packages and Special Service Programs

According to the NMa, the market for program packages offered via cable can be further subdivided into standard program packages and so-called “plus packages” (specialised content). Since the consumer needs a decoder and has to pay an extra fee in order to receive specialised content, from the consumer’s point of view standard packages and specialised content are not considered as substitutes. However, because of rapid innovation and technical developments substitutability of different program packages can not be excluded in future. Both the participants of pay TV and of free access TV will be able to use various new possibilities.

Even if the NMa has not yet dealt with the wide range of markets the EC Commission defined, it can be concluded that in principle the Dutch competition authorities follow the same line: In the broadcasting sector, a lot of markets can be distinguished. With regard to the wholesale markets for content to be broadcasted, the Ministry of Economic Affairs considered even in 1997 that there was a separate market for each individual Dutch football match and that the individual clubs had the right to sell the broadcasting rights of summaries of the matches\textsuperscript{131}.

\textsuperscript{127} NMa, Case \textit{UPC-PrimaCom}, para 50. See also NMa, Advice 1658/21(supra note 114), paras. 15 et seq. and Commission Decision, 94/922/EC, \textit{MSG Media Service}, [1994] OJ L364/1, para. 41.

\textsuperscript{128} NMa, Case, 6 November 2002, \textit{Liberty Media/Casema}, para. 43. See also NMa, Advice 1658/21 (supra note 114), paras. 15 et seq.


\textsuperscript{130} OPTA, Consultation Document Cable Access (supra note 129); EC Commission, New Regulatory Framework for Electronic Communications and Services (supra note 7).

\textsuperscript{131} Dutch Ministry of Economic Affairs, KVNB, Case “Collective Selling of Highlights of Dutch Soccer Games”, 22 December 1997, para. 55.
2. Geographic Market

In several cases the NMa held that from the program supplier’s point of view the market for the distribution of radio and TV signals via cable is national. As the NMa stated in case UPC/Eneco K&T Group, this can even be the case if - from the consumer’s point of view - the market for the distribution of RTV signals via cable networks is a regional one and coincides with the service area in which the consumer is present. From the program suppliers’ point of view, different factors have to be taken into consideration: The transmission of RTV signals appears to have a regional dimension. This is due to the fact that a program provider has to negotiate with each individual cable company about the transmission of its programs in the service area of the cable company. Cable companies are obliged to transmit a minimum package of channels. The composition of the entire package is subject to approval by the national Program Council. However, if a certain program requires minimum transmission coverage of a large part of the Netherlands, the market has a national character.

3. Summary

In the broadcasting sector, the Dutch case law does not exactly correspond with the EC Commission’s decisions dealing with market definition as outlined in Chapter 1. The different findings, however, do not result from divergence in the methodology of market definition but can be easily explained by the individual cases dealt with. Nevertheless, it can be concluded that - like in the other media sectors - the methodology used to define the relevant markets and the criteria relied upon are the same. In its decisions, the NMa draws cross-references to decisions and documents of the EC Commission and the EC courts. When doing so, the NMa not only uses the passages being important for its own market definition in the individual case but also appears to confirm, incidentally, the EC Commissions market definitions in general. For instance, in case Liberty Media/Casema the NMa does not explicitly distinguish pay TV and free TV. However, it becomes incidentally clear that the decision is based on such a distinction.

As to the market definition criteria, in the broadcasting sector the prices and switching costs, the composition of services and the technical differences are of particular importance. The NMa takes into account that in present times of rapid innovation and technical convergence of existing media, reliance on technical distinctions is inherently unstable and has to be treated with caution.

IV. Film Sector

It is outlined above as well as in Chapter 1 that TV films are necessarily involved in the broadcasting sector. Apart from that, no relevant decisions of the Dutch competition authorities or the courts regarding market definition in the film sector can be found. In other words, the NMa did not have to cope with competitive behaviour in the film sector. However, since the Dutch film has been subject of numerous reports in recent years, the NMa would be able to rely on lots of material concerning the “Dutch film world”. It can be mentioned that in an increasingly global audiovisual landscape, dominated by Hollywood, the Dutch film has
well created a niche for itself but does not play an important role in the global film world. On a global scale three models of production, distribution and exhibition can be identified: Hollywood, independent film and cinema. The third model includes films in a national or regional language. Dutch films can be identified according to the model in which they are produced, distributed and received. In any case, “Dutch films” belonging to the third model appear to constitute a separate market.\footnote{See B. Hofstede, Boekmanstudies, Summary, 2000, at pp. 1 et seq. The article can be downloaded from the WWW at http://www.boekman.nl/sumhof.html?reload_coolmenus.}

V. Internet

The articles, reports and cases dealing with media market definitions linked to the Internet sector in the Netherlands are numerous. Among others, the so-called “Report Internet Access”\footnote{NMa/OPTA Internet team, Report Internet Access (supra note 19).} is of essential importance. This study, which was jointly submitted by NMa and OPTA on 14 December 2001, defines the market for Internet access. It follows the “Consultation document Internet access”\footnote{NMa/OPTA, Consultation Document Internet Access (supra note 20).}, published by NMa and OPTA in March 2001. According to NMa and OPTA, the “Report Internet Access” can not be used directly to apply concepts in a concrete case but can serve as a guideline to discover how NMa and OPTA deal with market definitions in concrete cases.\footnote{See NMa/OPTA Internet team, Report Internet Access (supra note 19), para. 121.} In addition to this study, moreover, the New Regulatory Framework for Electronic Communications and Services will be taken into account with regard to possible changes in the future market definition in the Internet sector.

NMa and OPTA base their joint report on the assumption that a differentiation should be made between the market for Internet access services and the market for network access services.\footnote{See NMa/OPTA Internet team, Report Internet Access (supra note 19), paras 169 et seq. See also NMa, Case 2425, UPC/Prima COM which is summarised in NMa, Annual Report 2001 (supra note 12), p. 88; 3052/150, 6 November 2002, Liberty Media/Casema, paras. 289 et seq.} In the case \textit{Liberty Media – Casema}\footnote{NMa, Case 3050/150, 6 November 2002, Liberty Media/Casema, paras. 289 et seq.} the NMa refers to this conclusion.

Taking this distinction as a starting point, NMa and OPTA answer the following questions\footnote{The questions are formulated in: NMa/OPTA Internet team, Report Internet Access (supra note 19), para. 130.} which are fundamental to the definition of both the markets for Internet access and for Internet network access:

- Is it necessary to differentiate between narrowband Internet access on the one hand and broadband Internet access on the other?
- If such a differentiation has to be made, should a further distinction be made according to different networks?
- Are the markets identified national or regional?

\footnotesize{135 See B. Hofstede, Boekmanstudies, Summary, 2000, at pp. 1 et seq. The article can be downloaded from the WWW at http://www.boekman.nl/sumhof.html?reload_coolmenus.
136 NMa/OPTA Internet team, Report Internet Access (supra note 19).
137 NMa/OPTA, Consultation Document Internet Access (supra note 20).
138 See NMa/OPTA Internet team, Report Internet Access (supra note 19), para. 121.
139 See NMa/OPTA Internet team, Report Internet Access (supra note19), paras 169 et seq. See also NMa, Case 2425, UPC/Prima COM which is summarised in NMa, Annual Report 2001 (supra note 12), p. 88; 3052/150, 6 November 2002, Liberty Media/Casema, paras. 289 et seq.
140 NMa, Case 3050/150, 6 November 2002, Liberty Media/Casema, paras. 289 et seq.
141 The questions are formulated in: NMa/OPTA Internet team, Report Internet Access (supra note 19), para. 130.}

29
1. **Internet Access Market**

Internet access services are “downstream” services. Downstream services are defined as the provision of Internet access services by ISPs to consumers and business users.  

a) Distinction between Narrowband and Broadband Internet Access Services

*Product Market*

In their joint “Report Internet Access” NMa and OPTA point out three criteria to distinguish between a narrowband (dial-up) access and a broadband Internet access market:

- differences in product characteristics
- differences in price
- the cost of switching from narrowband to broadband and vice versa.

As to differences in product characteristics, NMa and OPTA attach importance to the combination of speed, flat-rate and “always on”. This combination of high transmission speeds higher than 128 Kbyte/s, a flat rate per period and the possibility of always on is in principle uniquely available for broadband. According to NMa and OPTA, the speed or capacity as one of the product characteristics playing a role in a user’s decision to use a certain Internet access service is furthermore important with regard to the development of services that can only be provided via cable or DSL. While the possible use of narrowband Internet access services is limited to Internet use and e-mail traffic, possible broadband services include the options for so-called “streaming media”, such as music, radio and video. It is expected that, with the growing number of services requiring speeds higher than 128 Kbyte/s, the speed criterion will become more and more important. As long as the variety of available broadband applications is limited, the combination of speed and price in relation to the intensity of the usage is regarded as the crucial factor when choosing between narrowband and broadband Internet access. NMa and OPTA take further account of the significant costs involved in switching from narrowband Internet access to broadband.

Additionally referring to the EC Commission’s *AOL/Time Warner* decision, where the Commission defines a separate market for narrowband access services and discusses the developing demand for the delivery of broadband Internet access, NMa and OPTA therefore conclude that there are separate relevant product markets for narrowband and for broadband Internet access.

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142 See NMa/OPTA Internet team, Report Internet Access (supra note 19), at p. 8.

143 Broadband Internet access is assumed as a fact if the maximal transmission speeds are higher than 128 Kbyte/s; the contrary is the narrowband Internet access. This definition is given in: NMa/OPTA, Consultation document Internet (supra note 20), p. 25, para. 3.3. The limit given in the consultation document is based on information from a large number of sources which state that the limit between narrowband and broadband should be 128 Kbyte/s.

144 See NMa/OPTA Internet team, Report Internet (supra note 19), at p. 38.

145 DSL means Digital subscriber line.

In the *Liberty Media/Casema* decision, the NMa separates narrowband and broadband markets using the Internet access report’s line of reasoning. Narrowband Internet access and broadband Internet access are not considered substitutable with one another so as to fall within one single market\(^{147}\). Again the NMa additionally refers to the EC Commission’s *AOL/Time Warner* and *Telia/Teleonor* decision\(^{148}\) where the always-on characteristic is emphasized as an important indication that the markets can be differentiated.

**bb. Geographic Market**

With regard to the geographic dimension, the Dutch competition authorities define the narrowband market as a national one. They conclude that the relevant geographic narrowband market consists of the entire region of the Netherlands: The IPS offer narrowband Internet access via the national telephone network. They generally offer their services and determine their prices on a national level. This is the reason why they also compete on a national level. The definition is in accordance with the EC Commission’s interpretation of competition law in the decision *Telia/Teleonor*\(^{149}\).

As regards the relevant geographic market broadband Internet access, the definition is a more complicated issue. NMa and OPTA present different factors influencing the question whether the market for broadband Internet access is a national or a regional market.

They note that there are no cases known in which subscription rates are differentiated according to the location of the user. The absence of such differentiation can be taken as an indication for defining a market as a national one\(^{150}\).

As NMa and OPTA note in their Report, the broadband Internet access services offered by the various cable companies do not compete directly with one another. This is due to the fact that cable networks, and therefore also the activities of the cable companies concerned, do not overlap. According to NMa and OPTA, this lack of direct competition does not however imply that markets should be defined on a regional basis, as the fact that multiple cable operators are active in the Netherlands may have a disciplining effect\(^{151}\).

Moreover, NMa and OPTA attach weight to the fact that the telephone and cable networks have practically national coverage and to the fact that the companies concerned are investing considerably in order to adapt their networks to be suitable for broadband on a large scale. Considering the fact that – to the knowledge of NMa and OPTA - no regional rate differentiation was seen for xDSL and the cable ISP also do not apply regional rate differentiation, they define the relevant geographic market for Internet access in principle as a national one, with the exception of those areas in which the relevant market is regional or local\(^{152}\).

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\(^{147}\) According to NMa and OPTA, this however does not imply that narrowband Internet access does not compete with broadband Internet access. The narrowband market can exert a certain amount of competitive pressure on the price structure in the developing broadband market.


\(^{150}\) NMa/OPTA Internet team, Report Internet (supra note 19), at p. 3.

\(^{151}\) NMa/OPTA Internet team, Report Internet (supra note 19), at p. 3.

\(^{152}\) Critical about this K. Schillemans, “Markets for Internet Network Access Defined, the Dutch Approach: A Negative Precedent for ISPS Seeking Access to Broadband Internet Networks”, CTLR [2003], 82 (85).
b) Distinction between Broadband Internet Access Services via xDSL and via Cable

When defining a separate market for broadband access services, the question arises whether a further distinction should be made between the telephone network and the cable network.

aa. Product Market

On the demand-side, NMa and OPTA concluded that these different access platforms are generally substitutable from the end-user’s perspective. An investigation was carried out in order to answer the question to what extent the different Internet access platforms can be substituted for and compete with one another.

NMa and OPTA stress that the different access platforms’ primary product characteristics and services to the end-user are in principle the same. The prices for these services are also compatible. However, NMa and OPTA acknowledge that technical differences between the networks raise the question whether a distinction should be made between cable network and telephone network. Those differences between the networks - for example, the nature of access is different, as with regard to cable on the local loop is shared, while with xDSL, it is exclusively dedicated to a certain user-, can also have implications for the application options available to consumers. Switching from xDSL to cable and vice versa involves extra costs for registration, installation and hardware. If these costs of switching are high, it may prevent the user from switching, and the networks can then, from the perspective of the user, not simply be substituted against other. These costs are however regarded as relative for a number of reasons. Therefore, and because the Internet access services via cable and via DSL share the primary product characteristics for broadband Internet access (speed, flat rate, always on), according to NMa and OPTA there appears to be no reason in defining the relevant product market to distinguish between broadband Internet access services via xDSL and via cable. In case Liberty Media/Casema the NMa confirmed this conclusion.

bb. Differentiation by User

Another type of distinction that can be made is to differentiate per type of user. According to NMa and OPTA, it is important to conclude whether a distinction should be made between residential consumers and business users who belong to the small and medium sized enterprise segment. NMa and OPTA stress that it would not make sense to differentiate per type of user in the market for narrowband Internet access. Due to its low capacity, narrowband Internet access will not generally be a real option for actual commercial use of Internet applications, with the exception of applications that are also used by residential consumers. ISP that offer broadband Internet access via xDSL, however, often have separate subscriptions for residential consumers and for the small and medium sized

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153 NMa, Case 3052/150, 6 November 2002, Liberty Media/Casema, pp. 81 et seq.; NMa/OPTA Internet team, Report Internet Access (supra note 19), para. 157.

154 According to the NMa and OPTA it can be expected that ISPs will share the costs of sharing. Further, the price of modems is expected to decrease and will become outdated relatively quickly, prompting consumers to frequently consider a switch. Also, the importance of switching costs decreases as the annual subscription fees increase in relation to the switching costs. NMa/OPTA Internet team, Report Internet Access (supra note 19), para. 158. See also K. Schillemans (supranote 152), p. 85.

155 NMa Case 3052/150, 6 November 2002, Liberty Media/Casema, paras. 315 et seq., para. 324.

156 NMa/OPTA Internet team, Report Internet (supra note 19), paras 146 et seq.
enterprise segment. ISPs that offer broadband Internet access via cable generally do not have separate subscriptions for business users.

NMa and OPTA assume that there is no reason to differentiate between a separate market for the small and medium sized enterprise segment within the broadband Internet access market, because ISPs that offer broadband Internet access via DSL may in principle serve residential consumers and business users who belong to the small and medium sized enterprise segment; different types of subscriptions are then involved which are adapted to the needs of the consumers. The NMa confirmed this conclusion in the case Liberty Media/Casema.

2. Network Access Services

According to NMa and OPTA, the network Internet access market is derived from the Internet access market, because ISPs must have access to networks in order to offer Internet access services. Since ISPs usually do not have a direct connection to the end-user, the need for access to network structures that do have such a direct connection arises. If there is a specific demand for broadband Internet access, it can only be met by ISPs who have access to broadband Internet access. So, according to NMa and OPTA, the demand for network access is in reality caused by the demand for Internet access services. Because a distinction is made between narrowband and broadband for Internet access services, NMa and OPTA regard it as obvious to make the same distinction for network access services.

a) Distinction between Narrowband and Broadband Network Access Services

aa. Product Market

As regards the narrowband network access services, NMa and OPTA refer to their joint Report on Internet uncoupling where they distinguished three types of services through which the traffic is transported to an ISP: the local loop, the regional net and the national network. In both reports NMa and OPTA mention the division into three levels as a possible basis for defining the relevant product market. In the case Liberty Media/Casema the NMa stressed that because the network Internet access market is derived from the Internet access market, the fact that there has to be a distinction between narrowband and broadband Internet

\[\text{Note 157}\]
NMa/OPTA Internet team, Report Internet Access (supra note 19), para. 149.

\[\text{Note 158}\]
When the NMa had to deal with a concentration between UPS, the largest cable operator in the Netherlands, and NewCo AG, its market definition was in principle similar to the one as laid down at a later stage in the Report Internet Access. In that case the NMa, however, stressed that with an upgrade cable network it would be possible to offer so-called triple-play services (high-speed Internet access, television and telephony work). The NMa seemed to suggest that if demand for these services were to increase, it may be necessary to differentiate between xDSL and cable networks. This potential difference cannot be found in the report. See NMa, Case 2425, 4 July 2001, UPC/NewCo AG. See also K. Schillemans (supra note 152), p. 84.

\[\text{Note 159}\]
NMa/OPTA Internet team, Report Internet (supra note 19), para 169.

\[\text{Note 160}\]

\[\text{Note 161}\]
The network between the end-user and the local exchange of KPN, see NMa/OPTA Internet team, Report Internet Access (supra note 19), para. 175.

\[\text{Note 162}\]
The network between the local exchange and the regional KPN exchanges and the regional networks of other providers of telecom services that are rolled out at the level of the KPN local exchanges.

\[\text{Note 163}\]
The network between the local exchanges and the network between the regional KPN exchanges and the network between the regional exchanges of other providers of telecom.
access market naturally leads to the fact that there has to be the same differentiation between network access services.\textsuperscript{164} Moreover, the NMa stressed that there are significant differences in prices and technical possibilities.\textsuperscript{165}

\textit{bb) Geographic Market}

Regarding the geographic scope of the market for narrowband network access service, the Dutch competition authorities refer to the Commission’s definition of the market for gaining access by the ISPs to the local loop in case \textit{Telia/Telenor}.\textsuperscript{166} Like the Commission, NMa and OPTA define this market as a national one. They note that this is “because in order for ISPs to gain access to the local loop, the ISPs must gain access to the network of the incumbent operator, which then processes the Internet traffic to the local level. In principle, this access can be gained at any location in the telephone network. Because the telephone network in the Netherlands is rolled out to cover the entire country and there is no (longer) any scarcity of narrowband network access, there is no reason to further demarcate this market into regional markets.”

With reference to the geographic market for broadband network access, it can be concluded that it is national in principle. An exception to this rule could occur in a situation in which it is not probable that xDSL will be rolled out in a certain region and the coverage area of a cable operator is basically the same as that region. In that kind of situation, the market for broadband Internet and network access would be local or regional, by which the cable ISP would not experience competition from the xDSL ISPs. In the case \textit{Liberty Media/Casema} there was not such a situation: The geographic broadband network access market was defined as a national market.\textsuperscript{167}

\textit{b) Distinction between Relevant Markets for Broadband Network Access Services via Cable and via DSL}

NMa and OPTA recognise that cable operators in the Netherlands generally reserve network access to their affiliated companies. This does not however justify differentiation by network as the existence of the cable network exerts competitive pressures on the providers of xDSL services. Because of the fact that xDSL and cable compete on the market for broadband Internet access, a price increase on the broadband network access could, as a result of ensuing higher prices on the broadband Internet access market, lead to customers switching to cable. In addition, NMa and OPTA stress that if the price for network access via xDSL were to become relatively high, it could become profitable for cable operators to offer network access services to other than only affiliated ISPs. According to NMa and OPTA, there appears to be no reason in defining the relevant product market to distinguish between broadband network access services via xDSL and via cable.

In both their reports and decisions dealing with market definitions in the Internet sector, the Dutch competition authorities take into account possible changes and developments that can influence the market definitions. When applying the Competition Act or the Telecommunications Act to a concrete case, they emphasise, the relevant market must be a

\textsuperscript{164} NMa, Case 3052/150, 6 November 2002, \textit{Liberty Media/Casema}, para. 344.

\textsuperscript{165} NMa, Case 3052/150, 6 November 2002, \textit{Liberty Media/Casema}, para. 345 et seq.


\textsuperscript{167} NMa, Case 3052/150, 6 November 2002, \textit{Liberty Media/Casema}, paras. 369 et seq.
reflection of economic reality\textsuperscript{168}. With reference to the demand-side doctrine, the NMa stresses that, because in practice there are also products on the market with various combinations of the mentioned above characteristics, there must be carefully determined in each case which products are substitutable and which not\textsuperscript{169}.

3. \textit{Summary}

NMa and OPTA conclude that a distinction can be made between four relevant (product) markets with reference to Internet access. They consider narrowband Internet access as a separate market from broadband Internet access and narrowband Internet network access as a separate market from broadband Internet network access. With reference to the broadband Internet access and network access markets, NMa and OPTA do not consider it appropriate to distinguish between Internet access services made available via the xDSL networks or the cable networks in defining the relevant product market\textsuperscript{170}. In the Internet sector, the NMa relies on the whole repertoire of criteria being useful to identify the relevant markets. Taking into consideration both demand and supply side substitution, the NMa relies on product characteristics; technical differences, switching costs and competition pressure.

\textsuperscript{168} NMa/OPTA Internet team, Report Internet (supra note 19), para. 121.

\textsuperscript{169} NMa/OPTA Internet team, Report Internet (supra note 19), para 145.

\textsuperscript{170} See NMa/OPTA Internet team, Report Internet Access (supra note 19), at pp. 5 et seq.; NMa, Case 3052/150, 6 November 2002, \textit{Liberty Media/Casema}, para. 286 et seq.
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C Comparative Analysis of Market Definitions Adopted by the EC Commission and those Adopted by the Competition Authorities in Netherlands

I. Comparative Analysis

Dutch competition law is based on and closely linked to the EC competition rules. Since the definition of the relevant market allows to compare the market shares of competing undertakings, it continues to play an important role in competition analysis in the EC as well as in the Netherlands. On EC level, the substantive test under Article 2 Merger Regulation is whether the concentration “creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it”. In the Dutch Competition Act, Article 6 notes similarly that “agreements between undertakings, decisions by associations of undertakings and concerted practices by undertakings which have as their object or effect the prevention, restriction or distortion of competition within the Dutch market, or a part thereof, are prohibited.” As mentioned before, market definition can help to compare the market shares of competing undertakings. In the absence of economic analysis to provide key information about market power, a proper definition of the relevant market is a necessary precondition for the assessment of the existence of market power as well as for the effects of the concentration on competition. Therefore, in Dutch competition law, like in EC competition law, merger cases constitute the vast majority of competition cases dealing with market definition. It is stressed in Chapter 1 that in those cases the future developments of a market needs to be taken into account. Since EC law is – partly - directly applicable (Article 88 of the Dutch Competition Act), EC developments are especially significant in the Netherlands. As a consequence, the Dutch competition authorities will also have to pay particular attention to the continuing process of market integration as well as to technical innovation.

In several decisions the NMa has mentioned that these aspects are taken into consideration. In the Reasoning of the Draft Bill Concerning the Implementation of the New Directives, the Dutch competition authorities stress that the media sector is experiencing profound structural changes in the light of regulatory liberalisation and technological advances. Technical developments in the media sector, especially the digitalisation of networks lead to numerous new possibilities. Developments are planned to be taken into account when dealing with competition issues.

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171 See E. J. Carter (supra note 23), p. 94.
172 For more details see Chapter 1, B. III., paras. 1.43 et seq., para 1.47.
173 See para. 2.07, footnote 13.
174 On the EC level see Chapter 1, B. III. 3., para. 1.47.
175 See e.g. NMa, Case 3052/150, 6 November 2002, Liberty Media/Casema. See also NMa, Advice 1658/21(supra note 114).
176 Reasoning of the draft Bill Concerning the Implementation of the New Directives (supra note 8).
177 Draft Bill Concerning the Implementation of the New Directives (supra note 8).
Future developments can be regarded as one of various factors influencing market definition. The various criteria established in Dutch competition law for defining the relevant markets are to a very great extent similar to the ones established in EC competition law. The definition of the relevant product market is exactly the same as under Community law. As to the geographical market, the Dutch Competition Act applies to a significant restriction on the Dutch market or “a part thereof”\textsuperscript{178}, whereas the EC merger regulation applies to the “common market or a substantial part of it”. However, the criteria relied upon defining the geographic dimension of a market are the same in EC and Dutch competition law. In its decisional practice, the NMa often refers to EC case law.

II. Reasons for Divergent Results

Since the Dutch definition of the relevant product market is exactly the same as under Community law, there is, in principle, not only no reason for divergent results but also in facts there exist no significant differences. With regard to the relevant geographic market it can be noted that the geographic market as defined in the Dutch Competition Act can be smaller than the territory of the Netherlands (“a part thereof”), whereas the EC merger regulation applies to the common market or a substantial part of it. Due to this fact, the definitions of the relevant geographical markets can lead to different results in national and international competition\textsuperscript{179}. The NMa’s decisional practice shows however that this argument can be neglected. As long as the criteria defining the relevant markets established in Dutch competition law are to a very large extent similar to the ones in European competition law\textsuperscript{180}, the small difference in definition will usually not lead to divergence.

As a further argument it could be put forward that the administrative discretionary right to reserve negative merger decisions laid down in Article 15 of the Dutch Competition Act may lead to divergent results: A broad-minded definition of this Article can theoretically reduce the law’s effectiveness, while at the same time endanger the process of competition policy harmonisation on the EC level\textsuperscript{181}. This could also influence the relevant market definitions. Analysing this argument, however, it has to be stressed again that in practice this does not seem to be the case. The crucial argument remains that the NMa, operating more and more independent from the Minister of Economic Affairs, uses the EC Commissions market definition methodology. The NMa’s decisions can be scrutinized by the Dutch courts.

Divergent results therefore appear to be limited to general obstacles regarding convergence. As outlined by Bird&Bird\textsuperscript{182}, the lack of fitting criteria can lead to divergent results. It has to be taken into consideration that the market definition methodology was not created for the media sector. When competition law principles were first set, most cases actually related more to products than to services which may be the reason for the absence of distinction in the analysis between product and service markets. Because the media markets are mainly service

\textsuperscript{178} Competition Act (supra note 1), Chapter 1, Article 1, i).

\textsuperscript{179} E. Meerdink (supra note 2), at p. 115.

\textsuperscript{180} See paras 2.12. et seq. See also T. R. Ottervanger/S. J. van der Voorde (supra note 11), p. 243.

\textsuperscript{181} J. A. H. Maks, “The Dutch Competition Act from an International Perspective, the European Union, Germany and the United Kingdom”, [2000]. This article can be downloaded from the WWW at http://www.fdw wb.unimaas.nl/eurecom/Scientific%20publications/EnglishTBA.PDF.

\textsuperscript{182} Bird&Bird, Market Definition in the media sector, at pp. 12 et seq.
markets, some of the factors traditionally upheld for product market definition do not exactly suit for the media services markets\textsuperscript{183}.

Furthermore, even if the central idea of the Dutch Competition Act is the desire to comply as far as possible\textsuperscript{184} with the EC system, divergence of the national system and the EC model can develop in the event of changes in Community law. If, for instance, the new EC Regulatory Framework for Electronic Communications and Services requires an integral long term revision of the legislation with regard to the Dutch Media Act and the Dutch Competition Act there would be – for the time of the revision - room for divergence results. The Dutch Competition Act itself provides little guidance for such changes in Community law, nor does it give any indication as to how far the provisions of the Act should be interpreted in accordance with Community law\textsuperscript{185}.

Technical evaluations which take place over small periods of time can also lead to those divergences. The identification of substitutable products at any given point in time has been made more complicated by the developments of new products and services. Even the most careful analysis in an individual case can prove misguided in hindsight within even a short time. Moreover, it is difficult to foresee when they will impact on the market and to judge what the impact will be on related markets.

Since the high pace of innovation in the media sector makes the task of defining the relevant markets more speculative than in more stable industries the question arises if there is a need for specific rules in the media sector more accommodated to the specific needs and characteristics of the Dutch market. In the Netherlands, several sector-specific rules have been adopted in addition to the Dutch Competition Act, which is applicable to several sectors of the economy life. If there is a need for specific rules, their implantation will not necessarily have to be monitored by a separate regulator. The NMa is a well experienced competition authority, having dealt with numerous cases in the media sector and its market definitions in a detailed and transparent way. Several decisions were taken in agreement with sector specific regulators. Therefore, there may be need for more specific rules but not for a separate regulator in media competition cases.

**Conclusion**

The Dutch competition authority, NMa, regards the correct market definitions as a necessary precondition for the assessment of competition issues, especially in merger cases. Therefore, the NMa defines the relevant markets very detailed. Numerous decisions give insight in the NMa’s market definition methodology. In order to define the relevant markets, the NMa uses a wide range of criteria. The criteria established in Dutch competition law are to a very great extent similar to the ones established in EC competition law. Therefore, with regard to market definitions, many questions can be answered by referring to EC competition law. The relevant market is established by the combination of the product markets and the geographic markets. The NMa closely follows the developments on EC level as well as the EC case law.

\textsuperscript{183} Bird&Bird, Market Definition in the media sector, at pp. 12.

\textsuperscript{184} Explanatory Memorandum (24707, nr.3) p.10, See also E. Meerdink (supra note 2), at pp. 109 et seq.

\textsuperscript{185} E. Meerdink, (supra note 2), at p. 117.
D Presentation and Analysis of the Different, Non-Competition Regulatory Framework and Practice in the Netherlands.

I. The legal framework for the media sector in the Netherlands

For the purpose of this study the following acts can be regarded as the most important sector-focused legislation:

1. Constitution (of 4 September 1840) with all amendments

The Constitution, in its Article 7 postulates the fundamental right of Freedom of Expression (Grondwet or ‘Gw’). In this respect it distinguishes between four different categories of media, namely (i) print, (ii) radio and television, (iii) others, and (iv) advertising.

2. Sector-specific legislation

   a) Media Act of 1987 with all amendments (Mediawet or ‘Mw’) and the implementing Media Decree of 1987 as amended on 21 May of 2001 (Mediabesluit or ‘Mb’)

   The Media Act contains rules and regulations with regard to public service broadcasting (national, regional, local), commercial broadcasting and the Dutch world service. Furthermore it deals with distribution of broadcasting programs over the ether or cable, the financing over public service broadcasting, support for the press sector and the authority of the media regulator (‘Commissariaat voor de Media’ – see below). The Media Decree contains administrative measures that further specify the rules and regulations of the Media Act. In particular it deals with the way in which broadcasting time is distributed between public service broadcasters, the license requirements for commercial broadcasters and the support measures for the press sector.

   b) Telecommunications Act of 19 October 1998 with all amendments (Telecommunicatiewet or ‘Tw’)

   The in 1998 adopted telecommunications law is based at its core on principles relating to liberalization, support of competition, the safe-guard of public interest (‘universal service’) and the independent supervision of the sector (please see previous section also).

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186 All Acts are also available at www.overheid.nl.
189 Mediabesluit (1992). Staatsblad van het Koninkrijk der Nederlanden, 617 (last published, amended after.)
c) Copyright Act of 23 October 1912 with all amendments (Auteurswet\(^{191}\) or ‘Aw’)

The Copyright Act provides for the most important regulation with regard to the protection of works representing the creativity of authors.

d) Related Rights Act of 18 March 1993 with all amendments (Wet op naburige rechten\(^{192}\) or ‘Wnr’)

In the Netherlands, the rights that are conferred upon those persons with regard to such creative acts that to do not fall under the scope of the protection works are entitled to under the Copyright Act, are vested in the Act on Neighbouring Rights (or Related Rights).

e) the Database Act of 8 July 1999 with all amendments (Wet betreffende de rechtsbescherming van databanken\(^{193}\) or ‘Wrd’)

In the Netherlands the European Database Directive was implemented in two different legal Instruments, the existing Copyright Act and the new Database Act.

II. Media regulators

The following authorities are charged with media regulation:

1. Media Authority (“Commissariaat voor de Media” or “CvdM”)

The CvdM (established in Mw Art. 9 to13b) is an independent regulator who is charged with the supervision of compliance with the Media Act. In practice this means the supervision of commercial and public broadcasting (national, regional and local). It focuses in particular on the enforcement of sponsoring and advertising rules. In addition, the CvdM supervises the financial reports of public service broadcasters.

Since 2001 the authority is also charged with monitoring media concentration. To this purpose it publishes an annual report (also presented to the Dutch parliament), in which it pays particular attention to the consequence of concentration with regard to the plurality, independence and quality of the provision of news and information. It is up to the OPTA (Telecom Authority – see below) and the NMa (Competition Authority) to act upon the monitoring information provided by the CvdM.

The Ministry of Education, Culture and Sciences (“Ministerie van Onderwijs, Cultuur en Wetenschappen”) is politically responsible for the CvdM, but has no impact on its decisions.

Relevant Guidelines and Rules:

CvdM Rules on Programme Quotas of 18 December 2001\(^{194}\) (Regeling omtrent Europese, onafhankelijke, recente, Nederlandstalige of Friestalige programma onderdelen)

\(^{191}\) Auteurswet (1912). Staatsblad van het Koninkrijk der Nederlanden, 308 (last published, amended after).


2. **Independent Post and Telecommunications Authority ("Onafhankelijke Post en Telecommunicatie Autoriteit" or "OPTA")**

The OPTA is charged with the supervision of compliance with the Telecommunications Act. More concretely it has the tasks of identifying dominant market positions in telecommunications; to serve as a mediator between competing operators; to approve interconnection and other tariffs; and to protect privacy. The OPTA also supervises the postal services.

The Ministry of Economic Affairs ("Ministerie van Economische Zaken") is politically responsible for parts of OPTA’s performance, but has no impact on its decisions.

Relevant Guidelines and Rules:

OPTA/NMA Guideline for conflicts with regard to access to broadcasting networks of 17 August 1999 (Richtsnoeren met betrekking tot geschillen over toegang tot omroepnetwerken)

OPTA Guideline Identifying Dominant Market Positions of 12 Oktober 2001 (Richtsnoeren aanwijzing aanmerkelijke macht op de markt)

Note: In the framework of the recommendation of the European Commission regarding relevant product and services markets in the electronic communications sector, the OPTA has started its Project Market Analysis. Between March and September 2003 it will analyze the 18 markets identified by the European Commission.

3. **Other administrative bodies**

The Press Fund ("Bedrijfsonds voor de Pers" or "BFP") is charged by the Media Act (Mw Article 123 through 132) with the task of monitoring and supporting the plurality of the printed press. The BFP can award financial support to publishers of printed publications. In addition, its monitoring activities are relevant for decisions on cross-media ownership rules. The fund was originally established as an advisory body for the Minister of Culture. The Media Act upgraded the BFP to an independent governmental agency and provides the legal basis for its structure, mission, and financial resources. The Media Decree (Mb Article 54 through 67) specifies several cases where the BFP can selectively intervene by providing subsidies and gives it the procedure to do so.

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194 Available via the CvdM or at http://www.cvdm.nl/pages/regelgeving.asp?m=r&.
195 Originally the Ministry of Transport, Public Works and Water management (Ministerie van Verkeer en Waterstaat) was responsible for the OPTA. This responsibility has since shifted to the Ministry of Economic Affairs.
196 Available at www.opta.nl.
197 Available at www.opta.nl.
198 The Fund is financed from the revenues of advertising on public broadcasting and commercial interior broadcasting networks. In accordance with the Media Act the government is authorized yearly to decide if it is necessary to transfer money from these revenues to the Press Fund, and if so, it can only be an amount up to the maximum of 4% of the total revenues of these advertising media.
Relevant Guidelines and Rules:

BFP Temporary Subsidy Rules\(^{199}\) (*Tijdelijke subsidieregeling*)

### III. Market perception in the relevant sector focused legislation

The Dutch Constitution makes four distinctions with regard to provisions for freedom of expression: *print, radio and television*, ‘*others*’ and *advertising*. Whereas print media receives the highest degree of freedom, advertising receives no protection under freedom of expression (Gw Article 7). This primarily technological medium based distinction is mirrored in the Dutch media regulatory framework. Its evolution can be characterized\(^{200}\) by a tendency to link new services (with new usage patterns), in terms of regulation, to ‘old’ technologically similar services. The historical example here is teletext, which was classified as a broadcasted TV-program. There have been proposals to move away from this regulatory approach based on technological differences\(^{201}\). Most notably the Commission for Constitutional Rights\(^{202}\) in the Digital Era recommended that a reformulation of Article 7 of the Constitution should be technology-independent.

Also the CvdM has raised the question in its most recent annual report\(^{203}\) of whether it still makes sense to distinguish between different media markets on the basis of the traditional media formats (e.g. newspapers, magazines, radio and television). Following the practice of competition authorities that take substitution on the demand side as criterion for determining relevant markets, the CvdM suggests that there are two arguments in favor of a single media market. First, with regard to the demand side substitution on the ‘opinion market’ it can be argued that for a ‘free market place of ideas’ it has seized to be relevant on which media market, e.g. newspapers, radio or television the citizen gets his information. And second, another line of this argument can be found in media usage. Accordingly, consuming media products are only different ways in which consumers pursue one goal – the spending of spare time.

Yet, the CvdM concludes that at this point it does not wish to depart from the conventions in the media sector, media policy and competition policy in its sector-specific approach (printed press, radio and television, news and information on the Internet). The argument for this rests primarily on supply side substitution. The CvdM holds that currently there is no supply side substitution to speak of. And although different media all offer information, the respective logics and routine inherent in each medium mean that they contribute to the information provision in society in very specific and diverse ways.

This report keeps to the conventions, as used by the relevant authorities, of distinguishing the areas of market definitions based on the traditional sector specific and media centred, rather than user or function based approach.

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199 Available at www.bedrijfsfondspers.nl.


Generally speaking the Dutch media sector-specific regulatory framework presents few definitions of relevant markets. It predominantly contains specific product distinctions and some geographic distinctions. We present those distinctions in the following overview.

The Media Act defines media as “all printed and electronic forms of mass communication” (Mw Article 1b).

1. Printed Press

The printed press is under special protection with regard to freedom of expression under the Dutch Constitution (Gw Article 7). The article handles a very wide definition of all printed material (including the press) in relation to general policy goals in terms of freedom of thought.

With regard to safeguarding pluralism in the printed press the Media Act (Mw Article 129) specifies rules (which include product and geographic definitions) to which a publication that is eligible to receive financial support from the BFP must adhere:

- “It is published in the Netherlands and targets the Dutch audience;
- a relevant part of its content is news, analysis, commentary and background information about diverse current affairs with regard to the formation of political opinions;
- the editors operate independently on the basis of an editorial statute which specifies the editorial identity;
- it is published regularly and at least once a month;
- it is available to everybody;
- it is available by payment;
- it is not published by or on behalf of government or public authorities;
- it is not published or distributed in connection with participation in or membership of an organization.”

These geographic and product dimensions are also mirrored in the Media Act’s definition of newspaper markets, very specifically with regard to cross-media ownership rules for licensing a commercial broadcaster (Mw Article 71b). Accordingly, the Act distinguishes between (Mw Article 1):

- *daily newspaper markets* as “the by the BFP established average paid circulation of a publication, during a calendar year, targeted at the general public in the Netherlands, published at least six times a week”; and
- *newspaper markets* as “the by the BFP established paid circulation of a publication, during a calendar year, targeted at the general public in the Netherlands, published a maximum of five times a week”.

The printed press is also covered under the Copyright Act that distinguishes between different types of printed material such as books, brochures, newspapers, magazines and all other written work (Aw Article 10). The Act, however, does not further define the terms book, brochure, etc.
2. **Broadcasting:**

The Media Act defines broadcasting as “an electronic media service that pertains to the maintenance and transmission of programs” (Mw Article 1c). Furthermore, it distinguishes between public and commercial broadcasting.

On the product level, the Act distinguishes on the one hand between different programs. A program is “an electronic product of sound or image content, which is transmitted with the purpose of being received by the general public”. Excluded are “data services which are available only on individual request, and other interactive services” (Mw Article 1f). And on the other hand, the Act defines ‘program parts’ as “clearly distinctive and as such recognizable parts of a program” (Mw Article 1g). Programs are further specified into:

- A program for general broadcasting is “meant to be received by the general public” (Mw Article 1k).
- A program for special broadcasting is “being transmitted coded and is meant to be received by a part of the general public. This part of the public comprises those that have an agreement with the broadcaster pertaining to the reception of the program” (Mw Article 1l).

In geographic terms, the Media Act distinguishes between national, regional (=provinces) and local (=municipalities) broadcasting (Mw Article 1u through 1w).

The Media Act (Mw Article 82i) furthermore specifies a basic program package which broadcasting networks are obliged to transmit. Accordingly, 15 television programs and 25 radio programs have to contain at least the following:

- “the programs of broadcasters with a national license;
- the programs of broadcasters with a regional license;
- the programs of broadcasters with a local license;
- the television programs of Dutch language national Belgian public broadcasters;
- two radio programs of Dutch language national Belgian public broadcasters”.

a) **Television**

The Media Act defines television broadcasting as an “electronic media service that pertains to maintenance and transmission of television programs” (Mw Article 1d). A television program is “a program that contains images, with or without sound” (Mw Article 1h). Furthermore, it distinguishes teletext as a separate type of television program, which “contains static images which can be accessed by the viewer in a self-determined order and point in time, and is transmitted on the same frequency which is being used on the same channel to broadcast another television program or a test image” (Mw Article 1i).

b) **Radio**

The Media Act defines radio broadcasting as an “electronic media service that pertains to maintenance and transmission of radio programs” (Article 1d). A radio program is “a program that contains sound” (Article 1h).
3. **Electronic Communications Services**

a) **Telecommunications**

The Telecommunications Act primarily distinguishes between different telecommunication services. A telecommunication service is “a service which includes the complete or partial transmission or routing of signals over a telecommunications network” (Tw Article 1e).

- A public telecommunication service is “a service which is available to the general public” (Tw Article 1f).
- A Leased Line is “the making available of transmission capacity between two telecommunication network points” (Tw Article 1i).
- Special access is “access to a telecommunications network at other points than those offered to the public” (Tw Article 1j).
- Broadcasting network: “Technical facility to be used to distribute programs via radio or cable” (Tw Article 1o).

Furthermore, the Act distinguished between mobile and fixed line public telephony services (Tw Article 1k and 1m).

Based on these service definitions, the Telecommunications Act defines on the supply side five relevant product markets with regard to identifying dominant market positions. (i) fixed line public telephony; (ii) mobile public telephony; (iii) leased lines; (iv) national fixed line and mobile public telephony together. The relevant geographic market is “the area in which the suppliers are active within the Netherlands (Tw Article 6.4).

The Act also applies the rules for dominant market positions (Tw Article 6.4) to the supply of broadcasting networks (Tw Article 8.2). Thus, (v) broadcasting networks is another relevant product market.

b) **Internet**

The main sector-specific legislation in addition to the EU regulatory framework for the Internet can be found in the Telecommunications Act and the Copyright and Related Rights Acts. In addition, Criminal Law provides a framework in particular with the Computer Crime Act204 (which is currently being revised and there are already some new drafts prepared). In 2002, the Telecommunications Act was adapted to include rules for access to public telecommunications networks with regard to offering access to the Internet205.

Dutch legislation was adapted with regard to the EU directive 96/9/EC on the legal protection of databases (e.g. creation of a Database Act and reformulation of Copyright Act, Article 10). The Database Act defines databases “as a collection of works, data or other independent elements, who are organized in a systematic or methodic manner, who are accessible through electronic means or otherwise, and where the gathering, control or presentation of the

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content in a quantitative or qualitative sense requires substantial investment” (Wrd Article 1.1).

4. **Film and Music**

Film and music both fall under the Copyright Act (Aw Article 10), the Neighbouring Rights Act (Wnr Article 1), and of course under Article 7 of the Constitution with regard to freedom of expression.

The Copyright Act furthermore specifies a number of provisions for film (Aw Article 45a through 45g) and defines a work of film as “a work that consist of a series of images, with or without sound, whether or not it is recorded, irrespective of the method of recoding” (Aw Article 45a.1.).

**IV. Market perception in sector specific practice of authorities and/or courts**

1. **Printed Press**

General Press Policy’s main concern is with those printed publications that are relevant with regard to information and the formation of opinions. In practice, it therefore focuses on daily newspapers, newspapers and news magazines.

The CvdM aligns its relevant market definitions with the NMa, who distinguishes aside from the geographic market different product markets. Accordingly, the CvdM therefore separates regional from national daily newspapers and because of different product properties the market for free daily newspapers, and as separate market the newsmagazines. The product properties are an important factor. The CvdM holds that the national and regional daily newspapers contain general news. And whereas the national daily newspapers can be distinguished on the basis of their identity, the regional daily newspapers most important characteristic is the region to which it is connected. Furthermore, the CvdM distinguishes special interest national daily newspapers, but agrees that in particular “Het Financieele Dagblad” on the basis of its product characteristics could be counted as a general national daily newspaper. Moreover, it acknowledges that although the free-daily newspapers constitute a separate market, based on its product properties, they do compete with national daily newspapers for the audience’s attention and the advertisers.

2. **Broadcasting**

The CvdM Rules on Programming Quota, on the basis of the Media Act and the Media Decree, distinguish between three different types of ‘program parts’:

- *European productions* (Article 3);

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208 CvdM Rules on Programme Quotas of 18 December 2001 (Regeling omtrent Europese, onafhankelijke, recente, Nederlandstalige of Friestalige programma onderdelen).
• *independent productions* (Article 4);

• *original Dutch and Friesian productions* (Article 6).

Furthermore the CvdM Rules specify a number of ‘program parts’ genre distinctions with regard to (i) *news*; (ii) *sport*; (iii) *game shows*; (iv) *advertising and teleshopping*; and (v) *static images* (Article 7).

a) Television

With regards to relevant market definitions the CvdM distinguishes mainly on the supply side between the market for “national” and “non-national” television, the producers market and the cable market.

b) Radio

The CvdM for primarily geographic distinctions between the “national” and “non-national” radio markets with regard to the relevant market definition. Generally the CvdM holds that on the basis of rough content criteria radio programs can be divided into news, classical music and pop music. The CvdM recently has paid a lot of attention to diversity in the radio sector, in particular with regard to the recent (re)distribution of frequencies.

The criteria approved by the government for the distribution of the frequencies for nine national radio programs specified that five spaces were reserved for specific programming (news, classical or jazz music, Dutch (produced) music and two times non-mainstream pop-music). Four spaces were open without specification.

3. Electronic Communications

a) Telecommunications

The OPTA (in line with the NMa) in particular with regard to its task of identifying dominant market positions (if market share is higher than 25 percent), bases relevant product market definitions on relevant product markets as defined in the Telecommunications Act (Tw Article 6.4 and 8.2). Accordingly these relevant markets are:

• fixed line public telephony

• mobile public telephony

• fixed line and mobile public telephony together

• leased lines

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• broadcasting networks

On the supply side of broadcasting networks the OPTA furthermore distinguishes between different functions a supplier might have: (i) The function of supplier of the network infrastructure; (ii) the function of supplier of the basic program package; (iii) the function of supplier of other services, such as program or telecommunications services.

With regard to identifying dominant market position in the case of the leased lines market the OPTA does apply exceptions to the 25 percent rule. On the basis of whether a supplier is able to influence market conditions or not the OPTA can decide to identify a party with a market share below 25 percent as having a dominant market position, or a party with a market share of above 25 percent as not having a dominant market position. The identification of a dominant market position in the leased lines market happens on the basis of the type(s) of leased lines offered by the supplier in a specific geographic area, thus the market of leased lines can also be subdivided into smaller markets.

b) Internet

Market definitions of the OPTA (together with NMa) with regard to Internet Access is covered in the first part of this study.

Furthermore, there have been a number of court cases dealing with the question of whether newspapers or magazines constitute a database according to the Database Act. For example newspaper publisher Wegener argued that a newspaper consists of a collection of works that are arranged in a systematic and methodological way, and therefore qualifies as a ‘database’. Therefore, Hunter Select, who had copied job advertisements from Wegener’s newspapers and used them on its website, had violated the database right of Wegener. The claim was in the first instance dismissed; however in the appeal the court ruled in favour of Wegener, concluding that the jobs section in the Saturday edition of a newspaper might be regarded as a database within the meaning of the Database Act.

With regard to ensuring plurality of the press, the temporary subsidy regulation of the BDF focuses on the product definition: ‘journalistic information products distributed via the Internet’ (Article 4 and 5), and in elaboration (Article 4.3a) it is specified that these have to be

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213 OPTA/NMa (1999), Richtsnoeren met betrekking tot geschillen over toegang tot omroepnetwerken, 17 August 1999.
215 On the basis of this KPN has been considered by the OPTA as not having a dominant market position in the market of leased lines with a capacity of over 2Mb. OPTA (2002). Besluit tot aanwijzing van KPN als een aanbieder van aanmerkelijke marktmacht op de markt van huurlijnen op grond van artikel 7.2 van de Telecomunicatiewet, 27 Maart 2002.
“published in regular intervals, on a set time schedule, at least once a month”. The CvdM\textsuperscript{220} also uses this definition in its markets perception with regard to its analysis of the supply and demand structure of information websites and search-engines.

4. Film and Music

As already mentioned in section 3.1.4 there is no sector specific legislation with regard to Film and Music other than Copyright and Neighbouring Rights’ provisions. Film sector specific practice does however encompass supporting the Dutch film landscape. This is part of the more general cultural policy of the Ministry of Education, Culture and Sciences, which has charged the Dutch film fund ("Nederlands Fonds voor de Film", one of many cultural funds created to stimulate cultural activities) with supporting film production in the Netherlands and promoting a positive climate for Dutch film culture. It does so primarily by subsidizing on a project basis.

The Dutch film fund has conducted research in focusing on demand (the current and potential audience for Dutch Films) and supply in the Dutch film market. On the supply side this study\textsuperscript{221} distinguishes between producers, distributors, theatres, financers, and 'others’.

V. Common factors and differences between the media (sector) specific market definitions and the market definitions used in application of the competition rules

The Dutch media sector specific regulatory framework focuses, unlike competition rules, mostly on the supply side and has very little regard for demand side substitution. Although there is increasing awareness of necessity to look more closely at the demand side, (as held for example by the CvdM) current legislation and regulatory practice so far does not.

With regard to market definitions the media (sector) specific regulatory framework consists predominantly of media product definitions with very few geographic market specifications, other than the national (Dutch) market. Furthermore, there is also very little consideration of the fact that most media operate on a dual product market. Sector specific regulation and policy is primarily concerned with the audience market and only implicitly with the advertising market.

Much of this can be attributed to divergent policy goals. Media policy in general has traditionally directly linked individual media forms and sectors to achieving normative policy goals, such as freedom of expression, pluralism and diversity in the information and cultural audio-visual forms, and the provision of public service broadcasting.

VI. The (possible) impact of this non-competition framework and practice on the work of the competition regulator, in particular when defining the relevant markets.

The OPTA and the NMa cooperate very closely and have developed a common protocol\textsuperscript{222} to this respect (as elaborated in part 1). This cooperation has to be seen in the wider political

\textsuperscript{220} Commissariaat voor de Media (2003), Concentratie en Pluriformiteit van de Nederlandse Media 2002, Mei 2003, p. 88.

\textsuperscript{221} Nederlands Fonds voor de Film (2002), Samenvatting Marktonderzoeken Nederlandse Speelfilm, available on www.filmfund.nl.
context on the future of sector-specific supervision in this area. As part of a performance evaluation\textsuperscript{223} the government initiated a shift in the OPTA’s institutional framework, whereby it will become integrated into the NMa as a separate Chamber in 2005. This model of sector-specific supervision envisages the organisation of the NMa as a single regulatory authority responsible for different sectors, each of which is ‘housed’ in a different Chamber. On a political level\textsuperscript{224} this has raised important questions on how internal prioritisation can take place within an organisation that supervises sectors where societal, commercial and political interests and tensions play such a large role.

With regard to the regulatory framework the Media Act has incorporated the relevant media product definitions of the Telecommunications Act and vice versa. The regulatory practice of the OPTA and NMa is consistent with the relevant market definitions according to EU competition regulatory framework. The major question, and what remains to be seen, is therefore, whether the rather detailed and specified product distinctions of the media-sector specific framework will find its way into the delineation of relevant market definitions, and thus whose regulatory interests are incorporated or even prioritised?

\textsuperscript{222} OPTA/NMa (2000), Samenwerkingsprotocol OPTA/NMa., 19 December 2002.
\textsuperscript{223} Kabinetsstandpunt Evaluatie Onafhankelijke Post en Telecommunicatie Autoriteit, 6 July 2001.
\textsuperscript{224} OPTA (2001), Brief aan de Staatssecretaris van Verkeer en Waterstaat, Onderwerp: Evaluatie OPTA.