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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
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**ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN THE NETHERLANDS**

-- 2006 --

*This report is submitted by the Delegation of The Netherlands to the Competition Committee FOR DISCUSSION at its forthcoming meeting to be held on 17-18 October 2007.*

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## 2006 ANNUAL REPORT OF THE NETHERLANDS

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

#### *Summary of new legal provisions of competition law and related legislation*

##### *Amendment to the Competition Act*

1. On 31 October 2006, the Lower House adopted the Bill amending the Dutch Competition Act following its evaluation (*Wetsvoorstel tot wijziging van de Mededingingswet als gevolg van de evaluatie van die wet*). The Dutch Senate adopted it on 26 June 2007. As from October 1<sup>st</sup> 2007 the amendment will be included in the Competition Act.

2. One of the main goals of the amendment is to enlarge the effectivity of the Competition Act by enhancing the sanctioning powers and powers of investigation of the NMa:

- NMa officials can now enter private accommodations under authority of an examining judge without permission of the occupant (Article 55).
- The NMa can impose fines up to a maximum of € 450 000 on natural persons that commission or lead company activities which can be qualified as a breach of the Competition Act (Article 56, par. 4).
- The maximum fines which can be imposed for breaches of the Merger Control are raised from € 22 500 to € 450 000 or 1% of the company's yearly turnover for formal breaches and to € 450 000 or 10% of the yearly turnover for material breaches.
- The NMa can, before imposing a fine, look into the company's books, if desired assisted by an accountant, with the purpose of determining the level of the relevant turnover, i.e. the company's turnover affected by its anti-competitive activity (Article 59a). According to the NMa fining guidelines, the relevant turnover is the starting point for determining the fine to be imposed.

3. Further, Merger Control has undergone other changes, most of which are inspired by EC Council Regulation 139/2004:

- A new substantial test, identical to the EC Significant Impediment to Effective Competition test in the EC Merger Regulation, is introduced.
- The establishment of cooperative joint ventures will also fall within the scope of merger control (Article 27).
- The turnover thresholds for notification can be lowered for certain categories of companies through an implementing regulation (*Algemene Maatregel van Bestuur*), each time for a

maximum period of five years. As to some transitional markets (e.g. healthcare market), there can be a need to bring more companies under the scope of the Merger Control.<sup>1</sup>

- The NMa can impose remedies in an early phase of the notification procedure (Article 37).
- Certain consecutive transactions can be seen as one in view of the turnover thresholds (Article 30).

4. There are also several important procedural amendments, some of which are inspired by EC Council Regulation 1/2003:

- The burden of proof is explicitly put with the company claiming that it does meet the requirements of the general exception to the cartel prohibition (Article 6 par. 4).
- The general exemption to the Competition Act is extended. There will be a new paragraph 2 in Article 7 stating that Article 6 par. 1 does not apply to agreements where the collective market share of the companies does not exceed 5% on any of the relevant markets and the collective turnover does not exceed € 40 000 000.
- A new Article 16 is introduced exempting collective labour agreements, business sector pension schemes and profession pension schemes from Article 6.
- Companies can give the NMa the commitment that they will act in compliance with the Competition Act after which the NMa can declare that this commitment is binding. Breach of the commitment can be severely fined (Articles 49a-d).
- The NMa may impose on the companies any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end (Article 58a).
- As to investigations of the NMa in business premises, Article 54 now provides for the sealing of business accommodations not only during the night but also during the day.
- When an association of companies does not pay a fine, the NMa has the authority to demand payment of the fine from each of the member companies (Article 68a).
- The concept of ‘interested party’ is extended to consumer organisations (Article 93, par. 3).

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<sup>1</sup> This legal basis was already introduced in the Competition Act with the coming into force of the Healthcare Market Regulation Act (Wet Marktordening Gezondheidszorg) on October 1<sup>st</sup> 2006.

## 2 Enforcement of competition law and policy in the Netherlands

### 2.1 *Action against anticompetitive practices, including agreements and abuses of dominant positions*

#### 2.1.1 *Summary of activities of:*

- competition authorities:

	2006
Statement of objections and fines	
Number of formal investigations in competition cases	26
Number of Statements of Objections based on a reasonable suspicion that the Competition Act was infringed	5
Number of cases concluded by means of alternative enforcement instruments	7
Number of cases in which investigations were discontinued due to a lack of evidence	14
Number of cases in which fines and/or injunctions were imposed	13
Total fines in millions of Euro	114.1

- courts:

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

	2006
Appeal District Court of Rotterdam	28
Final appeal Trade and Industry Appeals Tribunal	5

#### ii) Application of EC competition law by the Dutch courts

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)], are decisive with regard to procedural law.

## Civil judgments

1. Court of Appeal of The Hague, 19 January 2006, Intermediary v Koninklijke Notariële Beroepsorganisatie, 04/1701, LJN AU9955 (appeal case – summary proceedings)
2. District Court of The Hague, 1 February 2006, Plaintiff v Stichting Raad voor de Boomkwekerij, 243470, LJN AV0892
3. Provisional District Court of Maastricht, 14 February 2006, plaintiffs v BBQ Franchise B.V., 10692/KG ZA 05-470, LJN AV4718 (summary proceedings)
4. District Court of The Hague, 22 February 2006, Koepon c.s. v PVV/ CR Delta and NRS, 244480, LJN AV2897 (provisional judgment)
5. Provisional District Court of Arnhem, 16 March 2006, NVM-estate agents v ZAH, 136002/ KG ZA 06-25, LJN AV5236 (summary proceedings)
6. The Supreme Court of the Netherlands, 21 April 2006, C05/048HR, Plaintiff v Defendant, LJN AV0650
7. District Court of Utrecht, 17 May 2006, 189622 / HA ZA 05-168, Chipknip C.V. / Ceanet B.V. v British American Tobacco The Netherlands B.V. LJN AX3745
8. District Court of Haarlem, 22 May 2006, AWB 05/1452, X v Tax Authorities, LJN AX7112
9. Court of Appeal of Arnhem, 4 July 2006, 06/416, NVM v Zoekallehuizen.nl, LJN AY0089 (appeal case – summary proceedings)
10. District Court of Almelo, 19 July 2006, 66826/ HA ZA 04-916, X v Y, LJN AY8056
11. Provisional District Court of Almelo, 15 September 2006, 80633/ KG ZA 06-215, De Zuivelhoeve Winkelbedrijven B.V. v WW, LJN AY8624 (summary proceedings)
12. Provisional District Court of Utrecht, 14 November 2006, 220029/ KG ZA 06-998, Legopharma B.V. v Bayer B.V. LJN AZ2861 (summary proceedings)
13. District Court of Assen, 13 December 2006, 50106/HA ZA 05-58, Hometeam v defendant, LJN AZ5003

## NMa judgments

14. District Court of Rotterdam, 20 June 2006, MEDED 05/528-KNP, Duitse Producentenorganisaties v the Board (NMa case 2269) LJN AX9223
15. District Court of Rotterdam, 13 July 2006, MEDED 04/3242 WILD e.v. KPN Mobile, Orange, Telfort, T-Mobile en Vodafone v the Board (NMa case 2658) LJN AY4035
16. District Court of Rotterdam, 19 July 2006, MEDED 05/509 HRK e.v. Coöperatieve Producentenorganisaties, PO Wieringen, PO Danske, Heiploeg, Goldfish and Klaas Puul v the Board (NMa case 2269) LJN AY4888
17. District Court of The Hague, 25 July 2006, KG 06/789 KPN v the State (NMa) and OPTA

2.1.2 *description of significant cases, including those with international implications*

- *The Hague Court of Appeal, 19 January 2006, Intermediary v Royal Dutch Notary Association, 04/1701, LJN AU9955 (appeal case – summary proceedings)*

The intermediary (acting as an interagent) maintained a notary network for the provision of financial services. To this end, he had entered into agreements with a national network of notary offices in the Netherlands, which committed themselves to drawing up transport and mortgage deeds for clients of the intermediary against fixed, relatively low tariffs. Also, he had entered into agreements with providers of financial services (including mortgage companies, mortgage purchase federations, insurance intermediaries, estate agents, insurers and banks).

Central to the appeal was the issue whether the Royal Dutch Notary Association (hereinafter: KNB) acted wrongfully by informing its notary members in a letter dated 8 July 2004 that a notary's participation in the 'market initiative' set up by the intermediary (and in other such initiatives) amounted to an infringement of the prohibition on commissioning, in the sense of section 12(2) of the Professional Regulation and Codes of Conduct Directive (VBG); the KNB further stated that notaries must quit participation. The provisional judge in first instance ruled that the KNB's course of action did not contravene section 6 of the Competition Act.

On the basis of the Wouters-ruling of the European Court of Justice, the Court ruled that the KNB's decision, as contained in the letter dated 8 July 2004, shall be considered a decision of an association of undertakings in the sense of Article 81 (1) EC Treaty; the course of action pursued by the KNB, even though this association constitutes a public body, shall come under competition law. However, the Court would not look into the possible anti-competitive nature of the KNB's decision, as the Intermediary provided insufficient ground for it to do so.

During summary proceedings, the Court allowed the Intermediary's claim for rectification of the KNB's letter dated 8 July 2004, owing to urgent interests of the Intermediary. The Court did not readily accept that the market initiative set up by the Intermediary was to be considered anti-competitive. It found the interests of the Intermediary to have been seriously damaged as a result of the fact that notaries had deferred cooperation with the Intermediary following the letter of the KNB.

- *District Court of The Hague, 1 February 2006, Plaintiff v Stichting Raad voor de Boomkwekerij, 243470, LJN AV0892*

The plaintiff was a former director and majority shareholder of Agrofino Products N.V.: Agrofino ran a company that came under Belgian law and operated as a recognised producer and wholesale trader of potting soil. The potting soil bore the Belgian quality mark "B.B.P." and the French quality mark "C.A.S.". On the basis of a contract concluded on 3 December 2003, the plaintiff sold his shares in Agrofino and resigned as director of the trading partnership.

As from 1999, the Arboricultural Society [Stichting Raad voor de Boomkwekerij] (hereinafter: SRB) had presided over the "QualiTree-system". In 2001 this appreciation system was transferred to the [Stichting Erkenningen Tuinbouw] (hereinafter: SET). Arboriculturists who wish to do business under the quality mark of "QualiTree" should exclusively make use of potting soil that meets the demands set out by the RHP-certification system (hereinafter: RHP-potting compost soil).

The case at hand addressed the compatibility of the QualiTree-system with section 6 of the Competition Act and Article 81 EC Treaty.

The Court first of all examined whether potting soil produced by Agrofino in the period 2001-2003 was to be considered of equal quality to RHP-potting compost soil. The Court held that no such equivalence could be ascertained. It subsequently examined whether the QualiTree-system infringed section 6 of the Competition Act and Article 81 EC Treaty. Referring to the Kranenruling of the European Court of Justice, the Court found that approximately 8.64% of potting soil sales in this region could be related to QualiTree participants. An appreciable anti-competitive impact of the QualiTree scheme on providers of potting soil could not therefore be established.

Unnecessarily, the Court tested if the QualiTree system, when constituting an (appreciable) restriction of competition, complies with the NMA Guidelines for the Cooperation between Undertakings. Now that Agrofino's potting soil was found not to be of equal quality to RHP potting soil, Agrofino was not being unlawfully excluded, so concluded the Court.

Provisional District Court of Maastricht, 14 February 2006, plaintiffs v BBQ Franchise B.V., 10692/KG ZA 05-470, LJN AV4718 (summary proceedings)

BBQ exploits a franchise formula for operating indoor barbecue restaurants. BBQ entered into an agreement with the plaintiffs. It was established that BBQ allowed the plaintiffs to refrain from buying their meat at the contracted provider from mid-June/ July 2005 to 15 November 2005. BBQ argued that the plaintiffs did not comply with contract requirements after that date either. They still did not obtain their meat from the contracted provider, but from a third party. BBQ contended that this constituted a breach of the franchise agreement, warranting termination of this agreement.

The provisional judge stated that the importance of purchase obligations lay in guaranteeing the uniformity of products on offer with franchise participants. In general, purchase obligations were only permitted if indispensable to maintaining the image of franchise chain. The plaintiffs exploited an indoor barbecue restaurant. The essence of a barbecue restaurant lies in the meat. The franchise agreement laid down that the plaintiffs were to purchase contract products with the contracted provider, whenever it was impracticable to apply an objective quality standard. It was established that the provider concerned delivered the meat ready-prepared, partly under a private label applying its own recipes, so that the meat could be put on display without further handling.

As it was established that the contract provider delivered part of the meat under a private label, BBQ could not be held to have acted anti-competitively in forcing the plaintiffs to buy their meat from this provider exclusively. It was also established that the meat was marinated/prepared in a specific way, requiring a particular method of preparation at any rate. Another provider would deliver meat prepared on the basis of another kind of marinade/ recipe (yielding a different flavour). As a consequence, the provisional judge decided that the obligation to purchase meat from the contracted provider constituted a lawful exemption from the general prohibition on restricting competition. After all, by compelling the plaintiffs to purchase from the contracted provider, the uniformity of products on offer at BBQ restaurants was guaranteed.

- *District Court of The Hague, 22 February 2006, Koepon c.s. vs PVV/ CR Delta and NRS, 244480, LJN AV289 (provisional judgment)*

Koepon c.s. is an undertaking that specialises in carrying out company inspections for livestock farmers, providing advice on mating procedures and selling various kinds of breeding bull sperm.

CR Delta is a cattle improvement organisation. NRS, a subsidiary of CR Delta, is an undertaking that specialises in processing pedigree registration data and developing/ supplying information products to livestock farmers and organisations. It operates the NRS Information System [NRS Informatie Systeem] (hereinafter: NIS). The NIS is a databank containing information on cows. NIS input is derived from various sources (including livestock farmers and organisations that are active in the field of cattle improvement. It comprises pedigree registration data, breeding values, registration of external traits and data obtained from milk production tests.

On the basis of its decision dated 4 February 2002, the Producer Association for Cattle and Meat [Productschap Vee en Vlees] (hereinafter: PVV) authorised Tellus Nederland B.V. (hereinafter: Tellus), a subsidiary of Koepon c.s., to implement and regulate a performance study for exterior traits in cows. In addition, Tellus also gave out advice to livestock farmers and sold breeding bull sperm.

In a letter dated 19 March 2002, CR Delta rejected the application of Koepon c.s. for authorisation to record data related to the breeding values of bulls. In this letter Koepon c.s. offered its services in the field of uniformisation and harmonisation. It also informed Tellus that the estimation of breeding values in cows pertained to the pedigree registration process. CR Delta would neither include data coming from non-pedigree registered organisations such as Tellus in its catalogue, nor would it calculate cow-indexes based on information submitted by Tellus.

Koepon c.s. argued that it was discriminated against by CR Delta through its refusal to include cow test results submitted by Tellus in the NIS, while accepting results submitted by CR Delta. This proved harmful to parties purchasing the services of Koepon c.s., as cow certificates now made no mention of the results of performance tests carried out by Tellus, not in an exhaustive way at any rate. Also, CR Delta did not provide Tellus' customers with cow indexes. Competitive relations between CR Delta and Koepon were seriously disrupted as a result, as customers would now tend to obtain sperm and supplementary services from CR Delta. It was not in any way of a reasonable interest to CR Delta to refuse incorporating the indexes of cows tested by Tellus in NIS. Furthermore, CR Delta had used its position in the market for NIS data registration and management to enhance its market position in the derived market, being the market for gathering data and giving out advice to farmers on company structure based on collected data. Pursuant to case law of the European Court of Justice, CR Delta abused its dominant position in doing so.

- *Provisional District Court of Arnhem, 16 March 2006, NVM estate agents v ZAH, 136002/ KG ZA 06-25, LJN AV5236 (summary proceedings) (See also ruling Court of Appeal, 4 July 2006)*

Estate agents gathered in the Dutch Association of Estate Agents [Nederlandse Vereniging voor Makelaars o.g. en vastgoeddeskundigen] (hereinafter: NVM) provide information on their own websites regarding houses sold through them. The supply of houses of all NVM-estate agents jointly has been brought together on the website [www.funda.nl](http://www.funda.nl). ZAH is a search engine that daily browses through almost all websites for houses that have been put up for sale. Search results are made available on its websites ([www.zoekallehuizen.nl](http://www.zoekallehuizen.nl) and [www.zah.nl](http://www.zah.nl)). The information that ZAH places on its websites is obtained by means of a deep link to the website featuring the house for sale. ZAH did not request permission from NVM-estate agents for doing so.

NVM-estate agents contended that ZAH had infringed database rights and copyrights of NVM-estate agents. Furthermore, ZAH circumvented the effective technical protective measures implemented by NVM-estate agents into their systems (in the sense of the Copyright Act and Database Act), which amounted to an unlawful act against them. Moreover, ZAH acted in

contravention of the terms and conditions applicable, as set out by NVM-estate agents. Finally, the course of action taken by ZAH was established to be an unlawful act against the NVM-estate agents. The NVM-estate agents sought an injunction, accompanied by periodic penalty payments, for ZAH to refrain from deep linking.

First of all, the Court addressed the question whether a catalogue of houses on sale, as provided on the website of an NVM-estate agent, constituted a database. A database had been defined as a ‘collection of works, data or other kinds of separate elements which have been systematically or methodically arranged and can be individually accessed by electronic means or otherwise. Also, the obtainment, verification and presentation of database contents in a qualitative and quantitative sense attests to a substantial investment’. The Court found that NVM-estate agents failed to make a reasonable case for a qualitative or quantitative substantial investment. It ruled that NVM-estate agents had wholly failed to underpin the level of costs associated with data entry and subsequently keeping up-to-date the descriptions of property advertised on the websites. The Court concluded that the data collections did not as (protected) databases merit legal protection *sui generis*, pursuant to section 2 of the Database Act. As a result, the issue whether ZAH infringed the database rights of NVM-estate agents was not raised in Court. As regards copyright law, the Court found that ZAH had not infringed the copyright of the NVM-estate agents. The issue regarding the circumvention of technical protective measures did not merit further discussion due to changed circumstances, so ruled the Court.

Consequently, the Court responded to the question whether terms and conditions put forward by NVM-estate agents infringed on the Competition Act. ZAH argued that the NVM and its members had acted in contravention of sections 6 and 24 of the Competition Act in eliminating one of Funda’s competitors. The Court found that: “The NVM-estate agents have not contested that the NVM, counting (approximately) 3900 members, represents 80% to 85% of estate agents working in real estate in the Netherlands. It has also been established that the NVM recommended its members to take action against ZAH for using information without prior consent and violating database rights and copyrights. It is apparent from a message sent out by the NVM to its members on 18 October 2005 that it urged its members to block ZAH from deep linking. Also, a reasonable case is made that the NVM advised its members to add a copyright disclaimer to their website. This is evident from an NVM message to members sent out on 20 October 2005. In addition, the NVM website featured letter and user contract templates for members to pass on to ZAH. These contracts set out that deep linking is prohibited and that it is not allowed to use data found on the websites of estate agents by any way manner or means.

NVM-estate agents who adhered to these NVM recommendations are guilty of collusive practices that aim to impede competition in the relevant market, being the market for internet information on housing market supplies. The NVM recommendations strive to restrict the competitive strength of ZAH with regard to Funda, leaving consumers with only a single provider of housing market information, namely Funda, the website provided by the NVM. Such collusive practices are prohibited pursuant to section 6(1) of the Competition Act. For this reason also, ZAH is not bound to the copyright clause on the websites of Borgdorff and Drieman”.

- *The Supreme Court of the Netherlands, 21 April 2006, C05/048HR, Plaintiff v Defendant, LJN AV0650*

Dispute between car importer and car dealer on the legal validity of the importer’s termination of the dealer agreement; notice period, interpretation of contract provisions for termination of contract in the light of Commission Regulation (EC) 1475/95. Court of Appeal did not give

judgment. Only legal questions may be the subject of appeal, excluding factual questions. In this case no legal question was raised.

- *District Court of Utrecht, 17 May 2006, 189622 / HA ZA 05-168, Chipknip C.V. / Ceanet B.V. v British American Tobacco The Netherlands B.V. LJN AX3745*

BAT is a producer and supplier of tobacco products and also owns a large number of tobacco machines. Chipknip provides services that support the exploitation of banking chip cards. On 31 December 2002 Chipknip and BAT concluded an agreement with a view to adding an age verification system, hereinafter referred to as Agekey, to the banking chip cards. In a letter dated 22 April 2004, BAT informed Chipknip that it would terminate the agreement due to unforeseen circumstances.

BAT contended that Chipknip had abused its dominant position (section 24 of the Competition Act/ Article 82 EC Treaty) by forcing BAT into accepting unreasonable contractual conditions when the agreement was drawn up. These unreasonable conditions had comprised, so stated BAT, excessive tariffs charged for providing space on the banking chip card as well as claims for intellectual property rights that did not belong to Chipknip.

In assessing whether a dominant position exists, the relevant market needs to be identified first. Parties agreed that the relevant geographical market was to be defined as the Netherlands. The Court found that the relevant product market was made up of the market for providing the required facilities and services for equipping banking chip cards with an indicator which would allow tobacco machines to operate an age verification check. As it was uncontested that Chipknip acted as the sole provider of facilities and services required for loading the banking chip card with information for age verification in tobacco machines in the Netherlands, it was a given fact that Chipknip had held a dominant position in that market when the agreement was concluded.

Chipknip argued that it had not held a dominant position in the sense of the Competition Act, as it had not had the opportunity to behave independently. In this regard, Chipknip pleaded that BAT was a large professional opponent with sufficient so-called “countervailing power” at its disposal. The Court found that though BAT was indeed a substantial and professional party, the question was immaterial whether Chipknip was in a position to behave independently with regard to the other party, due to the fact that Chipknip was a monopolist. Monopolists by definition hold a dominant position.

Subsequently, the Court was to examine whether Chipknip had abused its dominant position in the sense advanced by BAT. In order to substantiate its argument that Chipknip had levied excessive tariffs, BAT put forward that the tariffs charged were not in any way directly related to concrete costs. BAT strongly emphasised that, taking into account Chipknip’s dominant position, Chipknip was under the obligation to charge transparent and cost oriented tariffs. This was contested by Chipknip. Chipknip argued that the principle of transparency and cost-orientation was applicable to specific regulated sectors only. The Court sided with Chipknip in ruling that the question whether excessive tariffs had been charged should not be responded to by reference to the principle of cost orientation, but required an assessment of whether tariffs were reasonably proportionate to the economic value of the product supplied (see in particular the EU Commission Regulation, 23 June 2004, in the case of *Scandlines Sverige AB v Port of Helsingborg*, COMP/A 36.568/D3 and the decision of the European Court of Justice in the case *United Brands*, case no. 27/76, 1978 ECR 207).

The Court did not reach an examination of BAT's argument that prices were not proportionate to costs as regards Chipknip, as BAT's claim foundered on a lack of arguments and motivation on the part of BAT relating to the economic value of the product. The Court thus found that BAT's argument that Chipknip abused its dominant position by charging excessive tariffs had been insufficiently motivated and must therefore be rejected.

BAT further argued that Chipknip abused its dominant position by imposing unreasonable contractual conditions in the sense that the agreement lay claim on intellectual property rights that should rest with BAT. Chipknip argued that the intellectual property rights at issue concerned products developed by Chipknip. In this regard too, BAT insufficiently motivated its arguments; the Court rejected BAT's claim.

- *District Court of Haarlem, 22 May 2006, AWB 05/1452, X v Tax Authorities, LJN AX7112 [fiscal deductibility of competition fines]*

Four European undertakings, including Knauf, maintained horizontal price agreements in the market for plasterboard during an extensive period of time. By decision of 27 November 2002, the Commission imposed fines amounting to approximately EUR 530 million on the undertakings concerned<sup>2</sup>. The Commission imposed a fine on the Knauf group in its entirety, though considering Knauf Westdeutsche Gipswerke KG to be the main undertaking. The Knauf group also includes two Dutch undertakings, located in Utrecht and Oosterhout. One of these is likely to have been the plaintiff in the case brought before the Haarlem Court.

The plaintiff in the Haarlem proceedings was charged with part of the Commission fine, as assigned by the Knauf group. Allegedly, the part of the fine relevant here, as calculated by a consultant to the undertaking in an extensive advisory report, had been intended to skim off illegal gains ('*voordeelonthoudende elementen*'). The plaintiff subsequently indicated the total amount of the fine assigned to it, i.e. EUR 2.5 million, as deduction factor from corporate income tax in its tax declaration.

On 22 May 2006 the Haarlem Court, having regard to Dutch tax law, ruled that Commission fines imposed for infringement of competition law may be deducted from income tax. At the time of the Commission decision in 2002, the Income Tax Act (*Wet IB 2001*) was of effect in the Netherlands. The Act laid down that fines imposed on the basis of the Netherlands Competition Act were not to be considered deductible from income tax. This particular stipulation also applied to corporate income tax. On the coming into force of the revised Income Tax Act (*Wet IB 2004*), the above situation remained unaltered, as all administrative fines were now considered to have been excluded from deduction (including fines pursuant to the Competition Act). These stipulations were introduced on the grounds that deductibility of financial sanctions would diminish the effectiveness of sanctioning and create an undesirable situation in which the level of taxable income would effectively co-determine the level of sacrifice imposed for committing an offence.

Commission fines, however, are subject to another provision, according to the Haarlem Court. Section 3.14 (1c) *Wet IB 2001* refers to 'fines imposed by an institution of the EU'. Though the Commission decision was drawn up in 2002, the Court ruling took into account Section 3.14 *Wet IB* (paragraph 5.4) which came into force in 2004. The Court outlined 4 criteria relevant to

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<sup>2</sup> Commission Decision of 27 November 2002 relating to proceedings under Article 81 of the EC Treaty against BPB PLC, Gebrüder Knauf Westdeutsche Gipswerke KG, Société Lafarge SA and Gyproc Benelux NV (Case No COMP/E-1/37.152 - Plasterboard) (2005/471/EC), OJ L166/8, 28.6.2005.

determining whether or not a decision intended to skim off illegal gains (juridical ground 5.6 and 5.7):

1. lack of an absolute maximum level of the fine;
2. negation of criminal character pursuant to Section 15(4) Regulation 17
3. deterrent effect as set out in Commission Guidelines on Fines<sup>3</sup>: ‘the Court takes these Guidelines to indicate that the fine is supposed to equal the amount of gains resulting from wilful infringements of Article 81 EC Treaty’.
4. calculation method providing for part of the fine amount to be based on relevant turnover.

Taking into consideration the above criteria, the Court stated that the Community term ‘fine’ differed from the national definition of ‘fine’. Fines imposed by the Community consist of punitive elements as well as elements intended to skim off illegal gains. A Community fine, therefore, is (partly) deductible from income tax. By estimation the Court divides the fine into a punitive part and a part which intends to withdraw gains, allowing the latter part to be indicated as deduction factor from income tax.

The plaintiff commissioned an advisory report which sets out the calculation method for determining the punitive part of the fine. The Dutch Tax Department contested its validity, arguing that the entire fine was of a punitive nature. However, the Court takes the view that the Dutch Tax Department has not sufficiently refuted the abovementioned advisory report.

- *Court of Appeal Arnhem, 4 July 2006, 06/416, NVM v Zoekallehuizen.nl, LJN AY0089 (appeal case – summary proceedings)*

The NVM and two estate agents filed appeal against the decision in summary proceedings of 16 March 2006 at the District Court of Arnhem. The Court dismissed the appeal. In line with the Court, the Court of Appeal found that no breach of the estate agents’ copyright and database rights was committed. Unnecessarily, the Court of Appeal addressed the competition concerns of this case. The preliminary judgment of the Court of Appeal found that the advice passed on by NVM to its members – to implement measures in order to prevent ZAH from cataloguing property on its website derived from the individual websites of NVM members – had the object of restricting competition in the national market for housing property as advertised on the internet, in contravention with section 6 of the Competition Act.

- *District Court of Almelo, 19 July 2006, 66826/ HA ZA 04-916, X v Y, LJN AY8056*

Y contended that the vertical agreements with X were void. These agreements provided for absolute regional protection, which contravenes the Competition Act and Regulation 2790/1999.

The Court ruled that the agreements concluded between parties are subject to the restriction as set forth in section 4(b) of the Regulation, due to the fact that the agreements related to a specified area in which Y may sell the products of X, while also setting out that Y may not undertake sales and delivery activities outside of this area. However, this did not result in the agreements being

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<sup>3</sup> Guidelines on the method of setting fines imposed pursuant to Article 15 (2) of Regulation No 17 and Article 65 (5) of the ECSC Treaty (98/C 9/03), OJ. C 9/3, 4.1.1998.

void, as contended by Y, but resulted in the exemption in the sense of section 2 of the Regulation not being applicable.

The Court subsequently examined whether the agreements contravened section 6 of the Competition Act and contemplated the non-applicability of this provision should the effect on competition not be appreciable. In that case the criterion of appreciability (de-minimis-rule) would not be met. An agreement that aims to impede competition often affects the market in a significant way. However, owing to the weak position of the parties concerned in the relevant market, it may not impede competition in the relevant market to a degree that is relevant in terms of competition law and escape the prohibition laid down in section 6(1) of the Competition Act. In applying the criterion of appreciability, the concrete situation in which the agreement will be of effect must be taken into account, particularly noting the economic and legal context in which the undertakings concerned operate, the nature of the services to which the agreement relates and the structure of the relevant market and the actual circumstances in which it operates (Trade and Industry Appeals Tribunal [CBb], 7 December 2005, LJN: AU8309, Secon and G-Star / NMa). X argued that the agreements concluded between parties, considering the small-scale nature of X's activities, did not have an appreciable effect on competition in the relevant product market and geographical market. Owing to a lack of sufficient substantiation, this argument was not contested by Y, so that the Court upheld the argument. This entailed that in this case the aforementioned criterion of appreciability was not met. As a result, the agreements concluded between parties were not subject to the prohibition laid down in section 6(1) of the Competition Act and were not, therefore, void pursuant to section 6(2) of the Competition Act.

- *Provisional District Court of Almelo, 15 September 2006, 80633/ KG ZA 06-215, De Zuivelhoeve Winkelbedrijven B.V. v WW, LJN AY8624 (summary proceedings)*

On 1 October 2000, the Zuivelhoeve and WW concluded a franchise agreement. WW terminated the agreement out of court by means of a letter dated 8 June 2006. The Zuivelhoeve sought to enforce the performance of the agreement. WW contended that it was not bound to performance, as it had terminated the contract with good reason, also referring to the agreement's incompatibility with European and national competition law.

The provisional judge considered that agreements not having an appreciable adverse effect on trade among Member States or aiming to restrict or restricting competition in an appreciable way do not fall within the scope of Article 81(1) EC Treaty. In general, it is assumed that agreements concluded by undertakings with a market share in the relevant market of less than 10% do not fall within the scope of Article 81(1) EC Treaty. Furthermore, agreements between SMEs by nature rarely have an appreciable effect in the sense of Article 81(1) EC Treaty (see Commission Notice on Vertical Restraints [Richtsnoeren inzake verticale beperkingen 2000/C291/01]).

The provisional judge found that the franchise agreement under scrutiny was not shown to fall within the scope of Article 81(1) EC. It was not made plausible in this procedure that the franchise agreement or the franchise formula by nature could adversely affect trade between the Member States. It has neither become manifest that trade could be adversely affected as a result of the abuse of a dominant position, as alleged by WW. This shall apply, mutatis mutandis, to the provisions of national law.

- *Provisional District Court of Utrecht, 14 November 2006, 220029/ KG ZA 06-998, Legropharma B.V. v Bayer B.V. LJN AZ2861 (summary proceedings)*

Legropharma is a wholesale business in pharmaceutical products and specialises in brand name medicine licensed for the Dutch market. As from November 2004, Legropharma had purchased the Bayer produced drugs Adalat OROS (30 and 60 mg) from Bayer's. Legropharma contended that it had been wholly dependent on Bayer for the purchase of both drugs and that no equivalent brand name product had been available. For this reason, so argued Legropharma, Bayer should only have terminated the contractual relationship for reasons of substantial interest. Legropharma did not only contest the existence of such a substantial interest, but also argued that Bayer's termination was unacceptable by reasonable and fair standards and contravened competition law. The provisional judge found that Legropharma failed to make plausible that the termination was unacceptable.

Legropharma put forward that Bayer employed a prohibition on passing on wholesale supplies, which entailed that wholesale businesses in the Netherlands, such as Legropharma, was allowed to deliver these products to pharmacies in the Netherlands only. Bayer enforced compliance with this prohibition by means of periodic reports, which Legropharma was due to provide to Bayer. As Legropharma had also delivered supplies to fellow wholesale businesses and Bayer had evidently established this (so contends Legropharma), Bayer instituted a quota for deliveries of Adalat OROS. Subsequently, Bayer terminated the contractual relationship on account of infringement of the prohibition on passing on wholesale supplies. Legropharma contended that the prohibition on passing on wholesale supplies contravenes section 6 of the Competition Act and Article 81 EC Treaty.

The provisional judge found that Legropharma had failed to make plausible that a prohibition on passing on wholesale supplies was in force and that Bayer had acted in conflict with Article 81 EC Treaty and section 6 of the Competition Act.

- *District Court of Assen, 13 December 2006, 50106/HA ZA 05-58, Hometeam v defendant, LJN AZ5003*

As of 1 February 2002, Hometeam (franchisor) and defendant (franchisee) have concluded a franchise agreement for the duration of 5 years. Parties entered into a conflict. The defendant subsequently terminated the contract, which Hometeam refused to accept. The Court first of all faced the issue of whether the franchise agreement between Hometeam and the defendant or the behaviour challenged by the defendant (possibly in combination) already at the start gave rise to or resulted in a prevention, restriction or distortion of competition in that part of the Dutch market in which Hometeam operated. The Court established, amongst other things, that price competition and competition for quality was eliminated due to the provisions in the agreement. The Court found that the franchise agreement contravened section 6 of the Competition Act. The Block Exemption Vertical Restraints was not applicable, neither was section 7 of the Competition Act. The agreement was declared void.

- *District Court of Rotterdam, 20 June 2006, MEDED 05/528-KNP, German Producer Organisations v the NMa (NMa case 2269) LJN AX9223*

The Court found that the German Producer Organisations (hereinafter: POs) had infringed Article 81 EC Treaty and section 6 of the Competition Act. The Dutch, German and Danish POs

arranged regularly meetings with a number of shrimp traders. These “Trilateral Consultations” concerned North Sea shrimps. The agreements concluded within these meetings set out fishing quotas and minimum prices.

The Court based its decision on the assessment framework of the Milk Marque ruling and examined whether the application of competition rules interfered with the practical implementation of PO powers, as granted to them under the common market organisation. This was not the case. The Court also established that the NMa had determined with sufficient certainty that Regulation 26 did not apply to the Trilateral Consultations.

As to setting the level of the fine, the Court did not agree with qualifying the behaviour under scrutiny as a very serious infringement. According to the Court, the specific legal context within which the POs operated had not been clear. Secondly, the POs tried to implement the task given to them by the Community legislator, though doing so by the wrong means. The case, therefore, did not deal with classical ‘hard core restrictions’; practices were to be considered serious (instead of very serious) infringements in the sense of the guidelines for the setting of fines.

The Court allowed the appeal with regard to the level of fines, in that respect quashing the disputed decision; the Court dismissed the remainder of the appeal.

- District Court of Rotterdam, 13 July 2006, MEDED 04/3242 WILD e.v. KPN Mobile, Orange, Telfort, T-Mobile and Vodafone v the NMa (NMa case 2658) LJN AY4035

This case concerned concerted practices among mobile operators involving rebates offered to external dealers as an incentive. Dealers received a rebate for every new post-paid subscription or prepaid package which they sold to consumers. The concerted practices originated in a meeting held on 13 June 2001, which had been attended by at least four out of the five mobile operators. Several months after the meeting of 13 June 2001, the operators (more or less simultaneously) actually lowered the dealer rebates. The decision on appeal established that the activities of the five mobile operators amounted to concerted practices, aimed at restricting competition, and in contravention of section 6 of the Competition Act and Article 81 EC Treaty.

The Court considered proven that concerted practices had been in place as regards rebates for post-paid subscriptions, but concluded that the actual participation of Telfort and Orange had not been sufficiently established by the NMa. As regards Vodafone, KPN Mobile and T-Mobile, the Court considered their participation proven, but judged that the NMa had in its decision on appeal insufficiently addressed the arguments advanced by these three parties to refute the contention that their market behaviour had been determined by concerted practices dated 13 June 2001. Besides, the Court found that the NMa should not have held these concerted practices to be a (very) serious infringement. It also ruled that concerted practices regarding prepaid packages must be considered not proven.

The Court allowed the appeal of five mobile operators, quashed the decision of the NMa and ordered the NMa to adopt a new decision on appeal as regards this case in compliance with the Court’s ruling.

On 20 October 2006, the NMa revised its decision on appeal with regard to Telfort and cancelled the fine.

- *District Court of Rotterdam, 19 July 2006, MEDED 05/509 HRK e.v. Cooperative Producer Organisations, PO Wieringen, PO Danske, Heiploeg, Goldfish and Klaas Puul v the NMa (NMa case 2269) LJN AY4888*

The Court found that shrimp traders had infringed Article 81 EC Treaty and section 6 of the Competition Act. The Court concurred with the NMa in qualifying shrimp traders' conduct as constituting a series of very serious infringements. The Dutch and Danish POs also infringed Article 81 EC Treaty and section 6 of the Competition Act, so ruled the Court. The Court did not hold, as the NMa had argued, that POs' conduct must be qualified as a very serious infringement. *For further information, see summary of ruling by District Court of Rotterdam, 20 June 2006.*

The court dismissed the appeals of shrimp traders Heiploeg, Goldfish and Klaas Puul. The appeals of the Dutch and Danish POs were allowed with regard to the level of fines; the Court dismissed the remainder of the appeal.

Following the two rulings of the District Court of Rotterdam in this case, the NMa lowered the fines imposed on the POs (see decision, 12 December 2006).

- *District Court of The Hague, 25 July 2006, KG 06/789 KPN v the State (NMa) and OPTA*

KPN contended that KPN and the cable companies were in direct competition with one another, as their respective infrastructures now supported similar services. Competition had been further stimulated by the so-called "triple play"-strategy of the cable companies (the combined provision of television, telephony and internet services). KPN argued that no "symmetrical situation" existed between the cable companies and KPN; KPN was at a disadvantage. Government measures were partly to blame for this. KPN was subject to a wide range of government measures, restricting its freedom to operate. The Ministry of Economic Affairs, the Postal and Telecommunications Authority (OPTA) and the NMa had allowed cable companies to go their own way unhindered, so stated KPN. In short, KPN demanded that this unequal situation be brought to a halt. KPN argued that administrative means of redress could not in time provide the provisions that were now required, partly because of the limited interpretation of the concept of 'interested party' and the funnel effect of administrative and judicial appeal.

First of all, the provisional judge ruled that the civil court was competent, as KPN based its demands on the contention that the State and OPTA had acted unlawfully by treating KPN differently from the cable companies, contrary to the principle of equality.

Furthermore, KPN's demands mostly targeted the market analysis decisions adopted by OPTA and NMa decisions adopted in cable company cases, in which the NMa had noted that the tariffs of UPC and Casema had not been excessive in the period 2000-2004. To contest these decisions, KPN has recourse to legal to procedures, with sufficient safeguards, which also provide for emergency provisions. Such procedures are indeed pending. Taking this into account, the provisional judgment outlined that currently the validity of these decisions must be assumed. Insofar as these issues are brought up for discussion by KPN, KPN is inadmissible.

### 3. Mergers and acquisitions

#### 3.1 *Statistics on number size and type of mergers notified and/or controlled under competition laws*

NMa	2006
Notifications of mergers, acquisitions and joint ventures (mergers)	135
Notifications withdrawn	5
Exemption from the waiting period	0
Decisions on notifications of mergers	119
License required for the merger	8
Decisions on applications for a license	2

#### 3.2 *Summary of significant cases*

##### 3.2.1 *Healthcare*

5. The introduction of the Health Insurance Act [Zorgverzekeringswet] and the Healthcare Market Organisation Act [Wet marktordening gezondheidszorg (WMG)] in 2006 has brought significant changes to the healthcare system. Insurers, healthcare providers and consumers were given more room to make their own decisions. The reforms have proved to be of great consequence to the role of market parties and have changed enforcement policy. The official launch of the Dutch Health Authority [Nederlandse Zorgautoriteit (NZA)] on 1 October 2006 marked the arrival of a new ‘market supervisor’ in healthcare. A collaboration protocol outlines the division of tasks between the NMa and NZa. The NMa will see to it that parties act in accordance with the Competition Act and will provide information.

6. The trend towards concentration in the healthcare sector has continued into 2006. It proved especially

7. relevant to organisations operating under the Exceptional Medical Expenses Act [AWBZ]. Often, licensing conditions were imposed. The table below gives an outline of the most interesting healthcare cases in 2006

**Table 2: Mergers and Acquisitions in Healthcare**

Healthcare sector	Result of notification	Year in which license application was submitted	Result of license application in 2006
<b>Hospitals</b> Stichting Ziekenhuis Walcheren – St. Oosterscheldeziekenhuizen	License requirement imposed in 2005	2005	License application withdrawn
<b>Health insurers</b> VGZ – Univé	Concentration cleared	Not applicable	
Delta Lloyd – Menzis – Agis	Concentration cleared	Not applicable	
<b>AWBZ</b> St. Pantein – STBNO	Concentration cleared after remedy proposal	Not applicable	
St. Zorggroep West- and Midden-Brabant – St. Amarant	License requirement imposed in 2006	2006	Parties refrain from submitting a license application
St. Amstelring – St. Zonnehuisgroep Amstelland	License requirement imposed in 2006	2006	Parties refrain from submitting a license application
St. GGZ Noord-Holland Noord – St. GGZ Dijk and Duin	License requirement imposed in 2006	2006	Parties refrain from submitting a license application
Oosterlengte – Thuiszorg Groningen – Sensire	License requirement imposed in 2005	2005	License application withdrawn
De Basis – Thuiszorg Gooi and Vechtstreek – Vivium	License requirement imposed in 2006	2006	License application withdrawn
Laak & Eindhoven – Amant	License requirement imposed in 2006		License application withdrawn (Feb. 2007)
St. Zorggroep Noord-Limburg – St. Thuiszorg Midden-Limburg – St. Land van Gelre and Gulick	License requirement imposed in 2006	2006	License granted unconditionally

### 3.2.2 *Hospitals*

8. After an initial investigation into the intended concentration between Stichting Ziekenhuis Walcheren en Stichting Oosterscheldeziekenhuizen, the NMa concluded that the merger might possibly create a dominant position involving these two Zeeland hospitals in the region of Walcheren, Noord-Beveland, Zuid-Beveland and Schouwen-Duiveland. On receiving the license application, the NMa pursued an in-depth investigation. It investigated whether the merger would yield quality benefits outbalancing potential negative effects of the merger. NMa concerns related to the freedom of choice available to patients in this region, as only one independent hospital would remain after the merger.

Because of a lack of viable alternatives open to patients, the post-merger hospital would not have sufficient incentives for competition. The hospitals argued that the merger would bring efficiency benefits outweighing possible negative effects. The NMa concluded that these benefits had not been sufficiently substantiated. The hospitals also emphasised the powerful position of the insurer, which would compensate for any dominant position on the part of the two hospitals in the event of a merger. Following the issuance of a statement of issues, parties decided on withdrawing their license application.

### 3.2.3 *Health insurers*

9. In June 2006, VGZ and Univé notified the NMa of their intended merger. The intended merger between health insurers Delta Lloyd, Agis en Menzis was notified in August 2006. These were the first merger notifications submitted by health insurers following the introduction of the Health Insurance Act on 1 January 2006. Subsequently, the NMa looked into how the Health Insurance Act has affected the way in which the product market and geographic market are defined.

10. It was established that these mergers do not create a dominant position in the national and provincial health insurance markets, so the NMa cleared both concentrations. The purchase market for healthcare services was not separately investigated, as this market is very closely related to the sales market.

11. It was also examined whether a collective dominant position could emerge in the health insurance market. The NMa concluded that this is not the case at present, judging by the strong negotiating position of insurance collectives, current innovation processes in the sector and the fact that the market situation is not yet stable. Delta Lloyd, Agis and Menzis have indicated that they will examine other merger options.

#### Concentration cleared after remedy proposal

12. After investigation the NMa cleared the concentration between health organisations Stichting Pantein (Pantein) and Stichting Thuiszorg Brabant Noord-Oost (STBNO). However, conditions were imposed.

13. STBNO is a provider of home care services. Pantein provides nursing-home and convalescent-home care, as well as home care services. The NMa concluded after an initial investigation that the merger in the region of Land van Cuijk may result in the emergence or strengthening of a dominant position in the markets for home care (personal care, nursing care and domestic care). The already strong position of STBNO in this region would significantly increase as a result of the merger with Pantein, and only a very small competitor would remain. In order to address problems with regard to competition, parties will give up some of their activities in the field of personal home care, home nursing care and domestic home care to Zorggroep VDA, a new market entrant in the region. As a result, clients will continue to have a choice of alternative providers in the home care market.

#### License application withdrawn

14. In August 2005 the NMa concluded after an initial investigation that the concentration of the health organisations Stichting Thuiszorg Groningen/Stichting Sensire (TZG/Sensire) and Stichting Oosterlengte may lead to the emergence or strengthening of a dominant position. NMa concerns related to extramural services (personal care, nursing care and domestic care) provided within the region of the Groningen healthcare agency. The NMa did not establish any possible restriction to competition in markets for intramural care services (provided in convalescent and nursing homes) under the AWBZ. However, competition in the said markets for extramural care services under the AWBZ in the region of the Groningen healthcare agency could indeed be impeded significantly as a result of high combined market shares following the merger. It seemed likely that other health organisations would not exert sufficient

competition pressure. An in-depth investigation, focusing on the extent to which the health agency had sufficient purchase power to discipline the merging parties, did not result in a merger decision, as notifying parties withdrew their license application following the NMa's statement of issues released in February 2006.

15. In November 2005 the NMa concluded after an initial investigation that the concentration of the health organisations Thuiszorg Gooi en Vechtstreek, De Basis and Vivium, located in the region of 't Gooi, may lead to the creation or strengthening of a dominant position in the markets for psychogeriatric convalescent-home care (for people suffering from geriatric illnesses such as dementia), nursing-home care as well as home nursing services. The second phase investigation assessed the markets for psychogeriatric convalescent-home care as well as personal care and nursing at home.

16. Also, the NMa further investigated potential opportunities for Thuiszorg Gooi and Vechtstreek to act as a so-called 'gate keeper'. In doing so, parties would use their market position to refer their home care clients to nursing homes that are to be part of the newly formed group. Following the merger, the parties concerned could take up a very strong position in the field of home care and convalescenthome care. In November 2006 they withdrew their licence application following a statement of issues released by the NMa.

#### 3.2.4 *Cable*

17. The NMa approved of the sale of Essent Kabelcom to private equity funds Cinven and Warburg Pincus (owner of Casema and Multikabel). The European Commission had referred the case to the Netherlands ('reasoned submission'). The merger creates the largest cable company in the Netherlands. Essent Kabelcom and Casema/ Multikabel jointly provide services to 55 per cent of Dutch homes that subscribe to cable television. Consumer choice remains unaffected, as the regions in which cable companies operate do not overlap. The NMa's investigation focused on whether the increased buying power of the merged company in relation to providers might adversely affect the choice of television channels offered to consumers. The investigation also looked at possible adverse effects on up-and-coming alternatives, such as digital television and DSL television (via internet). These could not be established.

#### KPN – Nozema

18. In 2006 the NMa also assessed the acquisition of Nozema by KPN. The acquisition was conditionally cleared. KPN is under the obligation to sell a number of its high broadcasting masts to an independent third party approved of by the NMa, within a period of two years after the NMa's decision. This prevents competition in the market for the transmission of wireless radio signals from being impeded.

#### Fine for late merger notification

19. The NMa imposed a fine of EUR 17,500 each on Airfield Holding B.V. and Chellomedia Programmering B.V. (formerly UPC Programmering B.V.) for prematurely finalising the acquisition of Canal+ N.V. The Competition Act prohibits the effectuation of a takeover prior to notification with the NMa. At the time, UPC took over Canal+ from Airfield. On signing the acquisition agreement, UPC received authority over Canal+ on the basis of specific rights of approval. It was only after concluding this agreement that parties notified the NMa of the acquisition. In 2005 the NMa finally approved the takeover by granting a license to the companies concerned.

#### 3.2.5 *Transport*

20. The market for public transport was liberalised on the basis of the Passenger Transport Act 2000 [Wet personenvervoer 2000]. Licenses to operate bus, tram, metro and regional railway services are now

open to public procurement. The public transport market may be characterised as a bidding market. Transport companies compete for often large concessions, which are granted to a transport company for a maximum of 8 years (barring exceptional circumstances). Competition is therefore more intense than in non-bidding markets, in spite of high market shares. At present, three large transport companies are active in the Netherlands, Arriva, Connexxion and Veolia, competing for various large concessions. Connexxion is the main player. At the end of December 2006, the NMa cleared the acquisition of the municipal transport company GVU in Utrecht and the local transport company Novio in Nijmegen by Connexxion. The NMa does not expect the takeover to cause GVU en Novio, relatively small bus transport companies and important competitors to Connexxion, to exit the market. Moreover, the acquisition will not result in a significant deterioration of the competitive position of other important transport companies.

### 3.2.6 *Pork*

21. In February 2006 the NMa cleared the acquisition of Slachthuis Groenlo by Dumeco, part of the Sovion group. Both parties are active in the field of pig and sow slaughtering and pork processing and sales.

22. After investigation, the NMa concluded that the geographical market for pig and sow slaughtering services has cross-border dimensions and that combined market shares do not render it likely that a dominant position is created or strengthened in the purchase markets for pigs and sows for slaughter. In the markets for pork processing and sales also, Sovion market shares will not create or strengthen a dominant position.

### 3.2.7 *Savoury snacks*

23. Another concentration case involves Smiths and Duyvis. In April 2006 the NMa cleared the acquisition of Duyvis by Smiths Food Group (part of PepsiCo) after a merger enquiry. Parties will have a strong combined position in the market for savoury snacks, but the concentration will not create or strengthen a dominant position. The NMa found that supermarkets may exert sufficient buying power on the postmerger company. Besides, there are sufficient opportunities for market entry. Also, consumers and wholesale buyers will continue to have a sufficient choice of savoury snacks, including supermarkets' own brands and other brand products.

### 3.2.8 *Sugar*

24. In September 2006 the NMa decided on pursuing an in-depth investigation into the concentration of

25. Koninklijke Coöperatie Cosun U.A. and CSM Suiker B.V. The companies will achieve very high combined market shares, possibly impeding competition in the Dutch sales market for sugar. Following a license application, the NMa will thoroughly investigate the geographic dimension of the sugar market. Due to the coming into effect of the Common Market Organisation for sugar on 1 July 2006, the main question to be addressed relates to whether or not this market will comprise an area beyond the Netherlands. Such an analysis is important to establishing the parties' combined position in the sugar market. The NMa therefore decided that a merger license is required.

### 3.2.9 *Supermarkets*

26. At the end of October 2006, the NMa cleared Ahold's acquisition of 29 Konmar supermarket branches.

27. This required a modification of the original merger notification submitted by Ahold on the basis of a so-called regional analysis by the NMa. The NMa had identified potential restrictions to competition in a number of local markets for the sale of daily consumer goods via supermarkets. On a national level, the addition of 29 Konmar stores to Ahold's market share is limited, but in a number of local markets the merger may create high combined market shares, reducing Ahold's incentives to compete.

28. The remedy proposal put forward by Ahold entails selling off several AH and C-1000 stores to a competitor in a number of regions. Also, Ahold has committed itself not to set up new supermarkets in two newly built shopping centres. On the basis of this modification, dominant positions are prevented from being created or strengthened and consumers will continue to have a sufficient choice of supermarkets in these regions. The European Commission referred the case to the Netherlands ('reasoned submission').

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

29. Besides the tasks of fighting cartels and examining proposed mergers, the NMa also performs advocacy tasks (broadly understood). These include for instance the performance of market scans, the issuing of informal opinions, vision documents, advices etc.

30. For example, the NMa has performed the following market scans, which form the basis for further steps to enforce competition policy:

- school books
- financial sector
- energy sector (wholesale and consumers)
- rail sector
- gasoline tank stations sector

31. Moreover, the NMa published the so-called energy vision document, which was a consultation paper initially, on its website. This key document sets out the relationship between energy and competition policy. This report has been used by the Dutch Government to formulate its energy policy and has been noted also internationally.

32. The NMa (together with OPTA) also produced a report to advise the Minister of Economic Affairs regarding the issuance of mobile phone frequency permissions. More specifically, the following examples should be noted.

#### **4.1 Transport**

##### **4.1.1 OV Chip Card**

33. In the autumn of 2006 the NMa issued an informal opinion on the OV Chip Card system, a new electronic payment system for public transport. The system will be launched nationally on 1 January 2009 and is expected to become the new standard payment system in public transport, replacing the so-called 'strippenkaart', which is used in buses, trams and metros, and railway tickets. The system has been developed by Trans Link Systems (TLS), a collaborative venture of five public transport companies,

Netherlands Railways [de Nederlandse Spoorwegen (NS)], Connexxion, GVB, RET en HTM. TLS is responsible for development, implementation and management of the system.

34. In its informal opinion, the NMa signalled two competitive risks. Firstly, the system under consideration lacked an independent appeals procedure for public transport companies, if they were to be denied access to the OV Chip Card system. Following this observation, TLS has introduced an independent arbitration procedure that processes complaints submitted by public transport companies excluded from the system. Also, the NMa pointed out that the NS owns 55% of TLS shares and, accordingly, has related powers of authority, which poses a risk, as the NS might keep competitors from gaining access to the Chip Card system. This brings along a large responsibility for the NS to safeguard that the board of TLS can independently decide on the interpretation of access conditions to the OV Chip Card system, thus preventing any disruptions to competition.

## **4.2 Liberal professions**

### *4.2.1 Architects*

35. Within the framework of its 2006 analysis, the NMa conducted meetings with the professional organisations concerned: the Royal Institute of Dutch Architects [Koninklijke Maatschappij tot Bevordering der Bouwkunst Bond van Nederlandse Architecten (BNA)] and the Dutch Professional Organisation of Urban Designers and Planners [Beroepsvereniging van Nederlandse Stedebouwkundigen en Planologen (BNSP)]. These meetings resulted in a number of changes to self-regulation. Codes of conduct should not hinder or stop clients from switching to another architect. Architects have therefore been given greater opportunity to engage clients that have previously contracted another architect. Also, changes have been made to the rules on contacting colleagues about a new project due to arise within a similar building to the one in which an architect is working. The NMa expects these alterations to promote the level of competition among architects and provide a wider range of choice to clients when selecting an architect. This may improve the quality of architectural services provided. NMa analysis of self-regulation among architects has now come to an end. Subsequently, the NMa will draw up its final report on self-regulation among architects.

### *4.2.2 Notary profession*

36. The NMa conducted a series of meetings with the professional organisation concerned: the Royal Society for the Notary Profession [Koninklijke Notariële Beroepsorganisatie]. By subsequently issuing a consultation document on 30 March 2006, the NMa invited the opinion of a wide range of parties involved in the market for notary services, including private and business users. They were queried on the issue whether current forms of self-regulation were considered to be necessary and proportional to the sound exercise of the notary profession. These included the prohibition on awarding provision and specific limitations regarding the use of intermediaries and the outsourcing of services. The consultation document was not sent out until the government had officially reacted to the report issued by the Committee on the Evaluation of the Notary Act. The consultation round was officially closed off by means of a round table meeting on 4 December 2006, in which various respondees and a number of interested parties participated. A final report is expected for the first half of 2007.

### *4.2.3 Legal profession*

37. Likewise, the NMa conducted a series of meetings with the professional organisation involved: the Netherlands Bar Association [Nederlandse Orde van Advocaten]. Following this, the NMa invited the opinion of a wide range of interested parties, including private and business users of legal services, who were asked to give their opinion by responding to a consultation document. The question under

consideration was whether current forms of self-regulation were considered to be necessary and proportional to the sound exercise of the legal profession and the protection of customers. More specifically, rules prohibiting particular collaborative associations and the direct approach of potential clients were the subject of consultation. The consultation document was not sent out until the government had officially reacted to the report issued by the Committee on the Legal Profession. After taking note of the reactions to the consultation document, the NMa will in the course of 2007 convene a round table meeting inviting respondees and interested parties.

#### *4.2.4 Accountants*

38. In 2006 the NMa conducted a series of meetings with the professional organisations concerned: the Royal Dutch Institute for Registered Accountants [Koninklijk Nederlands Instituut van Registeraccountants (NIVRA)] and the Dutch Association for Accountants and Administrative Advisors [Nederlandse Orde van Accountants-Administratieconulenten (NOvAA)]. Almost simultaneously, various legislation processes were completed. Recently, the Directive 2006/43/EC, the Act on the Enforcement of Accountants Organisations [Wet toezicht accountantsorganisaties (Wta)] and the Decision on the Enforcement of Accountants Organisations [Besluit toezicht accountantsorganisaties (Bta)].

39. On the basis of this regulation, NIVRA and NOvAA have drawn up many new directives and supplementary regulation, while removing regulation that had now become obsolete. The NMa commented on these directives and supplementary regulation from the perspective of competition. At the close of 2006, some new directives and supplementary regulation had not yet been implemented. The process will be completed in the course of 2007. The NMa will then announce its findings on self-regulation among accountants.

### **4.3 GTS**

40. In September 2006 the NMa issued an informal opinion on the GTS investment proposal to expand the Dutch network for high caloric value gas. The NMa found that current transport capacity in the high caloric network insufficiently safeguards future supply security. The NMa also concluded that an investment is both necessary and justified in order to safeguard supply security, now and in future. With a view to the expected demand for (additional) transport capacity and a decline in gas supplies from abroad, the NMa primarily considered opportunities for Dutch consumers to profit from the network expansion in its assessment of the investment proposal. For instance, consumer profit may result from lower gas prices or higher supply security. The NMa has provided GTS with the opportunity to submit an enhanced proposal.

#### *4.3.1 Vivens*

41. Vivens will jointly purchase gas oil and electricity for the entire railway market. In addition, Vivens will operate tank installations belonging to ProRail. Vivens will need to amend its statutes to secure the independent nature of decisions on participating in Vivens and guarantee open access to tank installations for non-members. Also, a number of concerns were pointed out to Vivens, which in practice may give rise to infringements. By means of this informal opinion, the NMa contributes to transparent, non-discriminatory energy purchasing for railway companies. In this case also, synergy between general competition enforcement and sector-specific regulation was at play, as the Office of Transport Regulation cooperated with the NMa's Antitrust Department and its Office of Energy Regulation.

### **4.4 Healthcare**

42. At the request of the NZA, the NMa issued an informal opinion on the issue of regional representation. On the basis of information provided, the NMa set out that the Competition Act is not

applicable to negotiations between health organisations, the dominant health insurer in the region and the regional representative on the issue of tariff approval/ fixing by the NZa. Such consultation is to be regarded as a preliminary act to drawing up an NZa decision. Health insurers may enter into mutual negotiations through a regional representative, as this is now required for the NZa to fix the budgets of health organisations in the so-called A-division. In its informal opinion the NMa emphasises that other kinds of potential practices implemented by the regional representative have not been taken into consideration. The informal opinion strictly applies to the consultative meetings mentioned above.

#### **4.5 *ConsuWijzer website***

43. Finally, it should be noted that the NMa has setup a joint website with OPTA and the Consumer Authority [Consumentenautoriteit], called ConsuWijzer<sup>4</sup> that aims at helping consumers with their complaints and provides valuable information. This is also an important means by which NMa provides information to consumers. After all, critical consumers are important for a healthy culture of competition.

### **5 Sector-specific regulation by the Offices of Transport and Energy Regulation**

44. The NMa has sector-specific powers and authority for the energy and transport sectors. Their implementation lies with two ‘chambers’ within the NMa: the Office of Energy Regulation (DTe) and the Office of Transport Regulation. The fact that both sector-specific regulators are integrated within the NMa creates significant synergy between the supervision of compliance with the Competition Act and sector-specific regulation.

#### **5.1 *Office of Transport Regulation (Vervoerkamer)***

45. The Office of Transport Regulation was given an important new competence under the amended Aviation Act, which came into force on 19 July 2006. This Act assigned a new task to the NMa, namely regulating the tariffs and conditions for the aviation activities which Schiphol provides to airline companies. The system for allocating costs and revenues from Schiphol’s aviation activities must be submitted to the NMa for approval. This system is the basis for determining the tariffs which Schiphol charges for the use of the airport by airline companies. The assessment by the NMa resulted in a draft decision for approval of the allocation system, after Schiphol had made a few amendments to the original system submitted. This decision was made available for inspection at the beginning of 2007.

##### **5.1.1 *Rail monitor***

46. At a conference in early 2006, the Office of Transport Regulation with the NMa presented the conclusions to the rail monitor. The scope of the railway monitor covers all railway companies, the railway infrastructure operator and remaining parties entitled to services in the railway market. The most important question explored in the rail monitor relates to the problems encountered by railway companies on a daily basis. The monitor is to be an annual publication. It will appear from this monitor whether improvements to competition have indeed materialised over the years.

47. The results of the monitor provide information on:

- compliance with the Railway Act;
- problems experienced by railway companies in complying with the Railway Act;

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<sup>4</sup> See the website of Consuwijzer: <http://www.consuwijzer.nl/>.

- barriers encountered by railway companies, impeding competition;
- the functioning of the Office of Transport Regulation.

48. The conclusions to the monitor 2005 are that the railway market considers capacity allocation and charging fees to be the main issues of concern. The Office of Transport Regulation subsequently prioritised these topics in its regulation policy for 2006

#### *5.1.2 Passenger Transport Act*

49. In 2006, the Office of Transport Regulation advised the Ministry of Transport, Public Works and Water Management with regard to the amendment of the Passenger Transport Act. The amendment came into force on 1 January 2007. The Amendment Act assigned a new regulatory task to NMa, assessing whether local transport companies separate rail (tram and metro) and bus activities in their financial accounts. In addition, this Act extends the task of the Office of Transport Regulation by 10 years. The background to this amendment is to provide local transport companies with the opportunity to issue tenders for bus and rail transport separately. Tenders for bus transport must be issued before 2009 and rail transport before 2017.

#### *5.1.3 Capacity allocation and charging fees*

50. In 2006 the Office of Transport Regulation dealt with a complaint submitted by the freight transport company Dillen & Lejeune Cargo NV (DLC) against ProRail on the issue of capacity allocation. Judging by the unsafe conditions of the railway line between Budel-Weert, the Office of Transport Regulation indicated that ProRail had not been capable of allocating capacity to DLC. Nonetheless, it should have provided DLC with better information.

51. Charging fees are tariffs levied on railway companies by the network operator for access to the railway network. Various regulatory measures have proved necessary here. Firstly, it was apparent from research that the access agreement concluded between the railway companies and the operator ProRail did not arrange for performance targets. Such targets are obligatory by law and stimulate parties to improve their performance on the railway network and reduce disruptions to services. The NMa pressed for a retroactive agreement on performance targets with which parties finally concurred.

52. Furthermore, the Office of Transport established that provisions for charging reservation fees, as contained in the Network Statement, have a discriminatory impact. On the basis of these findings, ProRail amended the provisions. Research also showed that budgeted costs entered for non-centrally controlled areas (Niet Centraal Bediende Gebieden (NCBG)) by ProRail proved too high. As a result, charging fees needed to be adjusted downwards. ProRail refunded an amount of EUR 3.43 million to transport companies.

#### *5.1.4 Maritime pilotage services*

53. The NMa advised the Ministry of Transport, Public Works and Water Management on the issue of maritime pilotage services. It issued a Practicability and Enforcibility Test [Uitvoerbaarheidsen Handhaafbaarheidstoets] for the new Market Monitoring Registered Pilotage Services Bill [wet Markttoezicht registerloodsen] and advised on the decision relating to this Bill. The Bill was brought before the House of Representatives of the Dutch Parliament in December 2006. Parliament is expected to pass the Bill in the course of 2007. After the Bill comes into effect, the Office of Transport Regulation will expand its range of tasks.

## 5.2 *Office of Energy Regulation (Dte)*

54. Following a decline in consumer confidence on the energy market in previous years, the NMa was resolved on contributing to the restoration of trust in 2006, wherever possible. The NMa called on energy companies to set up a joint code of conduct in 2005. This had been prompted by alarming signals on aggressive canvassing methods and incorrect communications relating to requests for switching in the energy market. In the summer of 2005, especially, the number of complaints rose significantly. Providers publicly accused one another of improper practices. In media and political circles too the issue was at the centre of attention. This was one of the reasons for a decline in consumer confidence in the energy market. In line with its restrained approach to intervening in the free market, the NMa provided the sector with an opportunity to propose a solution to the problems under consideration. This resulted in the Code of Conduct Consumer and Energy Providers [Gedragcode Consument en Energieleveranciers] which has been of effect since 1 September 2006, applying to all providers within EnergieNed. By means of this code of conduct, the sector shows its willingness and capability to resolve problems by itself. This creates wider support for the criteria applied. If warranted, the NMa may still intervene on the basis of the law, and will continue carefully to monitor the opportunities for consumers to choose an energy provider on the basis of sound information. The information desk ConsuWijzer, launched in the summer of 2006, also focuses on the consumer.

### 5.2.1 *Penalties*

55. At the start of 2006 the NMa imposed periodic penalty payments on Oxxio for failure to eliminate its administrative backlog. The backlog involved the dispatch of annual settlements and was to be eliminated on 1 February 2006 at the latest. In March 2006 it became apparent on inspection, also involving a company visit by the NMa, that Oxxio had complied with the injunction. In the autumn the NMa withdrew a supply license for failing to comply with license conditions.

56. This measure had not been implemented before. The company concerned no longer complied with the conditions set out for energy providers. The NMa received complaints from customers on the company's structural inaccessibility. In addition, the company failed to comply with agreements outlining adequate complaint and dispute processing and did not provide its customers with annual or final settlements.

### 5.2.2 *Scorecard*

57. In order to keep energy companies alert and inform consumers on the quality of administrative processes, the NMa publishes a so-called 'scorecard' every three months. By means of this scorecard consumers are informed about the performance of individual energy companies as concerns timely billing. On this issue, the NMa is satisfied with the improvements that were realised by energy companies over 2006.

58. For the first time ever, all scores for the market as a whole were above the norm. Nevertheless, individual companies fall short of the mark. Though the focus on administrative transactions has led to improvements in timeliness, the NMa still receives a relatively large number of questions and complaints, for instance on the issue of meter registration procedures when switching providers; the NMa will continue to monitor this in 2007.

### 5.2.3 *Profits of energy companies*

59. During the summer the NMa initiated an investigation into the profits of energy companies. The investigation aimed at finding out about the source of profits and their allocation. It is important for consumers to know whether or not they are being charged excessively. Conclusions are expected for 2007.

60. Apart from the investigation into profits, the NMa annually fixes the maximum tariffs and price caps to be levied by a network operator for its energy transport activities. The NMa regulates the network operators as they are monopolists by nature. There is no competition incentive, therefore, to optimise the price-quality ratio. Two regulatory periods have passed since 2001, during which the NMa stimulated the sector to be more effective by imposing a price cap, also referred to as the 'x-factor'. As a result, consumers benefited by a total amount of more than EUR 1.1 billion.

#### *5.2.4 Quality service reports on interruptions by network operators*

61. Network operators annually report on the quality of their services. These reports monitor the duration of power interruptions and the level of compensation awarded in such cases. A serious power cut occurred in Haaksbergen in November 2005. The investigation into this power failure was completed in the course of 2006 and has been made available at [www.minez.nl](http://www.minez.nl). Consequently, the compensation scheme for end users was amended on the basis of this investigation. The quality service reports issued in 2006 may be consulted on our website [www.nmanet.nl](http://www.nmanet.nl) under the menu item of Annual Report.

#### *5.2.5 Sustainable energy*

62. In the field of sustainable energy, work was done to further refine the so-called 'electricity label', which informs about the source of electricity. In 2006 the NMa mainly focused on compliance with regulation, improving the practicability of regulation and further adjusting electricity labels in accordance with consumer wishes. This has resulted in a reliable, comprehensible and uniform electricity label for each energy provider, allowing consumers to take into account the source of energy, in addition to price and service considerations, when choosing a provider.

#### *5.2.6 Current developments in energy markets*

63. Being the energy market regulator, the NMa closely monitors energy market developments. If possible, it aims to stimulate and direct such developments. Expert knowledge of the market is indispensable to effective regulation. Such expertise makes it possible for the NMa to give out advice to companies and ministries. NMa activities over 2006 comprised:

- Publishing market monitoring studies
- Performing the sectoral investigation into concentrations on the energy markets
- Actively contributing to creating North West European energy markets

#### *5.2.7 North West European electricity and gas markets*

64. Over the past few years, the NMa has taken a number of important steps towards developing integrated North West European markets for electricity and gas. The NMa actively participates in various international initiatives for gas and electricity. These involve collaboration with market parties in order to find practical solutions to trade barriers. In the field of gas the NMa chairs the Gas Regional Initiative for the region North/ North West. This regional initiative commenced in the summer of 2006 and has produced action plans prioritising six topics: interconnection, hub development, coordination among regulators, transparency, gas balancing and gas quality. Meanwhile, the action plans have given rise to the dispatch of various questionnaires. These aim to bring into focus specific bottlenecks in the market.

### 5.2.8 *Implementation market coupling electricity*

65. In November 2006 an NMa decision opened the way for market coupling of the electricity markets in Belgium and France. Market coupling is a market-based mechanism that allows a more efficient allocation of day-ahead cross-border capacity between the Netherlands, Belgium and France. Market coupling is an important step towards further regional market integration. Its implementation will allow for more efficient cross-border trade by guaranteeing an optimal use of existing available day-ahead capacities between the three countries. In preparing its decision the NMa took into account that remaining auction rules in the three countries (pertaining to year and month capacity) were to be further harmonised as of 1 January 2007. Furthermore, electricity exchanges involved in the market coupling programme will disclose trade data for market monitoring purposes. Also, market coupling will be extended to include other countries.

### 5.2.9 *Regional integration of electricity markets*

66. In addition to market coupling, regulators in Belgium, France and the Netherlands (CREG, CRE and the NMa) consider the advanced harmonisation of trade regulation to be of undiminished importance in order to realise further market integration. The three regulators have in the meantime involved the German and Luxemburg regulators in a collaborative agreement working towards a stronger regional integration of electricity markets. A joint action plan, involving the regulators in the Benelux, Germany and France, is expected for spring 2007.

### 5.2.10 *Annual capacity auction 2007*

67. The annual auction of transport capacity at the interconnector Netherlands-Germany now involved two rounds (September and November 2006) instead of a single round, as was the case previously. A total amount of 1300 Megawatt (MW) was auctioned instead of the usual 900 MW. TenneT – the national high voltage grid operator – was granted a temporary exemption from a number of provisions in the NetCode. The exemption will be lifted as soon as the Code provides for a new transport capacity allocation scheme. The European Court of Justice rejected the present scheme put forward in the NetCode.