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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

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ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN THE NETHERLANDS

-- 2005 --

This report is submitted by the Delegation of the Netherlands to the Competition Committee FOR INFORMATION at its forthcoming meeting to be held on 18-19 October 2006.

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Foreword

1. This report only concerns the competition enforcement of the NMa. However it is important to notice that the statutory tasks of the NMa and its Offices, which regulate specific sectors, include the enforcement of the Competition Act [Mededingingswet], the Electricity Act 1998 [Electriciteitswet 1998], the Gas Act [Gaswet], the Passenger Transport Act [Wet personenvervoer 2000] and the Railways Act [Spoorwegwet]. The NMa is also responsible for the enforcement of article 81 and 82 of the EC Treaty within the Netherlands.

2. With a view to furthering competition and protecting consumers, the NMa has certain sector-specific tasks and powers, namely in relation to the energy and transport sectors. These sectoral tasks are carried out by the NMa's 'Offices': the Office of Energy Regulation (DTe) and the Office of Transport Regulation. To increase efficiency and effectivity, the NMa stimulates a vibrant exchange of expertise and manpower within its organisation. In this way, the advantages of healthy competition can be optimised within the regulated sectors.

1. Changes to competition laws and policies, proposed or adopted

1.1 Summary of new legal provisions of competition law and related legislation

Competition Amendment Act: the NMa, an independent Administrative Authority

3. On 7 December 2004, Dutch Parliament approved the bill which transformed the NMa into an independent administrative authority. As of 1 July 2005, the NMa is no longer an agency of the Ministry of Economic Affairs, acquiring a Board with the status of an independent administrative authority (ZBO). This ZBO-status was formally granted to the Board. Up until then, the NMa had been governed by a Director General. The Board now consists of Mr Pieter Kalbfleisch (Chairman, formerly Director General), Mr René Jansen (formerly Deputy Director General NMa) and Mr Gert Zijl (formerly Director of the Office of Energy Regulation [DTe]). The Chairman's term of office is six-years; the other Board Members are appointed for a period of four years.

4. From 1 July onwards, both sector-specific offices have been fully integrated within the NMa and brought under the supervision of the Board. Up until 1 July 2005, the Director of DTe was responsible for the regulation of the Electricity Act 1998 and the Gas Act. As of 1 July 2005, his responsibilities have been transferred to the Board of the NMa. In this process of transition, DTe retained its name. Within the NMa, the Office of Transport Regulation continues to operate as a sector-specific regulator for public transport. DTe and the Office of Transport Regulation have their own websites: www.dte.nl en www.vervoerkamer.nl.

5. The NMa's status as an autonomous administrative authority entails that it formally operates at a greater distance from the Ministry of Economic Affairs. Since it was established in 1998, the NMa has been an agency of the Ministry of Economic Affairs. It has operated at a relative distance, with its own responsibilities and powers.

6. The most important change in relation to the Ministry of Economic Affairs, is that the Minister can no longer issue directives in individual cases dealt with by the NMa. This strengthens (in a formal sense) the independence and objectivity of competition enforcement policy and increases its effectivity. No minister, however, has ever exercised this particular kind of directive power. The Minister of Economic Affairs will remain politically responsible for policy and legislation in relation to the energy sector and competition enforcement, and is authorised to issue the NMa with general directives. The NMa's

remodelling into a ZBO did not involve major changes to its work method. The NMa continued to adhere to its core values: to be effective, decisive and authoritative.

2. Other relevant measures, including new guidelines

2.1 New provisions concerning sanctions

7. In 2005, the NMa developed specific guidelines on fining in the construction sector (available in Dutch at the NMa-website www.nmanet.nl). In January 2004, the NMa issued a construction sector-wide appeal for companies to report on cartel offences voluntarily. At the same time, the Government issued a warning that construction companies should “come clean” on past irregular behaviour before 1 May 2004, or face exclusion from future public tenders. In total, 481 companies heeded the call to come clean. Though a number of investigations were already underway, these notifications significantly contributed to a second period of intense investigation and sanctions procedures. Both bid rigging and product cartel deals proved to have been endemic in a range of sub sectors, relating to installation engineering, building and housing, concrete paving stones, cable and piping, horticultural services and concrete floor elements and piles. By voluntarily providing valuable information to the NMa, companies became eligible for leniency. The NMa’s leniency programme was specially adapted to fit the exceptional nature of the cases at hand, resulting in a series of Notices on the Setting of Fines:

- Guidelines on Fines in respect of Certain Anticompetitive Activities in the Road Construction and Infrastructure Construction Sector (GWW) - 13 October 2004
- Guidelines on Fines in respect of Certain Anticompetitive Activities in the Installation Engineering Sector - 21 April 2005
- Guidelines on Fines in respect of Certain Anticompetitive Activities in the Housing and Utility Construction Sector -1 September 2005 (Rectification of the Publication on the Application of Fines in respect of Certain Anticompetitive Activities in the Housing and Utility Construction Sector -11 October 2005)
- Guidelines on Fines in respect of cables and wires – 17 November 2005
- Guidelines on Fines in respect of horticultural services November 2005
- Guidelines on Fines in respect of Certain Anticompetitive Activities in the Manufacture of Concrete Products (mortar, concrete paving stones, prefabricated concrete piles, concrete floor elements) - 24 November 2005

2.2 Guidelines for informers

8. In 2005, the NMa published its Policy Rule for Informers [Beleidsregel Informanten]. This Policy Rule records the way in which the NMa deals with informers who wish to remain anonymous or do not want their identity to be revealed outside the NMa. This Policy Rule answers queries on how and where to contact the NMa and illustrates what can be expected of the NMa. Furthermore, the NMa concluded an agreement with the crime tip-off line Meldpunt M (Meld Misdaad Anoniem), so that informers can now also anonymously register tip-offs there. The Policy Rule is not applicable to anyone acting as an interested party intent on submitting a request for the NMa to impose a decision with regard to enforcement issues on the basis of the General Administrative Law Act [Algemene Wet Bestuursrecht]. The NMa cannot give a foolproof guarantee as to informers’ anonymity, but in drawing up procedures it has made a substantial

improvement to safeguarding anonymity and, if such be the case, keeping an informer's identity safe within the NMa.

2.3 *Brochures 'Complaints, tip-offs and signals submitted to the NMa' and 'Statutory powers of the NMa'*

9. In 2005, the NMa published its brochure 'Complaints, tips and signals submitted to the NMa' [Klachten, tips en signalen bij de NMa]. Whenever citizens or entrepreneurs suspect an infringement of the Competition Act, they can report to the NMa. On the basis of their report, the NMa may instigate an investigation. Such reports may contain very useful information and contribute significantly to the effectivity of NMa policy. The NMa aims to be transparent about what citizens and entrepreneurs may expect after reporting to the NMa. The Brochure on complaints, tip-offs and signals submitted to the NMa, will inform them on this issue. The brochure deals with questions such as 'How do I report on an infringement?', 'How do I submit a complaint?' and 'How will the NMa process my complaint?'.

10. The NMa also published the brochure 'Statutory powers of the NMa' [Bevoegdheden van de NMa] in 2005. This brochure includes specific information on the contents and background to the statutory powers of the NMa and the way in which it puts these into practice. This explanatory brochure is intended for undertakings who are confronted with an NMa investigation, but it will also prove useful to entrepreneurs who wish to instruct their employees on what to do and expect in case of an NMa raid or investigation.

2.4 *Economic Bureau*

11. In 2005, The NMa set up the Economic Bureau to strengthen the quality and effectiveness of regulation by increasing insight into its economic effects. This development is in line with the European trend to pay more attention to the 'outcome' of action taken by regulators. The European Commission has also had a Chief Competition Economist for several years. Prof. Jarig van Sinderen was appointed as the first Chief Economist of the NMa as of 1 April 2006.

2.5 *Consumer Information Desk*

12. The joint Consumer Information Desk has been initiated by the Consumer Authority [Consumentenautoriteit], the NMa and OPTA. The information desk aims to help consumers by furthering transparency. The desk will provide easy-access assistance to consumers, via the internet, telephone or email. Services are free of charge (no subscription) and easily accessible (local tariffs are applicable to telephone calls).

13. The joint approach should prove beneficial to quality standards and efficiency. The desk will function as the main channel of communication between the regulators involved (OPTA, NMa and the Consumer Authority) and consumers. The consumer may approach the desk with queries and signals on consumer rights. The desk will provide information to help consumers tackle a problem directly or show the way towards a solution.

14. The desk will be operational as from mid-2006, from which date consumers can approach the desk with their queries. Towards the end of September a media campaign will bring the new information desk to the attention of consumers. The desk will then be accessible via regular means of contact: website, telephone, post, fax and email.

3. Government proposals for new legislation

3.1 *Bill amending the Dutch Competition Act as a result of its evaluation*

15. In 2005, the government sent a Bill amending the Dutch Competition Act as a result of its evaluation to the Lower House. The Lower House approved the articles of the Bill in September 2006, but postponed final approval and referral to the Higher House until the Council of State has given advice on an amendment granting the NMa the power to search houses. Depending on parliamentary procedures, the amended Competition Act will probably come into effect in 2007 and include:

- *More powers for the NMa.* Cartel enforcement will substantially be strengthened:
 - a) Liability (maximum fines of € 450.000) of executives and factual instigators of breaches of Dutch Competition Act. Goal of this proposed power is to strengthen the deterrence of the Competition Act;
 - b) Higher maximum fines: 1% (procedural breaches) or 10% (material breaches) of annual turnover for breaches of merger control rules. This is in line with the European Merger Regulation 139/2004;
 - c) The power to impose structural remedies, as mentioned in article 7 of EC Regulation 1/2003, on undertakings or associations of undertakings. This power could be used to order the divestiture of a business unit, for example following repetitive breaches of the Competition Act;
 - d) When companies offer commitments to meet concerns expressed to them by the NMa, the NMa can make those commitments binding on those companies by decision. Such a decision may be adopted for a specific period and shall conclude that there are no longer grounds for action by the NMa. This power is in line with article 9 of EC Regulation 1/2003. The NMa can also make such a decision when the company offers commitments without being previously approached by the NMa;
 - e) The power to claim payment of fines with the members of an association of undertakings, in case the association does not pay the imposed fines; and
 - f) The power to ask for an accountant's statement on the company's turn-over related to the competition breach, which data can be used to determine fines.
- *Merger control rules in line with European Merger Regulation:* new substantive test.

16. The Dutch merger control rules will be brought in line with the European Merger Regulation, leading to a new substantive test. The "dominance" test in Regulation 4064/89 (forbidding concentrations creating or strengthening a dominant position as a result of which effective competition would be impeded in the common market or a substantial part of it is substituted in the new Merger Regulation 139/2004 by the "SIEC" test (forbidding concentrations which would significantly impede effective competition in the common market or a substantial part of it, in particular as a result of the creation or strengthening of a dominant position). Although the Minister of Economic Affairs and the NMa are of the opinion that the SIEC test is not, in its content, different from the "dominance" test, but rather a clarification thereof, a similar change from the "dominance" test to the SIEC test is proposed. In the Explanatory Statement of the Proposal it is mentioned that the NMa will issue Guidelines in order to provide more certainty as to how the SIEC test will be applied in practice. These Guidelines will address horizontal and non-horizontal

concentrations. It is not certain yet whether a mere referral to the existing EC Guidelines on horizontal concentrations and, in time, to the, not yet existing EC Guidelines on non-horizontal concentrations, will suffice, or whether explicit NMa Guidelines will be drawn up. The Explanatory Statement, in referring to the new SIEC test, furthermore provides for an opening towards a so-called “efficiency defence”, stating that the merger analysis will have to take into account, amongst other things, “the development of technical and economic progress provided that it is to the consumers’ advantage and does not form an obstacle to competition” (based on art. 2.1.b of Merger Regulation 139/2004). Guidelines on the efficiency defence will also be issued in due time. At the moment a written consultation amongst lawyers and economists has been set out in order to assess on which specific subjects practitioners feel that more guidance is needed, or whether a mere referral to the EC Guidelines will suffice.

3.2 *Criminalisation of the Competition Act*

17. In June and in September 2006, a majority in the Lower House requested the Minister of Economic Affairs to introduce prison sentences for infringers of the Competition Act. With this instrument, the Lower Houses wishes to enhance the deterrence of this Act. In a reaction, the Minister announced to send a Bill to Parliament before the end of 2006, providing for prison sentences and the power to ban someone from his profession, both to be imposed by a criminal judge. Further, he announced the power for the NMa to search houses. The introduction of prison sentences would be a novelty in view of the actual system of enforcement of Dutch competition law. Since its birth in January 1998, the Dutch Competition Act only provides for administrative enforcement, to be carried out by the NMa.

3.3 *Energy regulation: Splitting up of integrated energy companies*

18. In order to guarantee the security of supply and economic efficiency of the energy supply in the Netherlands in an adequate and structural way, the government sent in August 2005 a Bill to Parliament, aiming at the splitting up of integrated energy companies. This will lead to network companies which are responsible for the network monopoly and fully independent commercial energy companies which are active in production, trade and supply of electricity and gas. In April 2006, the Bill was adopted in the Lower House and sent to the Higher House. The Higher House will discuss it on 31 October 2006. The moment the Act has come into force, energy companies will have a maximum of two years and a half to actively split. Upon the splitting up, shareholders (provinces and municipalities) can sell their shares in the commercial companies (production, trade and supply). In view of the entrepreneurial risks which are involved with those activities, many municipalities and provinces already announced to give up their stakes. The government is of the opinion that following the coming into force of the Act, minority privatisation of network companies is acceptable.

4. Enforcement of competition laws and policies

19. Action against anticompetitive practices, including agreements and abuses of dominant positions :

4.1 *Summary of activities of*

- *Competition authorities*

Statement of objections and fines (2005)

Number of investigations in competition cases	20
Number of Statements of Objections based on a reasonable suspicion that the Competition Act was infringed	10
Number of cases concluded by means of alternative enforcement instruments	2
Number of cases in which investigations were discontinued due to a lack of evidence	8
Number of cases in which fines and/or injunctions were imposed	8*
Total fines in millions of Euro	141.
	2

* Including more than 500 decisions imposing sanctions in the construction sector.

- *Courts*

Statistics 2005 and 2006 (up to September)

Administrative judgements concerning decisions of the Netherlands Competition Authority (NMa):

	2005	2006 (up to September)
Appeal	22	9
District Court of Rotterdam		
Final appeal	3	3
Trade and Industry Appeals Tribunal		
Cases won	*	*
Cases lost	*	*

* As most cases were partially won or lost, we cannot specify exact numbers here.

4.1.1 *Application of Community competition rules by the courts*

20. The Dutch courts have applied EC competition law in the judgments listed below. It should be noted in this regard that the Dutch courts also interpret Articles 81 and 82 of the EC Treaty when they apply the Dutch Competition Act, since this Act is based on EC competition law. The District Court of Rotterdam has stipulated more precisely in its rulings that a comparison with Community law can only be of importance to substantive law. National rules of procedure in respect of administrative law, as set out in the General Administrative Law Act [Algemene Wet Bestuursrecht (Awb)], is decisive with regard to procedural law.

4.1.2 *Civil courts*

- a) Court of The Hague, 24 March 2005, 04/694 en 04/695, Marketing Displays International Inc. v. VR (civil proceedings)

- b) President of the District Court of Zwolle, 4 April 2005, 106345/KG ZA 05-92, Bicycle shop [A] v. Polar Electro Netherlands B.V. (interlocutory proceedings) (civil proceedings)
- c) Court of Amsterdam, 23 June 2005, 1974/04 KG plaintiff v. Chevrolet Nederland B.V. (formerly Daewoo Motor Benelux B.V.) (civil proceedings)
- d) President of the District Court of Utrecht, 3 November 2005, 201038 KG ZA 05-911, PCA v. Peugeot Nederland N.V. (interlocutory proceedings) (civil proceedings)

4.1.3 Administrative court

- a) District Court of Rotterdam, 20 June 2006, MEDED 05/528 KNP, German producers' organisations. the NMa
- b) District Court of Rotterdam, 19 July 2006, 05/509 MEDED HRK, 05/519 MEDED KNP, 05/438 MEDED HRK, 05/562 MEDED KNP, 05/510 MEDED HRK en 05/508 MEDED HRK, Dutch producers' organisations and shrimps wholesalers Heiploeg, Klaas Pull & Zoon and Goldfish v. the NMa.

21. In its judgement of 20 June 2006 the District Court of Rotterdam confirmed the decision of the NMa that the German shrimps producers' organisations violated Article 6 of the Dutch Competition Act and Article 81 of the EC Treaty. However, the Court did not agree with the NMa that the behaviour of the German producers' organisations constituted a very grave infringement. The Court stated that the behaviour formed a less grave infringement as the legal framework of Regulation 26 was unclear (applying certain rules of competition to production of and trade in agricultural products). The NMa has to take a new decision with regard to the fines imposed on the German producers' organisations. Furthermore, in its judgement of 19 July 2006 the Court ruled that the Dutch producers' organisations and the shrimp wholesalers Heiploeg, Klaas Pull & Zoon and Goldfish violated Article 6 of the Dutch Competition Act and Article 81 of the EC Treaty as well. The Court upheld the fines imposed on the shrimp wholesalers, but with regard to the Dutch producers' organisations the Court again ruled that it was not a very grave infringement, since the legal framework of Regulation 26 was unclear. Therefore, the NMa is also obliged to take a new decision with regard to the fines imposed on the Dutch producer' organisations.

- c) Trade and Industry Appeals Tribunal, 7 December 2005, AWB 04/237 and 04/249 9500, Secon Group B.V./ G-Star International B.V. v. the NMa (administrative proceedings)

22. The NMa imposed a fine on Secon because Secon violated Section 6 of the Dutch Competition Act (general prohibition on cartels equivalent to Article 81 EC). Secon included provisions on resale prohibition, recommended minimum resale prices and recommended resale prices in its General Conditions of Sale. On appeal, the Court of Rotterdam ruled that Secon's General conditions were contrary to Section 6 of the Dutch Competition Act. The Trade and Industry Appeals Tribunal (hereinafter: the Tribunal) ruled on appeal that Section 6 of the Dutch Competition Act had not been breached.

23. The Tribunal first considered if there was an agreement and consensus between Secon and its buyers. Citing the Sandoz and Adalat judgements of the Court of Justice the Tribunal ruled that there was consensus between Secon and its buyers. Secondly the Tribunal considered if there was an imperfect selective distribution system and that therefore the resale prohibition was not anticompetitive. According to Sections 12 and 13 of the Dutch Competition Act, Section 6 of the Dutch Competition Act is not applicable to an agreement that fulfils the criteria laid down in the Block Exemption on Vertical Restraints. The Tribunal ruled that Secon does not operate a (imperfect) selective distribution system, because Secon has not proved in anyway that it selects its buyers pursuant to objective selective criteria and that is the main characteristic of a selective distribution system. This means that the resale prohibition is anticompetitive.

Thirdly the Tribunal ruled that the minimum recommended prices are anticompetitive. Secon's General Conditions provide that a buyer can not deviate from the minimum recommended prices unless Secon has given its permission. According to the Block Exemption Regulation on Vertical Restraints buyers must be free to set their own resale prices. The same reasoning applies to the recommended prices Secon operates in its General Conditions. The Tribunal finally considered whether the agreement has an appreciable effect on competition (in meaning of the Volk Vervaecke case law concerning the quantitative criteria for assessing the appreciability of restrictions). It rules that the specific situation in which the agreement has effect must be considered and that the economic and judicial context in which the undertakings operate, the nature of the services the agreement has effect on, the structure of the relevant market and the actual circumstances in which the agreement operates must be taken into account. The Tribunal ruled that the NMa has not sufficiently considered the specific situation in which the agreement has operated. Also the NMa has not sufficiently motivated why the argument of Secon that the agreement has no appreciable effect on competition (very low market share) is unfounded. The Tribunal ruled that the NMa has to take a new decision.

4.2 Description of significant cases, including those with international implications.

4.2.1 Sanctions in the construction industry

24. In recent years the NMa conducted investigations into infringements of the prohibition on cartels in various sub sectors of the construction industry. In response to appeals by the NMa and the government to construction companies to "come clean" a large number of companies voluntarily provided the NMa with information on cartel activity. In October 2004 the NMa concluded its investigations into the civil engineering and infrastructure sub sector with a statement of objections. The investigations in the Installation engineering sub sector were concluded in April 2005. In both sub sectors cartel structures were exposed which involved a general system of bid-rigging. Investigations in other sub sectors were concluded in Autumn 2005.

25. The NMa developed a special 'accelerated' (fast-lane) sanctions procedure specifically for the construction industry in view of the large number of companies and the general desire to come clean quickly. This accelerated procedure is only open to companies who do not dispute the existence of the exposed cartel structures and their participation therein. Companies who choose to take part in the accelerated procedure receive a 15% reduction of their fine (the companies involved keep the possibility to appeal). Companies who choose not to participate in the accelerated procedure will partake in a regular sanctions procedure, as set out in sections 59 to 61 of the Netherlands Competition Act.

Sub sector Civil engineering and infrastructure

26. In the Civil engineering and infrastructure sub sector 90% of 380 companies chose to participate in the accelerated procedure and received a decision imposing a fine. The accelerated procedure in this sub sector was concluded in March 2005; approximately EUR 100 million fines were imposed in the accelerated procedure. The regular sanctions procedure is still in process.

Sub sector Installation engineering

27. In the Installation engineering sub sector 88% of 180 companies chose to participate in the accelerated procedure, which was concluded in October 2005. Approximately EUR 40 million fines were imposed in this procedure. The regular sanctions procedure is still in process.

Public Parks and gardens Maastricht

28. On 19 December 2005, the NMa imposed a fine on eight providers of horticultural services against whom a statement of objections had been drafted previously. The NMa considered it proven that these undertakings participated in consultations and concluded agreements, prior to five public procurement procedures set up by the city of Maastricht. Bid rigging constitutes a very grave infringement of the Competition Act. The start of a procurement procedure should actually signal the moment for undertakings to enter into competition. Parties that tender for contract should not be in contact with one another on the commission under consideration, as this would seriously restrict competition and might even entirely eliminate it. Fines were calculated in accordance with the Guidelines for the Setting of Fines as drawn up by the NMa. They were raised by 30% as undertakings operative in 2004, more so than ever before, should know that consultation prior to procurement is prohibited and will be severely fined. In this respect, the NMa explicitly referred to the fraud affair in the building industry and other sectors, which involved cartel deals and generated a great deal of publicity. Seven out of the eight undertakings have lodged an objection against the imposition of fines. With regard to five of these undertakings, all of which tended to public parks and gardens in Maastricht in the years prior to the procurement procedure, the NMa took into account the attitude of the Maastricht authorities. In spite of the public procurement policy to which the municipal authorities should have adhered, they initially chose to investigate how to maintain business relations with the aforementioned undertakings. Subsequently, municipal authorities instigated public procurement procedures all the same. The undertakings then reverted to bid-rigging in order to qualify for maintenance work. Solely the fact that municipal authorities had consulted undertakings beforehand to inquire about a possible continuation of existent relations, does not justify an infringement of the Competition Act. In specific circumstances, however, such a factor may be of relevance to the NMa when determining the level of the fines. As to the undertakings concerned, the fine was lowered by 30%. In the meantime, various undertakings agreed on a settlement with the municipal authorities involving financial compensation for losses incurred. The NMa took this into consideration and subtracted part of the amount of financial compensation from the total fining amount due. By reducing fines the NMa aims to contribute to the enforcement of competition legislation by means of the injured party's demand for compensation as directed towards the undertakings which have acted in breach of competition law. This so-called civil enforcement is furthered by the European Commission as part of the modernisation of communal competition law.

4.2.2 Financial services

Interpay (payment systems)

29. By decision of 28 April 2004 the Netherlands Competition Authority imposed fines on Interpay for infringing section 24 Competition Act and on its shareholders banks for infringing section 6 Competition Act. Interpay and its shareholders appealed this decision.

30. In the administrative appeal procedure the Netherlands Competition Authority decided that there is no infringement of section 24 Competition Act. Therefore the fine imposed on Interpay will be revoked.

31. For a well founded refutation of the objections of the parties the Netherlands Competition Authority deems it necessary to execute further economic research. The Netherlands Competition Authority furthermore established that recent developments on the relevant market occur; that is the shareholders and retailer interest groups have concluded an agreement. The agreement serves the settlement of disputes between the banks and retailers as a result of the Interpay decision of 28 April 2004.

32. Because of the aforementioned developments the Netherlands Competition Authority decided not to execute economic research. Thus it is not possible to refute the propositions of the parties on this matter.

33. The Netherlands Competition Authority rejects the objections of the parties on the assessment of the joint venture Interpay. Not only is the influence of the shareholders on the decision-making of Interpay so that Interpay cannot be deemed to be able to carry out its business activities on the basis of its own decision-making, but Interpay is also economically dependent on the shareholders. Furthermore the Netherlands Competition Authority finds that the joint venture at hand gives rise to the coordination of the competitive behaviour between the shareholders.

34. The objections against the finding that the Shareholder banks infringed section 6 Competition Act by letting Interpay sell network services thereby preventing competition on the relevant market, are also rejected. Furthermore has the Netherlands Competition Authority decided that the conduct of the shareholders is also to be qualified as a breach of Article 81 (1) of the EC Treaty.

35. The Netherlands Competition Authority decided to lower the fines imposed on the shareholder to EUR 14,000,000 in total. The reason for this reduction of the fines is the establishment of the fund conducive to socially efficient money transfer, in which they deposit EUR 10,000,000 in total.

4.2.3 Informal opinion on the institution of Currence

36. To increase transparency and competition on the Dutch payments market, Interpay has transferred the brands PIN and Chipknip to Currence, partly on the advice of the Wellink Commission. Currence branched off from Interpay. The organisation, founded in May 2005, mainly focuses on issuing licenses or certificates to market parties and (new) entrants, which entitle them to carry out activities on the market for payment products, insofar as this relates to collective payment products, namely PIN and Chipknip transactions. At the request of Currence, the NMa gave an informal opinion on the institution of Currence, its proposed work method and the criteria which certificate holders and licensees have to meet in order to provide PIN and Chipknip payment services. The NMa stated that the admission procedure for licensees and certificate holders as set up by Currence, seemed sufficiently independent and transparent. The criteria under consideration seem objective and do not go beyond what is necessary to a proper functioning of the payments market.

37. In its informal opinion, the NMa also pinpointed a number of issues relating to competition law, which require special attention. The NMa emphasises that Currence must operate in a way which is fully independent in carrying out its certifying activities, so that no single market party can influence decisions which determine whether (potential) competitors gain access to the market. This is particularly important as shareholders in Currence are also shareholders in Interpay and as such constitute the largest party in the banking market in the Netherlands. The NMa concludes that present ownership structures and decision-making procedures in Currence may not result in the unlawful exclusion of (potential) market parties or the obstruction of innovation.

38. The NMa will continue to monitor market developments and Currence's market conduct.

4.2.4 Financial Sector Monitor 2005

39. The Financial Sector Monitor [Monitor Financiële Sector/MFS], established in 2003, consists of a group of NMa specialists who perform economic research into the various submarkets of the financial sector. The group charts the specific characteristics of these markets and analyses to what extent competition in these markets is at risk. The MFS focuses particularly on the various indicators which, in an interrelated context, are a potential risk to competition. Bearing in mind the so-called mix of instruments, the NMa tries to enter into dialogue with the sector on these issues, in order to realise changes that will improve competition. There are two advantages to this work method. On the one hand, monitoring and publishing new insights have an enforcement effect of their own accord. The undertakings involved

become more aware of statutory norms as laid down in the Competition Act and the importance of compliance with these rules. On the other hand, monitoring benefits the NMa's prioritisation policy, and may give way to the implementation of actual forensic research into infringements of the Competition Act. By gathering expertise, the MFS also supports the NMa's policy of merger control in the financial sector, relating to the assessment of mergers and acquisitions. The first monitors in 2003 and 2004 mostly presented market scans which focused on identifying risks. In 2005, a number of problem areas were researched more thoroughly. The MFS investigated the effects of the transfer of PIN contracts from Interpay to banks. This research shows that larger retailers paid lower tariffs on average, while smaller retailers seemed to be paying more. Furthermore, it emerged that banks employed varying average tariffs. Also, there was an increase in the number of contract formats following the transfer. The research presents an overall image of a market characterised by nascent competition.

40. Research was also carried out into the market entry and exit of banks in the banking sector generally. According to this investigation, banks hardly face competition because of the entry of new market parties. Every year, four banks on average enter the market, set against six banks that cease all activities. Furthermore, the total number of entries and exits has decreased since 2003. The NMa has communicated these findings to the sector via the Monitor.

4.2.5 Report 'Competition in markets for life insurance'

41. The NMa and the Netherlands Bureau for Economic Policy Analysis (CBP) have jointly researched the level of competition in the life insurance market. This investigation shows that competition in this market is not optimal. A possible cause may be the limited incentive to insurance brokers to find the best product for their clients under the existent commission regime.

42. The research report identifies a number of policy options which help stimulate competition. Such policy options may be relevant to enforcement endeavours by the Ministry of Finance. One of the policy options is to make it obligatory for insurers and insurance brokers to provide more clarity with regard to management fees and commission. This will reduce opportunities for commission driven advice. In this respect, the Ministry of Finance has announced two measures. Firstly, the ratio of upfront and recurring commission will gradually be adapted to a ratio of 50/50 towards the end of 2009. Secondly, transparency as regards the level of fees will be introduced. Another option is to regulate the contractual relationships between insurance companies and insurance brokers.

5. Healthcare

5.1 Contracting healthcare providers by health insurers

43. Over the last few years, the NMa has received a great number of complaints from healthcare providers about health insurers' refusal to negotiate contracts. These were mostly complaints from general practitioners and independent physiotherapists. Healthcare providers characterised the conduct of health insurers as entailing the abuse of a dominant position. As soon as it was announced that physiotherapists' tariffs were to be made public by way of experiment in February 2005, the number of complaints increased as further complaints from independent physiotherapists were received.

44. Health insurers supposedly offered standard contracts which were not subject to individual bargaining. Also, the inclusion of specific contract conditions was to be regarded as an abuse of a dominant position by the health insurers.

45. On 26 May 2005, the NMa rejected the complaints by general practitioners and physiotherapists with regard to health insurers. The notion that health insurers should negotiate contracts with all healthcare providers individually, is based on a misunderstanding. The Competition Act does not prescribe individual

bargaining, not even in case a health insurer holds a dominant position. A health insurer is free to determine his own purchasing policy, providing the criteria employed are objective, transparent and non-discriminatory.

46. Physiotherapists lodged an appeal in this case, which is still under review.

6. Liberal professions

6.1 *Statement of objections ‘no cure no pay’*

47. In March 2005, the NMa issued a statement of objections against the Netherlands Bar Association (NOvA) for its ruling on the prohibition of results-based remuneration on the basis of ‘no cure no pay’. This method of remuneration is applied in two ways. An advocate and client may arrange for the client to pay a fee on condition that a particular result has been achieved only. Or they may arrange for the advocate’s fee to be proportionate to the financial result achieved. The NMa presumes that NOvA’s prohibition on results-based remuneration infringes Dutch and European competition legislation. The prohibition restricts advocates’ freedom to determine their own method of remuneration and, by implication, restricts competition. The NMa report voices the suspicion that an absolute prohibition on results-based remuneration goes beyond what is necessary to safeguarding sound professional practice among advocates. Initially, the NOvA had permitted personal injury advocates to apply results-based remuneration by way of an experiment. The amended regulation, which made possible this experiment, was annulled by the Minister of Justice. With a view to the activities of the Van Wijnen (also known as the Legal Profession Commission, instituted in 2005 by the minister of Justice in order to evaluate the market for legal services Commission), the NMa decided to suspend sanctions procedures. In so doing, the NMa makes sure that it disposes of all the relevant information and can guarantee a well-balanced and meticulous enforcement policy.

7. Agriculture

7.1 *Informal opinion shrimp fishery industry*

48. At the request of the Producer Organisation [Producentenorganisatie/PO] Nederlandse Vissersbond, the NMa gave its opinion on regulations to be implemented in the shrimp sector by the newly founded Transnational Association of Producer Organisations [Transnationale Vereniging van Producentenorganisaties/TVPO]. All TVPO’s – several TVPO’s may be set up in the shrimp fishery industry – are subject to the stipulation that they may not take up a dominant position in the relevant market, unless such a dominant position is in exceptional cases held to be necessary in order to comply with the objectives of the Communal Agricultural Policy as set out in article 33 of the EC Treaty. In this way, PO’s and/or TVPO’s will remain in competition with one another, but can also deploy sufficient countervailing powers to offset wholesalers in the shrimp sector. Ultimately, the consumer will benefit from effective and actual competition between the various links constituting the shrimp production chain. Whether or not the TVPO that is envisaged by the PO Nederlandse Vissersbond, actually disposes of a dominant position, is left undecided in the informal opinion. A TVPO may only implement measures with an effect on prices and the amount of shrimps brought to land, if these measures remain within the strict normative framework of legislation on communal fishing policy. In this regard, the informal opinion refers back to a previous NMa assessment of practices among producer organisations (and others), relating to agreements on fishing quotas, for example. This is expounded in the sanctions decision of 14 January 2003 and the decision on objection [besluit op bezwaar] of 28 December 2004 relating to case 2269. The informal opinion of the NMa stresses that a situation of structural overcapacity in the shrimp fishery industry may lead to company failures, surpluses and a very high fishing intensity, bearing ecological consequences of various kinds. In order to rid the market of its structural overcapacity at present, a

clearance operation might prove worthwhile. In its informal opinion, the NMa points out that – in exceptional circumstances – it is possible to set up a crisis cartel [herstructureringsovereenkomst] in order to revitalise the sector and restore economic soundness.

49. The NMa wishes to underline that it attaches great importance to compliance-programmes set up by undertakings and PO's in the shrimp sector. These may increase awareness and stimulate compliance with current competition legislation. Various important players in the shrimp sector had framed a compliance programme by the end of 2005 or were in the process of doing so.

7.2 CR Delta (artificial animal insemination)

50. In his decision of 31-12-03 the director-general of the NMa imposed sanctions on CR Delta for a violation of article 24 of the Dutch Competition Act (similar to article 82 EC) because of three rebate systems that, separate and together, form an abuse of a dominant position. CR Delta is a supplier of breeding bull sperm. Customers are cattle breeders. The so-called “quantity rebates” were not “invoice rebates” but were paid at the end of a reference period of one year, the rate increasing gradually (1-5%) according to the quantities purchased. The discount is calculated on the customer's entire turnover of breeding bull sperm with CR Delta. The second rebate system (2 respectively 1%) was granted in return for a promise by the customer to obtain his stock of breeding bull sperm (almost) exclusively (100 respectively 90%) from CR Delta. The third rebate system implied a discount of 10% on the customer's purchases of classified breeding bull sperm when the customer agrees to test unclassified breeding bull sperm. CR Delta's market share on the relevant market is approximately 80%. The infringement took place from 01-09-01 to 01-09-03. The director-general imposed a fine of EUR 2.600.000 and two orders. CR Delta appealed. In the following procedure of administrative review, the Board dismisses all of the party's objections. With regard to Regulation 1/2003 article 82 EC is applied to the infringement, which has not been the case in the contested decision. The case is now under review of the Dutch competition court.

8. Communication/Media

8.1 Broadcast - Nozema

51. In november 2005, the NMa has imposed a fine on the N.V. Gemengd Bedrijf Nederlandsche Omroep-Zender-Maatschappij (Nozema) and Broadcast Newco Two B.V. (Broadcast NT) amounting to more than EUR 1 million jointly. These two companies represent the only parties that transmit radio and television signals through the ether via their transmission networks. The NMa considers it proven that Nozema and Broadcast NT have come to an agreement with regard to commercial FM radio frequencies acquired by the Holland Media Groep (HMG, currently RTL Nederland). To that end, they signed a declaration of intent on 27 May 2003, the day after national commercial radio frequencies had been redistributed among radio broadcasting corporations by the Dutch government. In keeping with this declaration, Nozema would refrain from placing bids or entering into contract with HMG with regard to the frequency ranges the latter had acquired for a period of 24 hours. Within 24 hours after signing the declaration, Broadcast NT contracted HMG. The NMa therefore concluded that the parties involved had indeed divided the market as to the commercial FM radio frequencies acquired by HMG. As a result of this agreement, which infringes section 6 of the Competition Act, competition has been obstructed and HMG was put at a disadvantage [als opdrachtgever]. Both parties have lodged an objection against this sanctions decision.

8.2 *UPC – Canal+*

52. On 15 December 2004, the NMa received notification of the intention of UPC, a provider of television, broadband internet and telephone services, to take over the (film and sport) content for pay television as provided by Canal+. The NMa concluded after an initial investigation that the acquisition might possibly result in a situation in which UPC would obstruct other (new) providers of pay television in exploiting activities in this market, or refuse to provide Canal+ programmes to competing providers of infrastructure. On the basis of this initial investigation, the NMa ruled that the proposed acquisition required a license. In the licensing phase, further research was carried out as regards this case. On the basis of this more thorough investigation, the NMa stated that a restriction of competition in the pay television market or in the market for film rights as a result of this acquisition, was not to be expected. UPC's present activities with regard to pay television are limited. Also, new players enter the market for pay television and the main film studios are in a strong position relative to the buyers of film rights. Furthermore, UPC can be forced into allowing other parties to make use of its cable network on the basis of regulation provided by OPTA, the competition authority which regulates the market for telecommunication services. OPTA has announced that it is intent on imposing this obligation in future. It has also become clear that competing providers of infrastructure invest increasingly large amounts in alternative networks such as xDSL, satellite and ether. Finally, it appears that the content of Canal+ is not of essential importance for other providers of television to offer sufficiently interesting subscription deals. Therefore, the NMa granted a license for the acquisition.

8.3 *Cable decision Casema and UPC*

53. On the basis of two cost investigations, the NMa has concluded that in the past (2000-2004) Casema and UPC did not charge excessive tariffs – as stipulated in the Competition Act - for analogue television and radio subscriptions. There was no excessively large and durable disproportion between costs and tariffs charged for analogue television and radio subscriptions. As such, the abuse of a dominant position could not be ascertained in the case of these cable companies.

54. Developments in the broadcasting sector may be characterised as highly dynamic. Because of these dynamics, future profits for Casema and UPC are highly insecure. Past profits as well as the insecurity with regard to future profits of Casema and UPC have been taken into consideration while drawing up the decision. KPN has lodged an objection against the NMa decision.

9. Case summaries in other sectors

9.1 *OSB (cleaning sector)*

55. The Netherlands Competition Authority found that OSB, the association of cleaning agencies in the Netherlands, advised its members between 1998 and 2000 once every year to increase price levels by a certain percentage. The percentages were determined by the board of OSB on the basis of information on the development of cost levels. Furthermore in mid 2000 OSB advised its members to carry out an additional rise in prices.

56. The Netherlands Competition Authority concluded also in administrative appeal that OSB thus infringed Section 6 (1) of the Competition Act. Furthermore has the Netherlands Competition Authority decided that the conduct of OSB is also to be qualified as a breach of Article 81 (1) of the EC Treaty. The Netherlands Competition Authority imposed fines of EUR 2.000.000 on OSB.

The Netherlands Competition Authority – in accordance with the advice of the Advisory committee – has in the administrative appeal procedure decided that on the basis of the evidence available, the file does not contain sufficient proof of CSU, Asito and GOM, three cleaning agencies of which employees were –

among others – members of the board of OSB, having infringed Section 6(1) of the Competition Act . The imposition of fines has been revoked. The Netherlands Competition Authority finds that there is not sufficient proof that CSU, GOM and Asito initiated plans for the advice of OSB concerning the additional rise in prices in mid 2000 and then played an active and particular role in preparing the advice in question.

9.2 Bicycle producers

57. In his decision of 21-04-04 the director-general of the NMa has imposed sanctions on the three biggest bicycle producers in the Netherlands (joint market share of approximately 80% (sales of 2000) on the Dutch bicycle market) for a violation of section 6 of the Dutch Competition Act (similar to article 81 EC). Accell (by means of its subsidiaries Batavus and Koga), Gazelle and Giant have had two meetings about their (future) pricing strategy in the bicycle season 2001. The infringement took place from 01-09-00 to 01-09-01. The director-general imposed fines of EUR 12.809.000, 12.898.000 and 3.978.000 respectively. The bicycle producers have appealed. According to Dutch administrative law, the Board of the NMa has to reconsider the decision of the director-general in a procedure of administrative review, before the parties can challenge the decision in court. In his decision of 24-11-05 the Board dismisses most of the party's objections. With regard to Regulation 1/2003 article 81 EC is applied to the infringement, which has not been the case in the contested decision. Because of a violation of the rights of the defence, the Board grants the parties a 10% decrease of the fines. The fines after administrative review: Accell: EUR 11.528.000, Gazelle: EUR 11.608.000, Giant: EUR 3.421.000. The decision is now being challenged in court.

10. Mergers and acquisitions

10.1 Statistics on number, size and type of mergers notified and/or controlled under competition laws in 2005

• Notifications of mergers, acquisitions and joint ventures (mergers)	80
• Notifications withdrawn	5
• Exemption from the waiting period	2
• Decisions on notifications of mergers	80
• License required for the merger	5
• Decisions on applications for a licence	7

10.2 Summary of significant cases

Achmea – Rabobank

58. On 22 August 2005, the NMa gave the green light to the merger of the activities of Interpolis (part of Rabobank) and Achmea. Rabobank and Achmea will be the companies of the joint venture. The joint venture will be active on the market of banking services, insurance, pension administration services, health, welfare, services, and reintegration services. The fact that Rabobank's banking activities will be linked to the insurance activities of the merged undertaking will not result in an emergence or strengthening of a dominant position. The merged undertaking will acquire a relatively strong position on both the non-life insurance market and on life insurance market. After the merger, various other strong non-life and life insurers remain active and will ensure sufficient competition. In the area of non-life

insurance for the agricultural sector, the undertaking will acquire a strong position, but sufficient other strong players active which can exert competitive pressure.

Hospitals

59. In 2005, the NMa assessed three hospital mergers: Erasmus Medisch Centrum/ Havenziekenhuis, Ziekenhuis Hilversum/ Ziekenhuis Gooi-Noord en Ziekenhuis Walcheren/ Oosterscheldeziekenhuizen. Furthermore, the NMa ordered a non-case related investigation, such as the investigation into product characteristics of the market for hospital care. The NMa approved of the merger of the Erasmus Medisch Centrum and the Havenziekenhuis in Rotterdam after an initial investigation. Both hospitals provide services in an urbanized region with sufficient alternative hospital care on offer.

60. With regard to the merger of the Ziekenhuis Hilversum and the Ziekenhuis Gooi-Noord, the NMa concluded on the basis of an initial inquiry in 2004 that a license was required, which necessitated a more thorough investigation. This investigation was performed in 2005. In this particular case, there was no reason to assume that an analysis of the product markets for various specialisms would have yielded results that differ from the analysis of the market for general hospital care. Partly for this reason, the NMa investigation at this stage of licensing procedures focused mainly on the market for general hospital care. In so doing, the NMa followed decision practices as established by competition authorities abroad, for example in the United States and Germany. Furthermore, the geographical scope of the relevant market was the subject of research. It emerged from research results that the location of the two hospitals in relation to hospitals elsewhere, was of decisive importance. Patients originating from the Gooi region proved to have a sufficient choice of hospitals in the vicinity, for example in Amsterdam and Utrecht. As a result, they would not become too dependent on the merged hospitals. Therefore, the NMa issued a licence for this merger.

61. Another merger that was the subject of an in-depth investigation, concerned the intended merger between the Ziekenhuis Walcheren and Stichting Oosterscheldeziekenhuizen. The investigation performed during the notification phase, showed that a dominant position may occur as a result of this merger. Therefore, the NMa decided a license is required for this merger. After submission of the license application, the NMa commenced further investigations into the consequences of this intended merger. In 2006, the hospitals decided to withdraw its licence application and not to merge.

Vizier – de Wendel

62. Stichting Vizier and Stichting de Wendel are both active in the field of intra-, semi- and extramural care for the mentally handicapped as subject to the Exceptional Medical Expenses Act (AWBZ). On 7 March 2005, the NMa concluded that the merger of these two healthcare providers required a license. Its conclusion was based on the strong market position of both parties in North-Limburg and the absence of realistic opportunities for entry. In the course of the licensing procedure, the parties involved have proposed to amend the transaction in order to meet the stated objections with regard to competition.

63. Vizier has come to an agreement with a new entrant in North-Limburg, the Pluryn Werkenrode Groep, determining that the Pluryn Werkenrode Groep instead of Vizier is to realise 55 intramural healthcare places. While setting up these places, the Pluryn Werkenrode Groep may – if it so wishes – ask Vizier for support on issues relating to 24-hour care and the purchase of daytime activity programs.

Furthermore, the Pluryn Werkenrode Groep can temporarily make use of contacts which are necessary for entry to another health care agency's region. According to the NMa, the entry of the new market player creates sufficient competitive pressure on the joint market parties. Consequently, a license was granted for this merger

CZ – OZ

64. In 2005, the NMa assessed the intended merger of health insurers CZ and OZ. In that year, CZ and OZ provided for privately funded and supplementary insurance, as well as insurance which is paid for by the national health insurance fund. After an initial investigation, the NMa concluded that by the merging of CZ and OZ, a dominant position might arise in the health insurance market, particularly in Zeeland and the western part of Noord-Brabant. For this reason, the NMa informed parties that this concentration required a license. This license was granted conditionally. According to the conditions prescribed, CZ and OZ were to refrain from regional differentiation with regard to their supply of insurance policies in Zeeland and the western part of Noord-Brabant. The Court of Rotterdam overturned the NMa's decision which stipulated that the parties required a license for the concentration. The NMa withdrew its licensing decision in reaction to this court ruling. As a result, the merger of CZ and OZ may proceed unhindered by the abovementioned prescriptions. The court ruling makes clear that the NMa was only authorized to assess the intended merger of the private insurance and supplementary insurance activities of CZ and OZ and not its health insurance fund activities, as current legislation prescribed that health insurance funds were not yet undertakings subject to NMa enforcement. The Court referred to jurisprudence established by the European Court of Justice. Since 1 January 2006, when national health insurance funds ceased to exist as a result of the introduction of a new healthcare system, health insurers have fully operated as undertakings and competition law is integrally applicable.

UPC – Canal+

65. On 15 December 2004, the NMa received notification of the intention of UPC, a provider of television, broadband internet and telephone services, to take over the (film and sport) content for pay television as provided by Canal+. The NMa concluded after an initial investigation that the acquisition might possibly result in a situation in which UPC would obstruct other (new) providers of pay television in exploiting activities in this market, or refuse to provide Canal+ programs to competing providers of infrastructure. On the basis of this initial investigation, the NMa ruled that the proposed acquisition required a license. In the licensing phase, further research was carried out. On the basis of this more thorough investigation, the NMa stated that a restriction of competition in the pay television market or in the market for film rights as a result of this acquisition, was not to be expected. UPC's present activities with regard to pay television are limited. Also, new players enter the market for pay television and the main film studios are in a strong position relative to the buyers of film rights. Furthermore, UPC can be forced into allowing other parties to make use of its cable network on the basis of regulation provided by OPTA, the competition authority which regulates the market for telecommunication services. OPTA has announced that it is intent on imposing this obligation in future. It has also become clear that competing providers of infrastructure invest increasingly large amounts in alternative networks such as xDSL, satellite and ether. Finally, it appears that the content of Canal+ is not of essential importance for other providers of television to offer sufficiently interesting subscription deals. Therefore, the NMa granted a license for the acquisition.

De Telegraaf – De Limburger

66. On 7 December 2005, the NMa endorsed a request by the Telegraaf Media Groep (De Telegraaf) to lift one of the conditions attached to the license granted for the acquisition of Dagblad De Limburger by De Telegraaf. The NMa no longer considered it reasonable to force the Telegraaf into maintaining a strict division between the commercial and editorial management of the two daily newspapers. An investigation performed by the NMa showed that this division will result in negative operating results for a medium long period. De Telegraaf cannot realise efficiency advantages unless it contravenes NMa regulation.

67. Also, current market developments have resulted in a reduction of the total number of issues of both newspapers. The NMa deems it reasonable to lift the licensing condition. As a result, De Telegraaf will have the opportunity to prevent such negative future development.

68. At the time, the NMa granted a conditional license. One of the conditions concerned the required editorial and commercial independence of the Dagblad De Limburger and the Limburgs Dagblad, which was already part of De Telegraaf. The other condition related to the divestment of all activities with regard to free local papers distributed in Limburg. At the time, the latter condition was met. In July 2005, the NMa rejected an earlier request by De Telegraaf with regard to lifting the licensing condition. At that moment, the actual costs of restoring the editorial and commercial independence of the Dagblad De Limburger and the Limburgs Dagblad were still unknown.

69. Towards the end of October, the NMa imposed a fine of EUR 22,500 on De Telegraaf, after NMa research showed that De Telegraaf had for some time failed to comply with the license's condition with regard to editorial and commercial independence.

KPN – Telfort

70. In August 2005, the NMa decided to grant a license to KPN with regard to its acquisition of Telfort. The enforcement authority concluded on the basis of an investigation that there was no reason to suppose that the acquisition would significantly restrict competition on the market for mobile telecommunication services. Consumers as well as professional buyers will still have sufficient choice. The NMa has ascertained that KPN will gain a stronger position as a result of the acquisition. However, the concentration will not create or strengthen a dominant position. Four networks for mobile telecommunication services remain. The other three network operators (Vodafone, T-Mobile and Orange) belong to powerful international undertakings which are sufficiently capable of competing with KPN. On the wholesale market with regard to network entry licenses for providers of telecommunication services, KPN/ Telfort will also gain a strong position, but other network operators will exert sufficient (potential) competition pressure. The Netherlands is one of the few member states of the European Union in which five network operators are active in the mobile telecommunication sector. The NMa has observed that this market is dynamic. Dutch consumers switch providers relatively often. Besides this, an increasing number of service providers make use of the networks of mobile operators with a view to selling mobile telephone services themselves.

71. The NMa based its decision on market research and information provided by market parties. The expertise of OPTA, the Independent Post and Telecommunications Authority, was also used intensively. The OPTA provided the NMa with an informal opinion, in which no objections to the concentration were put forward.

11. The role of competition authorities in the formulation and implementation of other policies, e.g. regulatory reform, trade and industrial policies

11.1 Advice ministry of Economy

72. The NMa advised the Ministry of Economy about the Bill amending the Dutch Competition Act as a result of its evaluation.

11.2 Advice on 'Paying via new media'

With a view to strengthening the capacity for innovation in trade and industry in the Netherlands, the Ministry of Economics Affairs has initiated the project 'Intensifying Payment via New Media' [Intensivering van Betalen na Nieuwe Media] in June 2003. Within the framework of this project, a number of desires and opportunities with regard to innovative payment instruments have been analysed. On 9 March 2005, the Ministry of Economic Affairs published a final report on its findings. The report features a number of possibilities as regards payment instruments and opportunities for collaboration. Payment methods involving GSM phones in particular, are regarded as instruments likely to be successful in future. At the request of the Ministry of Economic Affairs, the NMa has issued a statement of advice, in which it discusses the extent to which collaboration between (potential) competitors is permitted within the framework of the Competition Act. The NMa has informed the parties involved of its willingness to provide further support, in order to avoid any uncertainty about implications of competition law relating to permissibility, as this could halt the process of innovation.

11.3 Providing information in the healthcare sector

73. Partly as a result of liberalising tariffs in a number of divisions of the healthcare sector, there is now more room for competition. Such developments, which market players often tend to regard as drastic and far-reaching, raise many questions. The NMa considers it an important duty to inform market parties extensively on competition legislation, as the newly introduced liberalisation of the market has important consequences in this respect. This may take effect in writing, by means of informal opinions, but also by speaking out in contributions to conferences, workshops and meetings of branch organisations and interest groups. Furthermore, the NMa enters into dialogue with market parties individually, to inform and be informed about an undertaking's specific intentions with regard to business. Are these in compliance with competition legislation? The NMa also maintains regular contacts with CTG/Zaio (for more information see the chapter 'Rondom de NMa'). Shortly after the experimental introduction of free tariffs, CTG/Zaio set up an analysis of contract negotiations among healthcare providers and health insurers over the year 2005: the so-called exploratory monitors for hospitals and physiotherapy.²⁰ CTG/Zaio operate in close collaboration with the NMa.

11.4 Advising the Ministry of Finance

74. In 2005, the NMa advised the Ministry of Finance on the sale of Nozema Services shares to KPN and/or Broadcast Partners. The NMa argued that the acquisition of shares by KPN as well as Broadcast Partners in Nozema Services would create or strengthen a dominant position on the market broadcast services with regard to analogue national radio. As to the acquisition of shares in Nozema Services by Broadcast Partners, the NMa stated that the emergence or strengthening of a dominant position or actual danger involving the coordination of market conduct, depends on the extent of Broadcast Partners' interest and the way in which company control is organised within Nozema Services.

11.5 Advising the ministry of Transport

75. The NMa has extensively advised the Minister of Transport, Public Works and Water Management on legislation laying down regulation procedures for NV Schiphol Airport (Aviation Act) and for the regulation of tariffs for marine pilotage services (Pilotage Bill).

11.6 Advice Havenbedrijf Rotterdam

76. The Minister of Economic Affairs in conjunction with the Minister of Transport, Public Works and Water Management, consulted the NMa on the privatisation of the NV Port of Rotterdam [Havenbedrijf Rotterdam]. In its advisory report, the NMa was to address the issue of the NV Port of Rotterdam's

potentially dominant position and, if such were to be the case, assess the risks of possible abuse of that dominant position. The investigation into the NV Port of Rotterdam was to enable the Cabinet to assess the necessity of extending existent competition legislation with supplementary rules for the NV Port of Rotterdam. The NMa concluded that the NV Port of Rotterdam takes up a dominant position with regard to providing harbour infrastructure to ships calling at the Rotterdam port, as the NV Port of Rotterdam does not compete with port authorities elsewhere in this respect. In reaching this conclusion, the NMa points out that a tariff increase by the NV Port of Rotterdam hardly ever induces ships to call at another port. This is accounted for by the relatively cheap port tariffs as compared to remaining transport costs, including sea transport, hinterland transport and cargo loading procedures. The rate of these remaining costs is a more decisive factor in determining the choice of port.

77. In the absence of competition with other ports, there is a reasonable chance of abuse of a dominant position in the case of the NV Port of Rotterdam. It may implement excessively high port tariffs or discriminate between port users which are in competition with one another. In its advisory report, the NMa solely assesses the theoretical risk of potential abuse of a dominant position by the NV Port of Rotterdam; the NMa has not investigated current practices with a view to detecting such abuse.

78. In its advisory report, the NMa suggests contemplating the implementation of measures to monitor tariffs in the port of Rotterdam, either by means of sector-specific regulation or adequate procedures of another kind.

12. Resources of competition authorities

12.1 Resources overall (current numbers and change over previous year):

- Annual budget : The NMa's total budget for 2005 was EURO 39 mil.
- Number of employees (person-years) : The total number of staff on 31-12-2005 was 367 (this accounts for the number of people employed, not the number of FTE's).

12.2 Human resources (person-years) applied to:

- Enforcement against anticompetitive practices : 185
- Merger review and enforcement : 29
- 'Other' regulator : 84 (Energy and Transport Regulation)

12.3 Period covered by the above information: 2005

13. Summaries of or references to new reports and studies on competition policy issues

13.1 Anticipating merger control

79. On the authority of the NMa, the consultancy bureau Twynstra Gudde studied the extent to which undertakings anticipate merger control by the NMa. From this research, which relates to the period of 2000-2003 and is based on interviews with individuals working in competition law and consultancy, it may be concluded that strong anticipation-effects can be discerned in highly concentrated markets, because in these sectors mergers are simply no longer contemplated. In sectors lacking any level of concentration, an anticipation-effect was also established: one in five intended mergers is not pursued or is substantially altered because advisors expect the NMa to reject the merger plans under consideration. Researchers

conclude that undertakings are well acquainted with the Competition Act, are aware of the fact that the NMa will enforce legislation and understand the way in which the NMa interpretes legislation. The decisions of the NMa are visible, transparent and clear, according to Twijnstra Gudde. Undertakings anticipate such decisions at an early stage by abandoning merger and acquisition plans which may prove restrictive to competition.

80. Paul Smits, president of the Management Board of the Medisch Centrum Rijnmond Zuid, commented as follows: *'Judging by previous decisions, I can perfectly well estimate that yet another merger will not pass, were I still to entertain such ambitions.'* In 2005, in at least one case a licence request for a merger was not withdrawn, after the NMa indicated that a more thorough investigation into the effects of the merger was required as the enforcement authority encountered objections with regard to competition.

13.2 Anticipation of NMa enforcement among MKB undertakings

81. Research performed by the EIM (a socio-economic policy research institute) has made visible the extent to which small and medium-sized undertakings anticipate the line of action taken by the NMa. These results shed a new light and contribute to specific modes of enforcement pursuant to the Competition Act.

Research

82. In 2005, data on more than 4,500 undertakings in the small and medium enterprise sector [MKB] were gathered on a grand scale for the first time. About 99% of undertakings belong to this category. Jointly, they realise about 48% of the total turnover and gross added value of Dutch business.⁴² In 2004, the Ministry of Economic Affairs developed the measuring instrument Perception of Competition-Index [Perceptie van Concurrentie-Index/PCI].⁴³ This index measures the threat of competition as perceived by undertakings, amounting to the perceived competition pressure. On the basis of this perception, undertakings will take strategic decisions (to compete more aggressively, to innovate, not to change anything etc.). The PCI is specifically suited to monitoring developments in the area of competition. This baseline measurement establishes the perceived threat of competition for 58 sectors, based on approximately 75 observations per sector. New measuring activities have been planned for 2006. Changes in the perceived threat of competition and underlying forces may then come to light.

Results

83. Research focuses on the institutional environment, specifically with regard to the degree in which undertakings reckon with decisions taken by competition authorities. More than 24% of the interviewed undertakings indicated that decisions taken by competition authorities strongly influence their strategic policy. Whether or not the NMa is active in their specific sector does not seem to be of relevance here. Considerable difference may be observed among the various sectors. In the paper and paperwork industry just about 6% of undertakings agree with the statement (a combination of response categories 'I agree' and 'I fully agree'). In the road works and civil engineering sector [GWW], the insurance and pension sector and the passenger transport sector, more than 40% of undertakings subscribe to the statement.

84. About 20% of the undertakings which took part in the interviews, indicated that they were in agreement with the statement 'The NMa is active in our market'. This percentage is slightly lower than regards the statement on the effects of decisions taken by competition authorities on the business policy of undertakings. Table 2 presents a survey of data for every sector. There are five sectors in which less than 10% of undertakings endorsed the aforementioned statement. In two sectors, the building and housing sector [B&U] and the insurance and pension sector, more than 40% of undertakings are in accord with the

statement. It is remarkable, furthermore, that all sectors with a high score on this statement, are mentioned in the NMa Agenda. This confirms intuitive expectations.

85. In general (pertaining to 44 out of 58 sectors) the average score per sector with regard to the question on business effects of decisions taken by competition authorities is higher than the score on the question about the NMa's line of action.⁴⁴ This was to be expected: the Competition Act and decisions taken by competition authorities are relevant to all sectors, while the NMa has not actively instigated research or imposed sanctions in all sectors. This is to be taken as an indicator of spontaneous compliance with or anticipation of competition authorities' enforcement policy by undertakings in these sectors, without the NMa actively and publicly enforcing legislation.

86. In the 14 remaining sectors, the score on the statement 'The NMa is active in our sector' is decidedly higher than the score pertaining to the statement on business effects of decisions taken by national competition authorities.

87. In the majority of these 14 sectors, the NMa was active recently. The higher scores in these sectors were to be expected. However, sectors in which the NMa was not recently active, namely the sectors relating to horticultural services, the paper and paper works industry, metal products, machine industry and transport rental, machines and instruments, are also featured. In order to explain this, further investigation is required, though differences are not significant.