NMa

2008 Annual Report

choices

Netherlands Competition Authority

Key figures NMa 2008

	2006	2007	2008
Competition			
Statement of Objections and Fines			
Number of formal investigations under competition law	26	25	22
Number of formal investigations resulting in a Statement of Objections	5	4	11
Number of investigations completed by means of an alternative instrument	7	10	3
Number of investigations in which the formal investigation was suspended due to insufficient evidence	14	11	8
Number of cases in which a fine and/or an order for periodic penalty payments was imposed [1]	13	6	6
Total amount of fines in competition cases (x € million)	114.1	9.5	9.0
Complaints and informal opinions			
Complaints settled in relation to violations of the Competition Act [2]	112	65	29
Informal opinions	22	0	1
Concentrations			
Notifications of mergers, acquisitions and joint ventures (concentrations)	135	108	129
Withdrawn notifications	5	7	8
Exemption from the waiting period	0	1	2
Decisions on notifications of concentrations	119	106	119
License required for concentration	8	4	4
License applications	5	5	3
License applications withdrawn	3	3	-
Decisions on license applications	2	3	2
Transport			
Railway Act			
Number of investigations by Office of Transport Regulation	32	10	2
Number of formal investigations resulting in a Statement of Objections	8	4	-
Number of investigations completed by means of an alternative instrument	22	3	2
Number of cases in which no violation was established	-	3	-
Number of completed sanctions cases	5	1	4
Total amount of fines in transport cases (x € million)	-	-	1.7
Number of completed complaints related to the Railway Act	3	2	7
Aviation Act			
Number of requests for tariff assessment resulting in a decision	-	3	-
Approval decision on cost allocation system	-	1	1
Pilotage Act			
Decisions Pilotage Act	-	-	5
Passenger Transport Act			
Completed cases involving local transport companies	1	12	4
Number of cases resulting in a court ruling	1	1	-
Energy			
Method decisions	24	25	8
Implementation decisions	156	74	103
Enforcement decisions	27	10	8
Advisory notices to the Minister of Economic Affairs	6	12	16
Dispute resolution [3]	45	64	46
# of energy cases in which a fine and/or an order subject to periodic penalty payments was imposed	1	2	5
Total amount of fines in energy cases (x € million)	0.1	0.3	1.6
Administrative appeals			
Completed administrative appeals in competition cases [4]	125	107	73
Completed administrative appeals in energy cases	34	44	72
Completed administrative appeals in transport cases	4	2	8
Judicial appeals			
Judicial appeals completed by the District Court of Rotterdam against competition decisions [5]	28	33	61
Judicial appeals completed by the Trade and Industry Appeals Tribunal against competition decisions	5	10	9
Judicial appeals completed by the District Court of Rotterdam against decisions in relation to energy	1	-	-
Judicial appeals completed by the Trade and Industry Appeals Tribunal against energy decisions	20	31	22
Judicial appeals completed by the District Court of Rotterdam against decisions in relation to transport	-	2	2
Budget and personnel			
Total budget granted (x € million)	40.6	45.7	44.9
Number of staff on December 31st	380	392	405
Ratio men/women	52%/48%	51%/49%	51%/49%
Average age of staff	37	37	37

[1] *Seven sanction cases were completed, resulting in a fine in six instances.*
[2] *Decline in number of complaints is partly due to new complaints-handling procedure.*
[3] *In contrast to previous years, this number reflects the number of completed procedures rather thab the number of handled requests*
[4] *Of which 47 construction-industry cases*
[5] *Of which 52 construction-industry cases*

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choices

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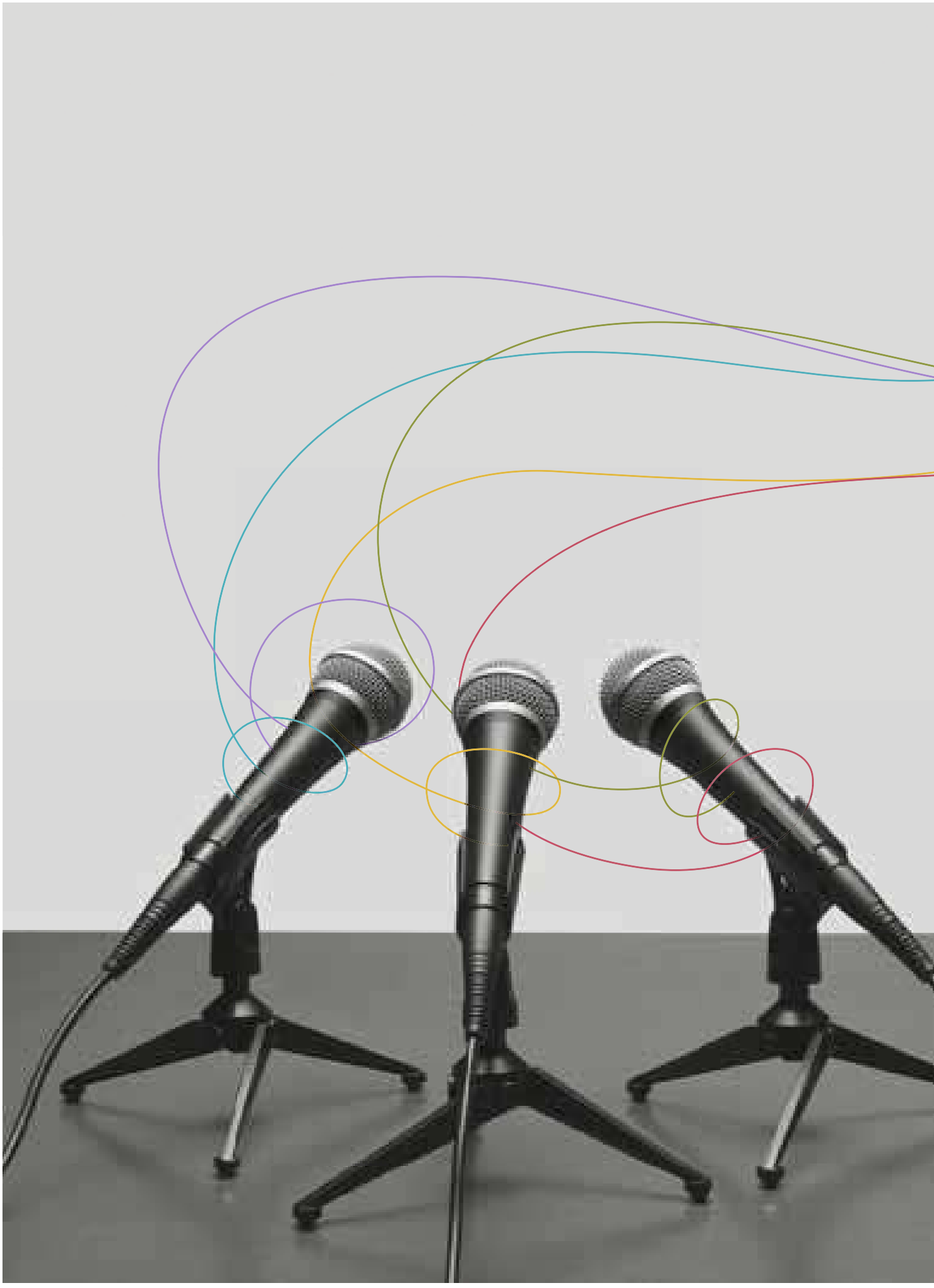
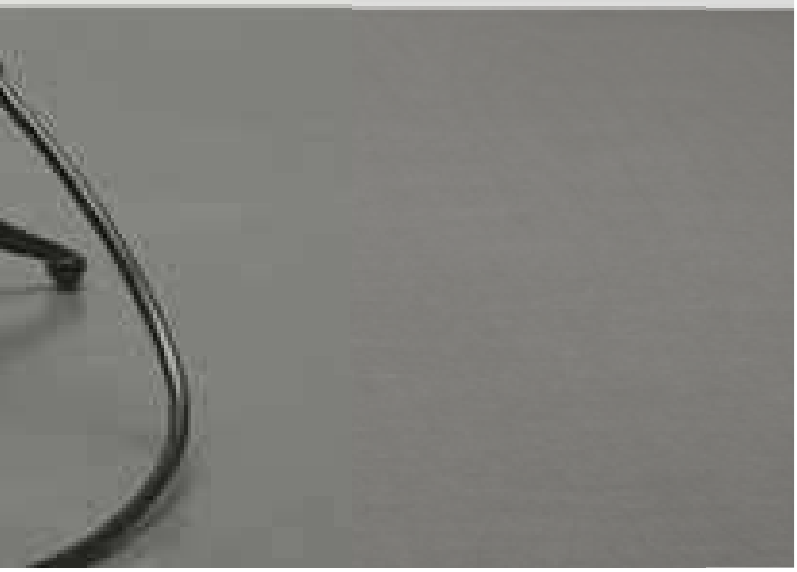


The Board looks back on 2008

The 2008 annual report of the Netherlands Competition Authority (NMa) recounts an extraordinary year. For the 2008 NMa Agenda, detailing our plans for 2008, we chose the metaphor of a lighthouse, standing tall in a stormy sea, as symbol for visible oversight, serving as a guiding light. Yet no one could have imagined just how stormy 2008 would turn out to be. Problems in the financial world have led to a crisis that now profoundly affects the real economy.



Oversight in times of crises

These developments eat away at the very trust that people should be able to place in society's fundamental structures and systems. Francis Fukuyama already wrote in his book 'Trust' that trust is a powerful economic value. Times like these show us that the very opposite of trust is equally as powerful as trust itself: distrust, just as the fear that comes on its heels. Are competition authorities just sitting by? No, the problems at hand are being looked at on a national, European and an international level with an enormous sense of reality. Many sense the urgency to restore the trust that has been lost. But what value does the NMa's mission still have today: 'making markets work'? As has been said before: competition does not interfere with finding a solution to the crisis, but is in fact part of the solution. Undertakings that have faced competition are in better shape and better equipped to weather economic hardship. Times likes these show us just how important it is for the strength of the Dutch economy to have innovative undertakings. The failure of the market as a self-correcting mechanism, as has happened in the financial world, does not mark the failure of the free market as one of the driving forces behind the economic development of the Netherlands. That would be

too hasty a conclusion. One of the lessons learnt however is that strict market oversight is crucial, though one should not be blind to special market circumstances or characteristics.

In his recent book 'Geopolitics of Emotion', Dominique Moisi describes how economies that have a 'culture of hope', like those in Asia, develop at a faster rate than economies that are afraid of losing what they have. And as fear often induces anti-competitive behavior, it hinders those undertakings that actually want to seize opportunities, which do exist in harsher economic times. Regulation, concentration oversight and the prevention of cartels or dominant positions, together with other factors, all contribute to that hope for better economic times.

Approach

As it is a mix of laws and economic effects, market oversight needs to be open-minded, always starting with the interests of consumers and buyers. Regulations are intended to steer economic reality in the right direction. Other interests, such as public ones, often play a role as well. The NMa therefore adopts a pragmatic, realistic approach – not a dogmatic one – when making tough choices and balancing different interests.

A good regulator is one that is capable of identifying the most important problems and to solve these wherever possible. The NMa's focus is on those industries where there is a high risk of violating the Competition Act, potentially causing severe damage to the Dutch economy. In each individual case, the NMa carefully selects from its gamut of enforcement instruments. These include sanctions, but we regularly press at an early stage already on adjustments to certain rules and regulations. With time, we have become increasingly able to strike a finer balance between the various instruments because of increased insight into the effects of our actions. Risk-oriented enforcement on a proportional scale helps to reduce redundant administrative burden on business.

Accountability

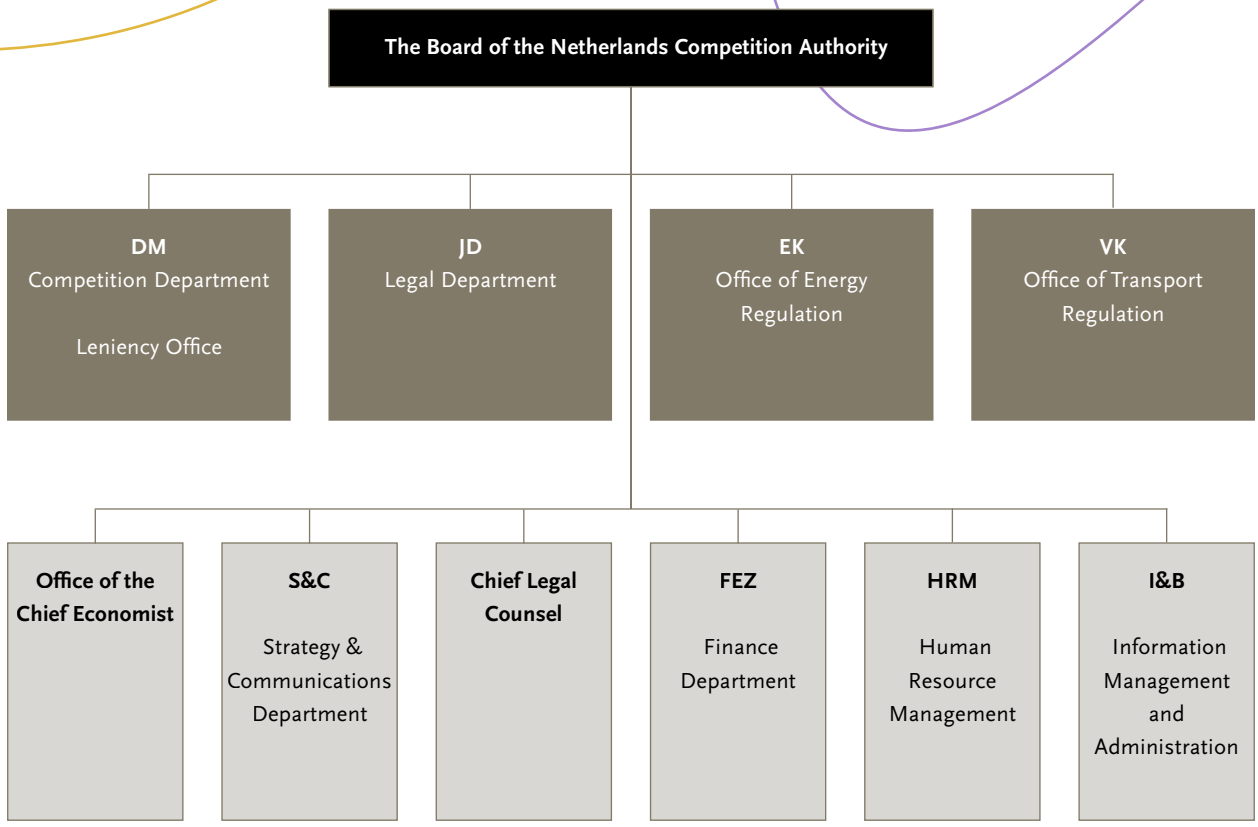
In our annual report, the NMa accounts for its oversight and enforcement actions, with emphasis on the prioritized industries, the so-called 'areas of attention'. In 2008, these were: health care, financial services, food & agriculture, energy, and transport. The overviews of the areas of attention are accompanied by thematic pieces that provide more background information, and which all share the common theme of 'choices'. After all, choices need to be made by regulators, entrepreneurs and consumers alike.

Thanks in large part to the newly created Competition Department, the NMa was able to carry out 22 formal investigations in 2008 into possible violations of the Dutch Competition Act, as well as to review 129 concentration notifications. The NMa handled 154 complaints against a decision, of which 47 involved construction cases. The NMa made a total of 119 decisions in energy cases. The NMa also concluded 4 sanctions cases in the transport industry, and has imposed a fine there for the first time ever. Fines in 2008 totaled more than €12 million. The most important ones are highlighted in this annual report. The outcome of its actions is an estimated €700 million. Please turn to page 46 for more on the theme of effects.

The Dutch economy faces a difficult year. The NMa will continue to carry out its assigned oversight task, taking into account the current, extraordinary economic circumstances. The Board of the NMa expresses its wish, and its confidence, that we, now and in the future, can make markets work, providing the Dutch economy with the strength to continue to grow and prosper.

The Hague, The Netherlands, April 7th, 2009

Pieter Kalbfleisch
Chairman of the Board of the NMa


The Board of the Netherlands Competition Authority
DM
Competition Department
Leniency Office
JD
Legal Department
EK
Office of Energy Regulation
VK
Office of Transport Regulation
Office of the Chief Economist
S&C
Strategy & Communications Department
Chief Legal Counsel
FEZ
Finance Department
HRM
Human Resource Management
I&B
Information Management and Administration

Developments affecting the NMa

This section summarizes several important developments and activities affecting the NMa. The other sections of the annual report provide more background information on the cases that were handled in 2008.

Cooperation

Effective cooperation is a necessary condition for effective oversight. On a national level, the desire to work towards a Market Regulation Code with other regulatory bodies was fulfilled in 2008, as evidenced by the signing of a memorandum of intent to the creation of the Consultation Forum of Regulatory Bodies (MTB). Its creation lays the foundation for structural cooperation between its participants – the Independent Regulator of Post and Electronic Communication in the Netherlands (OPTA), the Dutch Healthcare Authority (NZa), the Consumer Authority, the Netherlands Authority for the Financial Markets (AFM), the Dutch Central Bank (DNB), and the Netherlands Competition Authority (NMa). Aiming to advance the exchange of knowledge, experience and information with regard to market oversight and regulation, the initiative augments oversight efficiency, reducing oversight burden.

On a European level, the NMa is a member of the *European Competition Network* (ECN), working together with the Dutch Ministry of Economic Affairs (EZ) on policy matters. The NMa often sits on advisory committees, which decide on cartels, mergers, and abuse of dominant positions in EC cases. The NMa also participates in various ECN work groups and expert groups, in which the interpretation of European competition law is harmonized, such as enforcement priorities of Article 82 EC.

The *European Competition Authorities Association* (ECA) is a more informal body for cooperation between competition authorities, which includes the authorities of non-EU European countries, such as Norway, and which discusses the development of competition regulation. In 2008, ECA members have, for example, talked about best practices with regard to commitments and leniency.

On a global level, the NMa is a member of the *International Competition Network* (ICN) and, together with EZ, of OECD. In 2008, the NMa participated, for example, in the ICN work groups *Unilateral Conduct* and *Advocacy*. These work groups' objective is to create a more uniform approach of enforcing competition policy and regulation among competition authorities. The NMa cowrote the work groups' papers on *Market Studies*, *Tying and Bundled Discounting* and *Loyalty Discounts & Rebates*.

The OECD convenes three times a year to discuss competition policy and regulation. The NMa's papers for the OECD include *monopsony and buyer power*, *techniques for presenting complex economic analysis to judges*, *cartel jurisdiction issues* and *experience with direct settlements in cartel cases*.

The international journal Global Competition Review annually ranks competition authorities worldwide. In 2008, the NMa received three-and-a-half stars, equaling its 2007 score, placing it in joint ninth position in the world.

Advocacy and guidance

Advice to governments (*advocacy*), and advice to undertakings and consumers (*guidance*) greatly contribute to effective oversight. Good examples of advocacy are the feasibility and compliability tests of legislation amendments, which the NMa regularly carries out. These tests look at, among other things, the effectiveness of legislation, particularly in view of oversight burden. In 2008, the NMa Information Line received more than 2,500 calls from entrepreneurs. Consumers can contact the consumer information portal ConsuWijzer, jointly operated by the Consumer Authority, OPTA and the NMa. The NMa handled almost 25,000 questions, tip-offs and reports.

Complaints about the NMa

In 2008, the NMa received two complaints about its actions, concerning the events and procedures surrounding an investigation at an undertaking. After investigating the matter, the Board of the NMa rejected the first complaint, while in the second case it ruled in the complainant's favor, with regard to a complaint about the press release the NMa released after the investigation. Other complaints in the second case however have also been rejected.

Developments in 2008

Celebrating the ten-year anniversary of the Competition Act, EZ and the NMa organized a convention in March 2008 featuring various speakers, including European Commissioner for Competition, Ms. Kroes. Several authors shared their visions on ten years of competition oversight in the Netherlands in their contributions in a commemorative book, entitled 'Trust and Antitrust.'

Separation of policymaking and implementation
Speaking at the convention, Dutch Minister of Economic Affairs, Ms. Van der Hoeven, announced that she wanted to sharpen the separation of policymaking and implementation in two ways:

– A new article (Article 13) of the revised 2008 Protocol on Working Arrangements between EZ and the NMA states that the Board will submit planned, new or amended implementation rules to the Minister, who has the power of rejection.
– Policy rules of the Minister with regard to fines and leniency take the place of the corresponding implementation rules of the NMa, slated for the first half of 2009.

The Minister will also set additional policy rules (on mergers in the health-care industry, and combination agreements); although these are not the result of the abovementioned desire to sharpen the separation of policymaking and implementation.

Towards a leaner government
The NMa needs to comply with the current administration's program towards a leaner and more effective government. Approximately 57 jobs will be cut at the NMa between 2008 and 2011, while the budget will be cut by approximately €5 million. Considering the NMa's natural turnover, it is not expected that forced lay-offs are necessary. In complying with the program, the NMa's aim is to safeguard the effectiveness of both its industry-specific as well as its general competition-oversight activities. The Board's proposed measures offer a balanced mix of strategic, statutory and efficiency measures. This will undoubtedly put extra pressure on the NMa's ability to meet the political and public demands in fulfilling its oversight role. However, any expansion of the NMa because of new statutory tasks is not affected by this program.

Recommendations Netherlands Court of Audit
The Netherlands Court of Audit made several recommendations to the NMa in 2007. As a result, the NMa recently published more information about the application of several alternative enforcement instruments. In relation to the Periodic Penalty Payment and Appeal in case of a Belated Decision Act (not yet adopted), the NMa analyzed its investigations' lead times, which appear to have significantly improved across the board. Following the Netherlands Court of Audit's advice, the NMa now publishes lead-time information on its website.

Developments Competition Act
A bill on expanding the so-called bagatelle provision in the Competition Act (Section 7) was recently up for debate in Dutch Parliament. At the time of writing, the outcome of the debate was still unclear. Ms. Van der Hoeven has announced to push for a so-called dual system in which individuals that violate the Competition Act can be prosecuted, while undertakings continue to fall under administrative law. Consultations are underway to discuss the practical implications of this plan. The NMa considers a dual system a chance to further increase oversight effectiveness, because the deterring effect of oversight will increase when individuals can be prosecuted.

How does the NMa deal with public interests?

Competition is a cornerstone of any free-market economy, and thus also of Dutch society. Charged with the oversight of the competition process in industries where the government finds competition a welcome principle, the NMa finds itself fully embedded in society. It can therefore not close its eyes to other public interests that, simultaneously with competition, affect markets.

Public interests

Public interests exist the moment a government takes it upon itself to protect them in the belief that these interests would otherwise not be done any justice. The current financial and economic crisis shows how public interests can greatly influence markets (in this case financial stability), but it could also be, for example, environment, safety or quality.

The role of competition

Competition will always remain an essential incentive, making undertakings more robust (a valuable characteristic), leading to innovation, to a wider range of choices, and to higher quality. Which are all welcome developments, particularly in markets where other public interests also play a considerable role. Competition impediments hinder these developments and should therefore only be used as a last resort to safeguard public interests. These principles, passed on to the NMa by legislators, are at the core of the NMa's tasks. That is why the NMa's mission is 'making markets work'. Supply and demand often produces the desired outcome on any given market. The NMa's job then is to determine to what extent safeguarding a certain public interest justifies restricting that economic process. Such a decision should not be taken lightly.

Verifiable information

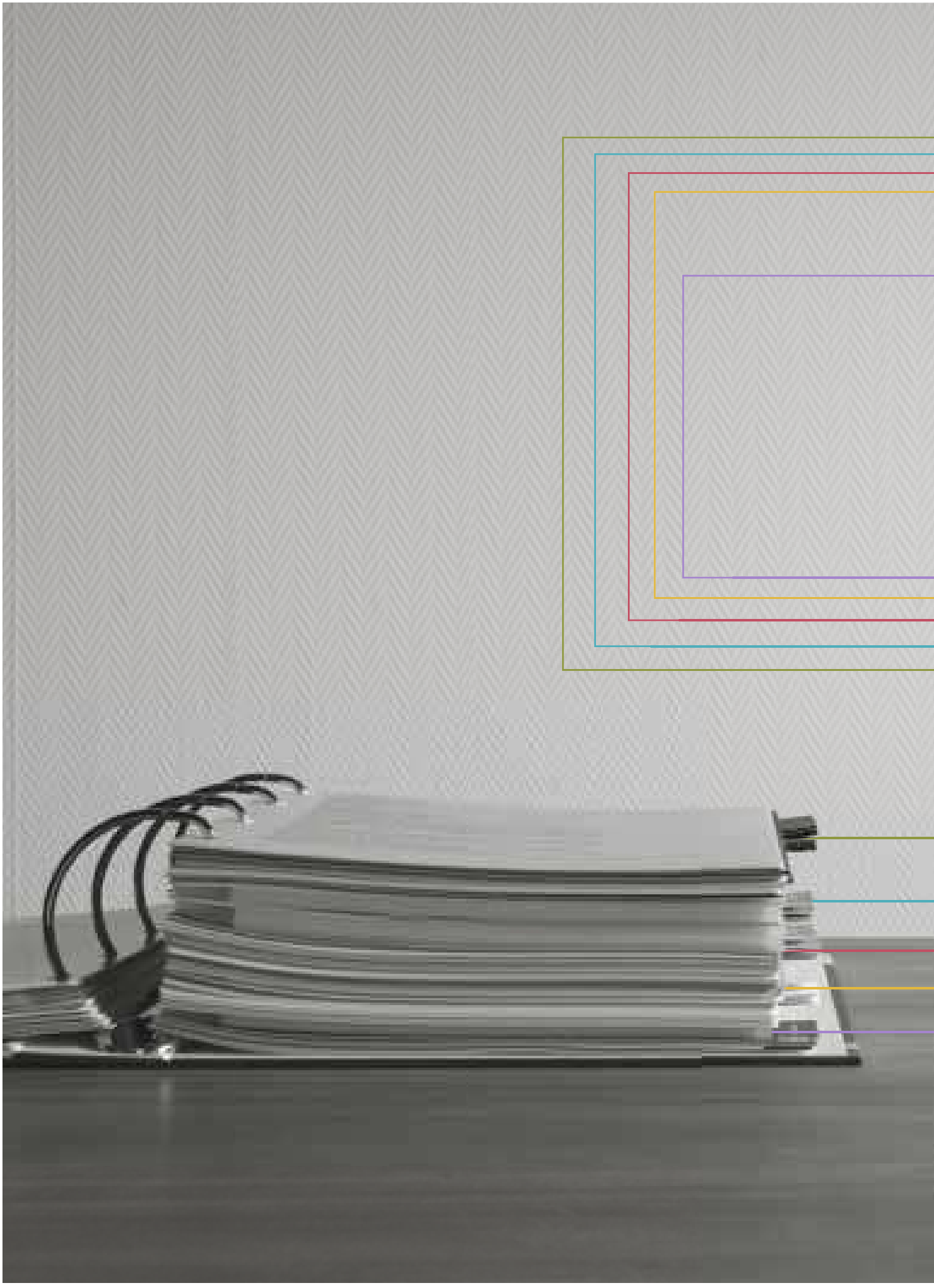
Fortunately, competition law offers enough reasons to include public interests in decision-making, when the market is unable to protect them enough by itself. Case law offers such reasons, such as the co-called Wouters ruling, in which the ECJ answered the question of whether the Netherlands Bar Association is permitted to draw up rules in order to protect the Association's basic principles. It is permitted, provided there is verifiable data, open to objectification, proving that certain agreements or conduct indeed contribute to the protection of a justified public interest, and also that this protection cannot be offered in another, less restricting way. Economic insight is also included. The law offers the option to approve of agreements that ostensibly offer economic benefits. The NMa bases its decisions on facts rather than on assumptions.

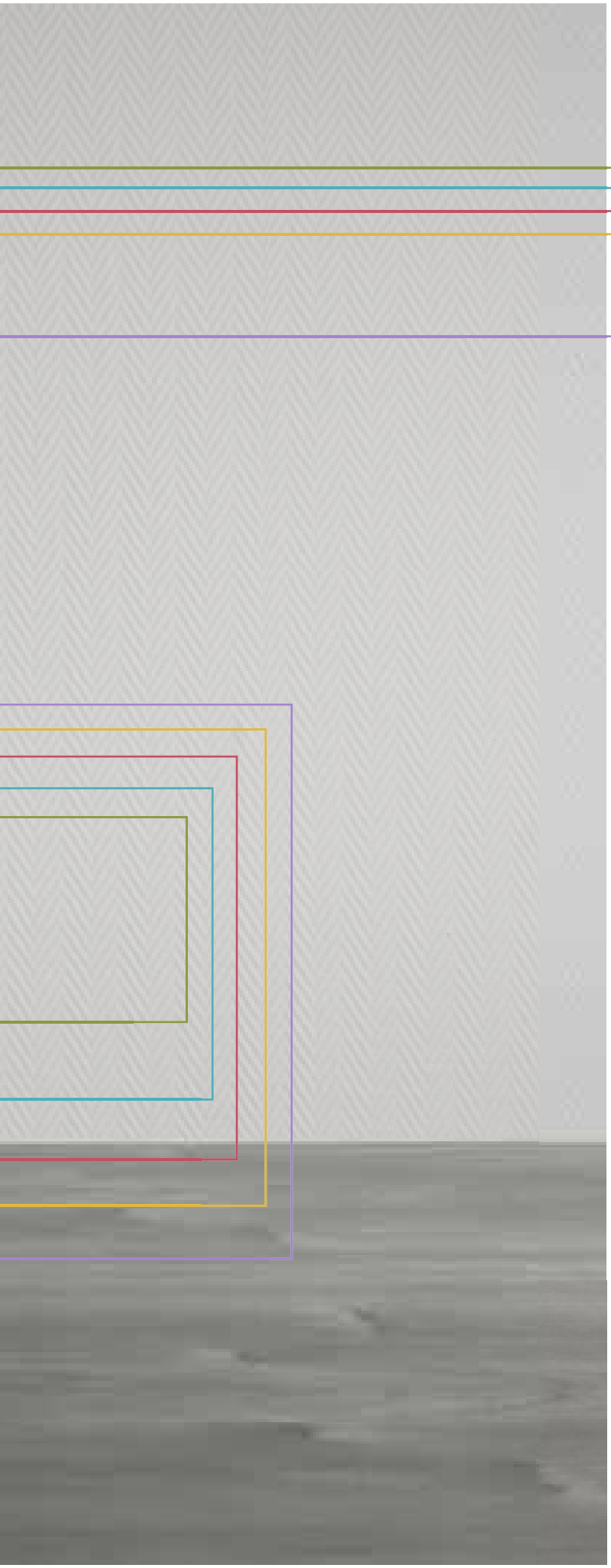
Health care industry as example

The health care industry is a good example. The NMa will never blindly rely on the promise of merging or cooperating parties that their actions will increase the quality of their services. The importance of competition, and the risks of its impediments, are far too great for that. Lawmakers have firmly embedded both the concept of competition and the importance of health care quality in legislation. As markets become more complex and as more important public interests start to play a role, the more intense government oversight becomes. That is why the NMa turns to, among others, the Netherlands Healthcare Authority (NZa) and the Netherlands Health Care Inspectorate (IGZ) for advice. This approach guarantees sound judgment as to balancing competition and other public interests.

Careful assessment possible

When markets are faced with profound changes and development, such as turmoil in the banking industry or expansions in the health care industry, the call for the protection of public interests grows louder. This is completely understandable, and, in most of the cases, justified as well. Competition law is fully equipped with all kinds of tools to ensure a careful assessment of all of the interests involved, so that intervention in the competition process by introducing new legislation will only happen as a last resort.





General

'Making markets work' is the NMa's mission. This section covers the various markets that the NMa focused on in 2008. The NMa's areas of attention are covered in the other sections.

Mergers and acquisitions

Green light to acquisition Yellow Pages Netherlands by De Telefoongids

Dutch business directory De Telefoongids has been allowed to acquire Yellow Pages Netherlands, after a thorough NMa investigation, which revealed that competition between the two at the moment is limited. The number of advertisers saying they will switch to the other competitor if prices were to be raised is small. The number of advertisers who, in the past, have indeed switched after prices were raised is small as well.

The NMa investigation also revealed that the use of paper versions of business directories has considerably decreased in recent years, as users increasingly favor online search alternatives. The NMa expects that, in time, advertisers will follow. A substantial number of advertisers indicate that in case of a price increase they will consider switching to other media, including both offline and online media, or that they will completely stop advertising. The NMa notes that a small group of advertisers might be disadvantaged by the acquisition, though nonetheless smaller than the group of those who will benefit from it. Part of the equation is that the acquisition will result in consumers receiving both directories as one by 2009 at the latest. An integrated directory is expected to be consulted by more users, benefiting advertisers. Their websites have already been integrated. Meanwhile, iLocal has started a procedure against the grant of the license.

NMa conditionally approves joint venture KPN-Reggefiber

Having consulted with market parties, the NMa conditionally approved the joint venture of Dutch telecom company

KPN and optical-fiber company Reggefiber, which will install fiber networks in the next few years for the Dutch consumer market making it possible to offer broadband services. KPN and Reggefiber guarantee that other telecom companies will have access to their joint venture's network in a non-discriminatory way, responding to earlier objections by the NMa who feared that the joint venture would be insufficiently stimulated to grant other telecom companies access. If these conditions are not met, then parties that want to gain access to the fiber network can file a complaint with the NMa.

The NMa has closely worked together with the Dutch Independent Regulator of Post and Electronic Communications in the Netherlands (OPTA) in the assessment of this case, in which OPTA provided the NMa with advice. Additionally, OPTA has drawn up draft policy rules for tariff regulation of unbundled fiber access in consultation with the NMa. The NMa has used these draft policy rules as input in its assessment of the joint venture. General speaking, the NMa enjoys a strong working relationship with OPTA. In 2008, for example, the NMa provided OPTA with advice on six market analyses decisions.

Further investigation into joint venture in industrial-water industry
Dutch industrial-water supplier Evides Industriewater BV and water supplier NV Waterleiding Maatschappij Limburg (WML) have yet to be granted approval of the NMa for the creation of a joint venture. These parties not only provide drinking water in large (different) parts of the Netherlands, they also treat waste water, and they produce and distribute industrial water. The NMa believes that the proposed joint venture could attain such a dominant position that it might leave buyers on the market for production and distribution of high-quality industrial water with too few alternatives. This applies to buyers that do not meet their demand for water themselves. If parties wish to go ahead with their plans, they will need to apply for a license then.

Enforcement

Fines for failure to notify of an acquisition on time
The NMa has imposed two fines of €315,000 and €92,000 on Henal N.V. and Schilde Beheer B.V respectively for having failed to notify the NMa on time of their acquisition of Pacton B.V. The undertakings notified the NMa of the acquisition, which exceeded the legal turnover thresholds, only after the agreement had already been concluded. It is prohibited to carry out an acquisition without having notified the NMa of the intention thereof in advance. This fine marked the first time that the NMa imposed a fine based on its expanded fining powers, which came into effect on October 1st, 2007 with the adoption of several amendments to the Dutch Competition Act. The maximum fine for not notifying an intended merger has subsequently been raised from €22,500 to €450,000 or, should that be higher, 10 per cent of the undertaking's turnover. Both parties have filed objections to this decision.

Evading NMa fines does not pay off
Evading a fine imposed by the NMa does not pay off. When a construction company claimed it was unable to pay the fine it got, the NMa later found out that funds had disappeared from the company's coffers, as well as that the company had apparently transferred several properties below their market value to a sister company. The NMa consequently filed a lawsuit against the company's CEO, claiming the company was unwilling to pay. The District Court of Den Bosch ruled that it could not be proven that the company was unable to pay, as claimed earlier by the company. The company's CEO was therefore sentenced to payment of the fine plus all costs related to the lawsuit. The CEO has appealed this ruling.

Fine for breach of seal affixed during company inspection
The NMa has imposed a fine of €269,000 on consumer-goods company Sara Lee Household & Bodycare Netherlands, because it found out that seals that had been

affixed to a door by NMa officials the night before had been breached. The NMa seals off rooms when an investigation that involves looking for evidence of a violation of the Competition Act has not yet been completed. Using these seals, the NMa can continue the investigation the next day without the risk of losing or damaging the evidence that is stored in the sealed-off area. This is first time that the NMa imposed a fine for breaching a seal. As of October 1st, 2007, the NMa is authorized to impose fines by itself for such an offense, for which the maximum fine can be €450,000 or 1 per cent of its annual turnover. The NMa is thus equipped with a deterrent for when an investigation is frustrated. In the past, incidents like these had to be reported to the police.

Fines imposed on traffic light suppliers
Five suppliers of traffic control equipment and systems have been fined €400,000 by the NMa for having made cartel agreements between 1998 and 2003. This is the final case in which construction companies were offered the option of taking the 'fast-lane procedure' in order for them to 'come clean' in relation to the so-called 'construction-industry fraud'. One party has filed an objection.

NMa releases short film on leniency
A considerable amount of leniency requests were filed with the NMa in 2008. Applying for leniency with the NMa may lead to fine reduction or may even lead to the applicant escaping the fine altogether, provided cartel members confess their involvement to the NMa in time and provide information that can be used in tracking down the cartel. A specially developed educational film focuses attention on the leniency program. The film is available for download on the NMa's website (www.nmanet.nl).

NMa continues to keep a close watch on construction industry
The NMa has completed all cartel cases against Dutch construction companies that had the option of taking the fast-lane procedure. In late July 2008, the District Court of Rotterdam laid down rulings in 18 cases of construction companies that had been fined for participation in the system of informal preliminary consultations in the civil engineering sector. The court upheld the fining decisions in 16 cases, while in one case it lowered the fine. In another case, the court ruled that the NMa still has to handle the case in the objections procedure. The court and the Trade and Industry Appeals Tribunal (CBb) are currently still reviewing appeals in dozens of cases.

In 2008, the NMa carried out a survey in the Dutch construction industry among 500 industry professionals. The results reveal that the Dutch construction industry *as a whole* has witnessed a change in the way it conducts business since the Dutch government started to tackle the fraudulent practices in the industry. At the same time, there are indications that price-fixing has not yet been rooted out completely. That is why the NMa plans to keep a close eye on the construction industry, as evidenced, for example, by the reports in 2008 on the paint industry. Also, when a Dutch municipality put out a construction tender in mid-2008, the NMa stepped in. Having received an indication about possible cartel agreements, the NMa issued a warning to the construction companies that were involved. As a result, the municipality was able to award the contract for a substantially lower price than earlier possible. The NMa continues to keep an eye on developments.

The judge draws the line

In 2008, the first court rulings in construction cases have been laid down, as the District Court of Rotterdam ruled on the civil engineering and technical contractor subsectors. These cases have been the result of the call by the NMa and the Dutch government to the construction industry 'to come clean.'

Fast-lane procedure

In response, a relatively large number of undertakings had filed leniency requests. To process these efficiently and without lengthty procedures, the NMa introduced the so-called 'fast-lane sanction procedure' in 2004. Undertakings could opt for this procedure instead of the standard procedure only after the sanction report had been drawn up. By doing so, undertakings waived certain individual rights, including their right to peruse their individual evidence files. Furthermore, they would not dispute the facts nor the violation mentioned in the report. In return, their fine would be reduced by 15 per cent.

The District Court of Rotterdam ruled that the fast-lane procedure was justified and that it did not harm the civil engineering undertakings' right of defense. After all, construction companies could voluntarily opt for the fast-lane procedure. The Court also approved of how the fines had been set in the 'come-clean' cases, tailored to each situation. The only critical comment concerned whether the fines the NMa imposed sufficiently reflected the specific circumstances of several undertakings. The Court therefore reduced the fine in one case. In 24 out of the 27 civil engineering cases, the judge was positive about the NMa. Appeals have been files in 18 cases.

Leniency decision justified

In reaction to fines in the technical contracting industry, the Court ruled on the NMa's instrument of leniency for the first time ever. The key issue here was whether the NMa had sufficiently carried out ex-officio investigations, before the undertakings had applied for leniency, since 'merely' 40 per cent leniency discount could be given on the fines, in contrast to a 50 per cent discount in other subsectors. This decision was considered as justified by the Court. Parties have appealed the Court's decision.

Cell phone companies

A highly anticipated ruling by the European Court of Justice (ECJ) will respond to questions posed by the Trade and Industry Appeals Tribunal (CBb) for a preliminary ruling in the cell phone companies' case. These questions include whether judges in individual Member states are bound by the evidentiary rules from European competition law (the Anic ruling). The issue is whether judges can follow the Member state's evidentiary rules or whether they should follow the ruling's presumptive evidence rule. The CBb refuses to tackle this issue without having consulted the ECJ first. The preliminary rulings will also affect other cases on the CBb's docket.

AUV case thoroughly investigated

In the summer of 2008, the CBb upheld the District Court of Rotterdam's ruling in the AUV case, a textbook example of anti-competitive behavior, in which veterinarians' corporations and wholesaler in veterinarian drugs AUV and Aesculaap refused to supply certain veterinarians. The violation's context was investigated enough for the NMa to reach this conclusion. The investigation did exceed however what would be considered a reasonable time limit, according to the CBb, resulting in lower fines imposed on AUV and Aesculaap to €7,760,000 and €200,000 respectively.

Investigation in psychotherapists' case not thorough enough

In a case of three associations of independent psychologists and psychotherapists, the CBb ruled that the NMa had investigated the context not thoroughly enough to establish an anti-competitive violation. In examining the facts, the NMa had to determine what role general practitioners and health care insurance companies played in the burgeoning markets. The mere fact that, legally speaking, there is room for competition since the introduction of market-based system is not enough to consider price advices as violations of the law. The CBb would like to see an evidenced-based analysis of the liberalized health-care industry.

	Competition Act (Mw)	Mw regular	Mw construction	Energy	Transport
	(total 39)	(9 cases)	(30 cases)	(total 18)	(total 1)
District Court (Rb)	33	3	30	-	1
Trade and Industry Appeals Tribunal (CBb)	6	6	-	18	-
Won	Rb 29 CBb 5	Rb 2 CBb 5	Rb 27 CBb -	CBb 12	-
Lost	Rb 4 CBb 1	Rb 1 CBb 1	Rb 3 CBb -	CBb 5	-
Other/partially stands	-	-	-	CBb 1*	Rb 1*

Table 1 The judge's decisions in figures

* Other/partially stand (violation stands and fine is reduced, or violation partially stands, etc.)

Government aid or not?

In 2008, the CBb ruled in an equally interesting case involving tennis parks: Blovo Boontje, in which the NMa tried to make a distinction between 'regular' competition cases and government aid cases. Unlike the European Treaty, the Dutch Competition Act does not contain any provisions regarding national governments favoring certain undertakings over others, which would be considered government aid under European law. However, these kinds of government-initiated market disruptions do exist. In its decision, the NMa alluded to this missing provision, thus claiming that it therefore cannot handle these kinds of complaints. This view is not shared by the CBb, ruling that the moment economic activities are involved, the government acts as if it were an undertaking and no longer as a government agency. Under the Competition Act, the NMa is then authorized to handle the complaint.

NMa's position on statutory interest upheld

In 2008, the Supreme Court of the Netherlands handled a case of the NMa for the first time ever. The protracted debate on what the starting date should be when calculating statutory interest on NMa fines was ruled in the NMa's favor in July 2008. That date should be thirteen weeks after the publication of the sanction decision. Legal remedies against a sanction will not void the fine plus the statutory interest, but will merely postpone the undertaking's obligation to pay.

Concentration monitoring

Firm action against too late a notification of a merger justified

The District Court of Rotterdam ruled for the first time on the issue of 'gun-jumping' in the Airfield/Chellomedia case. The NMa takes firm action when a merger has gone through without the NMa having been notified thereof and

without the NMa having given approval thereto. If the NMa would not do so, it would undermine the preventive effect of concentration monitoring. Having extensively analyzed the transfer of power in this case, the Court endorsed the NMa's choice.

Energy industry

NMa sets regulation method
The CBb gave a preliminary ruling on the method decision 'regional network operators natural gas' for the second regulation period and on the method decision 'natural gas third regulation period'. The CBb ruled that the NMa can set the regulation method, as long as it is transparent and well reasoned. The fact that the network operators would rather see a different method has no influence whatsoever on the legitimacy of the NMa's method.

CBb critical on the NMa's interpretation of its powers
The CBs remains critical with regard to the NMa's interpretation of its powers and of statutory requirements. In the Strijp case, the CBb said that, in case two operators are at odds with each other, the NMa, as arbiter, is not authorized to determine who the rightful network operator is. According the CBb, any interpretation of the so-called Area apportionment needs to be done in a binding instruction, under Section 5 of the Electricity Act.

Interpretation of the concept of stakeholder
The CBb continues to use the concept of stakeholder in its assessments, and it once again confirmed that network operators will almost always be considered as stakeholders. The CBb does not apply a similar approach to *gas shippers*. It concurs with the NMa that *shippers* have been unable to sufficiently prove that they had an individual interest with regard to the balancing regime for natural gas. GasTerra is a different case though, according to the CBb, as it was the only *shipper* that fell in the least favorable scheme ('the third tolerance bracket').

Transport industry

Schiphol uses a cost-allocation system for the airlines' use of the airport. The NMa's approval of that system has passed the District Court of Rotterdam's review almost untouched. The method of regulating Schiphol does not have any European origins and happens relatively from afar. The NMa has thoroughly examined the system and meets the court's critical demands.

Health Care

The NMa received 31 merger notifications in 2008 from the health care industry, a longtime area of attention. Turnover thresholds for mandatory notification in that industry have been lowered from €113 million to €55 million, which will likely to lead more merger notifications in the future.

Mergers and acquisitions

Merger between Evean, Philadelphia and Woonzorg
For the first time ever, the NMa has reviewed a merger between two health-care providers, Evean and Philadelphia, and a housing corporation, Woonzorg. Evean and Philadelphia's activities include nursing-home care, home care, and care for the disabled. Woonzorg's activities include construction and letting of residences, homes and nursing homes.

Because anti-competitive objections had been raised to the original plans, the NMa attached conditions to the merger plans. Competition could have been severely impeded in several service areas, such as the province of Groningen and the Zaanstreek area. In these regions, Evean and Philadelphia is already an active player in the nursing home market. At the same time, competitors of Evean and Philadelphia in these areas are dependent on Woonzorg, as they are leaseholders of nursing homes of which Woonzorg is the lessor. The future market share of these competitors might be influenced by the planned new holding, as housing is a critical part of Woonzorg's service to them. Worst-case scenario would be that the planned holding's market share would become so large that it could hurt competition. The anti-competitive objections would be overcome if Woonzorg would hive off eleven of its nursing homes in the service areas in question, currently leased by competitors. Hiving off these homes will continue to leave consumers with ample choice, and will continue to keep competitive pressure in the market at the preferred high level.

In late June, the then-Minister of Housing, Ms Vogelaar, prevented Woonzorg and the care providers from integrating further, reasoning that, in her view, regulations prohibit housing corporations to take on any care activities.

Acquisition of ThuishulpNederland by Asito
The NMa has imposed conditions on Dutch facility-service provider Asito Dienstengroep B.V. (ADG) before it could acquire Dutch home-care organization ThuishulpNederland B.V. ThuishulpNederland is part of the Evean Group and is solely active in the home-care industry. Having reviewed the plans, the NMa concluded that the merger would lead to problems in the city of Zwolle, located in the eastern part of the Netherlands, where the combined market share would be too large. As a result of this conclusion, parties have hived off their overlapping activities its home-care activities in Zwolle, and have transferred these to home-care provider De Nieuwe Zorg Thuis. This decision prevents that the position of ThuishulpNederland in Zwolle would lead to competition problems.

Merger between Cordaan and Amsterdam Thuiszorg
The NMa has attached conditions to the merger between Dutch home-care providers Amsterdam Thuiszorg Foundation and Cordaan Foundation. The NMa approved the planned merger, after Amsterdam Thuiszorg had hived off a quarter of its activities in the fields of domestic care, personal care, and nursing and counseling.

Merger in the licensing phase
In August 2007, the NMa indicated that it wanted to further investigate the planned merger between the Dutch mental health-care providers AMC de Meren Foundation and the JellinekMentrum Foundation. Having conducted a thorough investigation in the licensing phase, the NMa approved this merger in April 2008.

The planned concentration of ZorgAccent & Thuiszorg Noord West Twente Foundation, Sutfene Foundation, Carinova Leiboom Groep Foundation and Vérian Foundation could impede competition on the markets of domestic care, personal care and nursing, maternity care, and psycho-geriatric and somatic nursing home care. The NMa therefore ruled in the summer of 2008 that a license is required for this merger. In the licensing phase, the NMa will further investigate the exact consequences of the merger to competition. Parties filed the license application with the NMa in late 2008. Please turn to page 24 for more on the theme of mergers in the health care industry.

Enforcement

Multi-million euro fines in home-care industry
Changes in the Exceptional Medical Expenses Act (AWBZ) in 2003-2004 signaled the transition to a market-based system in the home care industry. Municipalities have put out domestic care to tender since 2007 because of the Social Support Act (WMO). Liberalizing the home care industry was aimed at improving home care quality and accessibility, and affordability, as care providers would then focus on their clients and try to do their best to win the client's approval. Cooperation between care providers would still be allowed in the new situation. The NMa indicated that chain cooperation between various care providers would not pose any problems in general, unless it would lead to exclusion.

The NMa imposed fines on five home care providers in the Dutch regions of Kennemerland and 't Gooi for having concluded anti-competitive agreements. These providers transferred activities to each other and made agreements on who would offer their services in which service area. This led to a situation in which clients were referred to any of the other participating providers, leaving clients no longer with any choice. With clients guaranteed through their mutual agreements, these care providers had no incentives to become more efficient, more client-oriented or to innovate. Internal documents reveal that parties deliberately chose to collude instead of to compete. In the region of Kennemerland, Viva! Zorggroep Foundation and Zorgbalans were fined €4,003,000 and €800,000 respectively. In the region of 't Gooi, TGV, Vivium and Hilverzorg were fined €1,621,000, €816,000 and €611,000 respectively. The current transition

to a market-based system calls for the industry to make profound adjustments. Believing that fines should not be counterproductive to the ongoing transition, the NMa has mitigated the fines. The providers in question have appealed the fining decision.

Commitment decision in day-care industry
Since 2007, undertakings have the opportunity to file a commitment with the NMa, which, in a nutshell, means that they promise to appreciably terminate or will not (or no longer) exhibit certain conduct that may be in violation of the Competition Act. The NMa made its first commitment decision in June 2008, which was in the day-care industry. Five Amsterdam-based day-care providers had exchanged information about their plans on whether or not to enter each other's markets, thus restricting parents' choices. The day-care providers made a commitment to the NMa to appreciably change their conduct. The NMa will keep an eye on whether this commitment is honored. If a commitment is not honored, the NMa can impose a fine of up to ten per cent the undertaking's annual turnover.

Round-table meetings with health care professionals
In response to the 2008 NMa Agenda, a number of parties drew attention to the purchasing behavior of big parties in the health-care industry. As a result, the NMa made the decision to gauge in 2008 the magnitude of this problem. To this end, round-table meetings had been organized, together with the NZa, for physiotherapists, psychologists, general practitioners, and psychiatrists. In early 2009, the NMa and the NZa will determine whether an intervention is appropriate.

NMa and NZa explain division of duties
For years, the NMa has provided the Dutch health-care industry with advice on what is allowed and what is not under the Dutch Competition Act. In 2008, the NMa and the Dutch Healthcare Authority (NZa) organized a convention for health insurers and health-care providers to explain in more detail which duties are carried out by which regulatory body and how the both of them work together.

NZa regulates ex-ante and is authorized to impose conditions on the market. The NMa checks compliance with the rules for fair competition and whether market players do not become too dominant, for example, through mergers. Both regulators offer assistance to one another when reviewing mergers. Mergers need to be notified with the NMa, and only the NMa is authorized to rule on them. The NZa gives advice on mergers, based on three criteria: affordability, accessibility, and quality of the care provided.

Both the NMa and NZa are authorized to act in case of dominant positions. An undertaking has a dominant position when it can act independently of its competitors, suppliers or clients. The NZa takes the lead in cases of considerable market power. It prevents such positions from impeding the competition process, and for that purpose, the NZa can intervene pre-emptively. The NMa can act ex-post when an undertaking has abused its dominant position, because, for example, competitors have been forced off the market, or because services were offered at too high a price. In these cases, NMa and NZa consult with each other.

Health care mergers scrutinized

The NMa received more than 30 merger notifications from the health care industry in 2008, more than from any other industry. Only if they do not 'significantly' impede effective competition will mergers be approved. So what are the NMa's choices and considerations in its assessment of mergers in a relatively new market, where competition has just started to pick up?

Societal perspective

In the health care industry, public interests, such as the quality of health care, play a big role: patients and insured individuals are not your average consumers. Competition law offers plenty of options to include public interests in merger assessments. The NMa needs to make a decision when anti-competitive problems may arise, because both the principle of competition as well as the importance of the quality of health care have been embedded in law. So when it processes a merger application, the NMa often consults with the clients' councils of the applying parties. In addition, the Dutch Health Care Authority (NZa), and, if necessary, the Netherlands Health Care Inspectorate (IGZ) give their advice to the NMa. For more on the theme of public interests, please go to page 10.

Future competition

The competitive situation in the health care industry is in constant flux because of changes in legislation. In merger review, both the current situation as well as possible future scenarios should be included. For example, in case of mental health care, patients often prefer treatment close to their homes. This means there is little competition between care providers in different geographical areas. However, should qualitative benefits increase with time, patients will likely become more willing to travel greater distances, expanding the care providers' catchment areas. Care providers in neighboring service areas will become each other's competitors. So if parties in adjacent service areas merge, this form of competition will never have had the chance to blossom. The NMa will therefore be critical towards those kinds of concentrations.

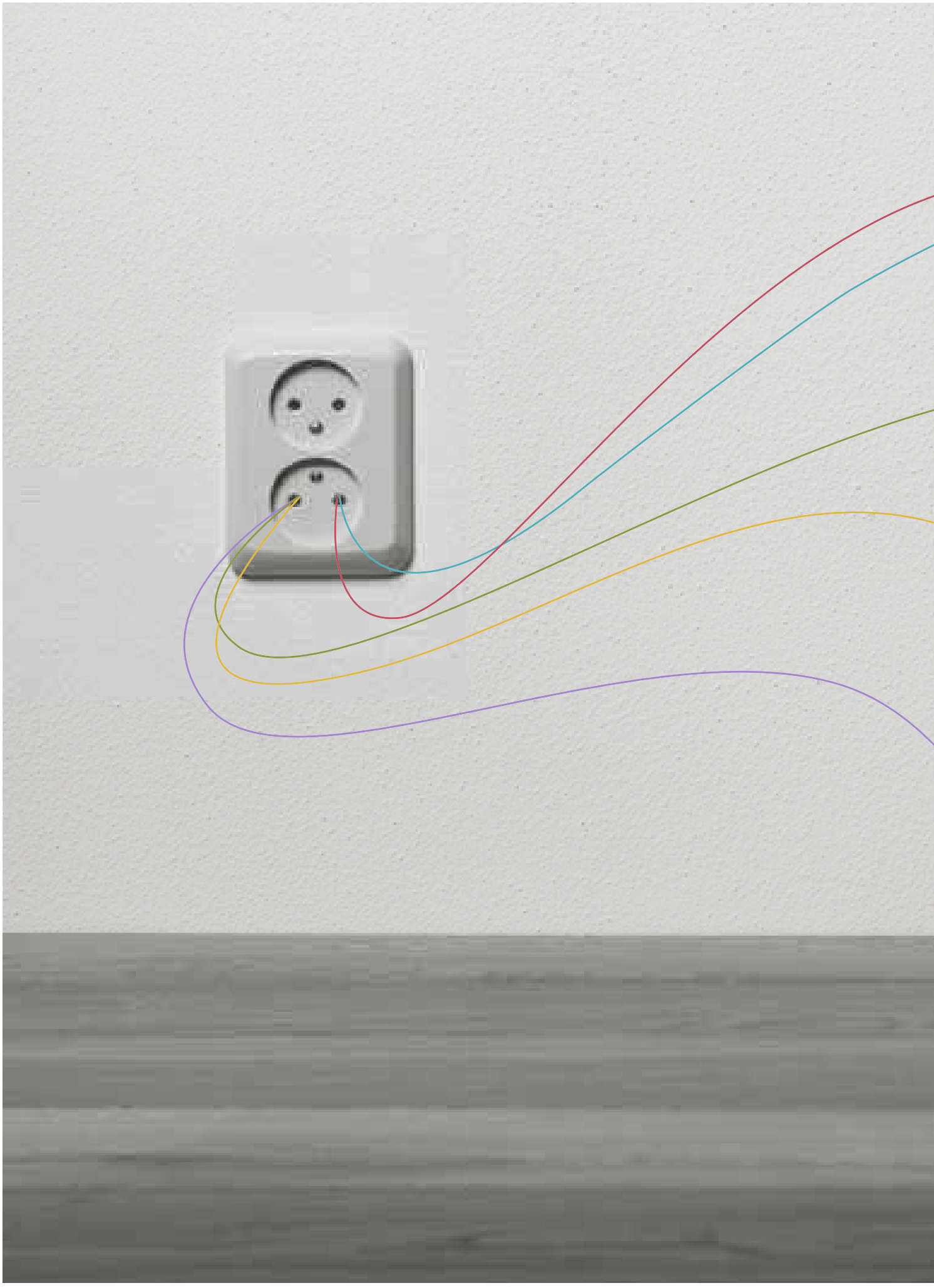
Merger review

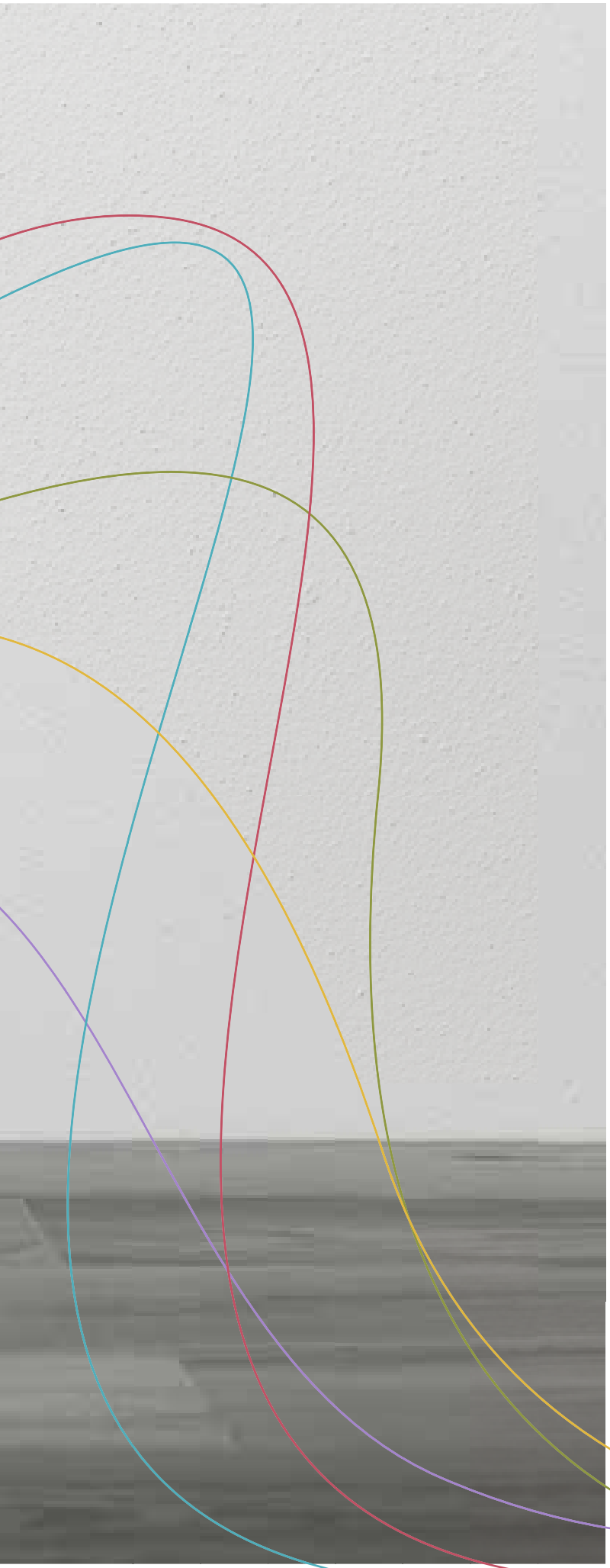
Public interests and future competition make merger review in the health care industry a complicated task. Yet it can be estimated reasonably in advance whether merger plans get the nod or not. The huge amount of decisions in recent years has created a high level of transparency. In fact, the NMa has drawn up guidelines for home care and intramural care for the elderly to help parties with their merger application. Based on recent decisions, the guidelines offer insight into the way product markets and their geographical markets have been delineated in the past. If the odds for approval are slim, parties often retract their application in an early stage.

When the NMa sees objections, based on its first investigation, parties need to apply for a license. The NMa will then further investigate the case before it issues a decision. If parties consider it likely that the NMa will disapprove the merger, they sometimes forgo applying for an application or they will retract an already filed application during the procedure, for example, after they have received critical comments from the NMa. Sometimes the NMa attaches conditions to a merger. In 2008, parties in three merger cases offered so-called remedies, measures to counter the impediments to competition as a result of a merger. The remedies in 2008 often entailed hiving off certain organizational units or activities to preserve competition. Examples thereof can be found in the text on health care on page 21.

The NMa's critical eye

Was merger review in health care in 2008 critical enough? Parties in health care are reasonably able to assess whether a merger application is approved or not. Experience shows that a considerable amount of incoming merger notifications do not pose any problems after investigations. Nevertheless, the NMa approved three big merger cases in the health care industry only after having imposed strict conditions.





Energy

As of June 1st, 2008, 'the Office of Energy Regulation' is the new name of the regulatory body for the energy market, which is part of the NMa. The new name is in line with the NMa's policy in how to name its divisions that are charged with industry-specific oversight. The Office's primary objectives remain unchanged: confidence in the energy market and a reliable energy supply.

Increased competition on consumer market

The number of consumers that switch to a different supplier is steadily increasing, according to the annual monitor for small-scale users. Eight per cent of all consumers have switched to a different supplier between July 2007 and July 2008, compared to seven per cent in the previous year. Also, consumers have more and more choices on the energy market, while energy companies have increasingly become more active in customer-recruitment activities. These are indications that competition on the energy market has increased.

It appears that consumers can place greater trust in information about prices and conditions that are published on the energy companies' websites. Having investigated the provision of information by energy companies, the NMa has drawn up rules that information of energy companies need to comply with, such as publishing information in a uniform way, enabling consumers to compare offers. The NMa highly values the availability of clear and reliable information. Launched in 2008, the online comparison tool Energiewijzer is based on the NMa's own information on the energy market and can be accessed via consumer information portal Consuwijzer, jointly operated by the NMa and several other Dutch regulators. Consuwijzer helps consumers by enabling them to compare companies on aspects such as service quality, phone accessibility and product range.

The monitor also reveals that consumers are increasingly satisfied with the service of their energy companies, such as the administrative services as well as the handling of complaints. Despite these increases, the industry average for handling complaints is still unsatisfactory. Seeing the handling of complaints as critical to consumer confidence in energy companies, the NMa has therefore encouraged those companies to step up their complaints-handling activities. The NMa will investigate the complaints-handling quality level again in 2009.

Wholesale market: more improvement needed

More improvements are needed on the wholesale markets for electricity and natural gas in order to reach the goal of well functioning markets. Dutch companies and consumers could see lower prices for electricity and natural gas if international transportation connections are utilized more efficiently, according to the 2007 monitor report on energy markets. Recent years have already seen many steps to further integrate the Dutch energy markets with foreign markets. For example, an electricity connection with Norway came into operation in 2008, and, on the market for natural gas, information about the volume of available cross-border capacity has been made available online for a year now. However, additional efforts are needed in order to have the wholesale market function better, according to the NMa. GTS, the Dutch gas transport system operator, and TenneT, the operator of the Dutch electricity transmission system, play an important role in that process.

Improving the European market
Aiming to advance a single European energy market, the NMa is active in various European expert groups on electricity and natural gas. On the electricity market, the coupling of national markets is seen as a critical condition in reaching that goal of a single European market. Coupling the Dutch market with the German and Norwegian markets is currently underway and is projected to be completed in 2010. Also, steps have been taken with regard to the allocation of cross-border capacity. For the allocation in the long run, uniform rules will be drawn up, while for the short term it will become possible to conduct cross-border trade during any given day.

On the natural gas market, regulators, network operators, and market parties within the Gas Regional Initiative North West (GRI NW), chaired by the NMa, have adopted a road-map for the next four years. The roadmap charts what steps the parties within the GRI NW plan to take in order to achieve the objective of a well functioning European gas market. Following up the agreements made in the GRI, the electricity exchanges in the Netherlands (APX) and Germany (Trac-X) have started a pilot project for secondary trade in cross-border capacity, and many steps have already been taken to make the market more transparent.

Improving the Dutch market
One of the most important topics with regard to the Dutch electricity market is the scarce transmission capacity on the grid. Grid operators reported during 2006 that there was insufficient transmission capacity to accommodate all new connection requests. Although it remains to be seen whether there actually is a shortage, market parties encounter many problems because of the uncertainty that the shortage brings along. Parties that would like to invest, for example, in a new plant, need assurances that there is sufficient capacity available for connecting that plant. The NMa provides the Dutch Ministry of Economic Affairs with advice on solutions for the short and long term.

On the domestic wholesale gas market, the NMa has established that Dutch gas trading company GasTerra still has a dominant position in the market for flexibility services. Enabling suppliers to balance peak and off-peak demand in natural-gas consumption, these services can virtually only be offered by GasTerra. Its dominant position forces Dutch transmission system operator GTS to offer flexibility services against regulated tariffs. The NMa has therefore developed a method that can be used in the annual calculation of tariffs. This *method decision flexibility services* is effective between 2009 and 2012, after which a reassessment will take place of whether GasTerra still has a dominant position.

The process of regulation

Grid administrators for electricity and natural gas face regulation because they are monopolists. Regulation simulates a competitive market in stimulating administrators to operate as efficiently as possible and to achieve a no more than reasonable return. This simulation should lead to an optimal balance between the prices consumers pay and the quality of the grid.

In the tariff-setting process, the grid administrators' turnovers from the previous year are taken as the starting point. The old tariffs are annually adjusted with a percentage based on several factors, of which the most important one is the so-called x-factor, which is an efficiency-stimulating tariff cut. Its level is partially determined by the industry's average efficiency level. Grid administrators that are more efficient than the industry's average will thus generate extra profits for that period. In the next period, the Office for Energy Regulation will set new tariffs. The average efficiency improvement will therefore increase because all companies aim for profit maximization. This system, being judged on one's performance relative to the other administrators, is also referred to as 'benchmark competition'. This kind of competition leads to grid administrators implementing efficiency improvements, which in turn lead to lower consumer tariffs.

The NMa's concern with this system is the importance of supply reliability guarantee. Depreciations, for example, are taken into account when determining the x-factor, as are the necessary investments in the grid and the transmission quality. In addition, grid administrators are entitled to a realistic capital-cost compensation.

The process of tariff regulation starts with the method decision, in which the tariff calculation method is determined. Using these method decisions, the NMa then determines the adjustment factors (including the x-factor) for each grid administrator. The method decision is valid for an entire regulation period, which lasts three to five years, after which the process is repeated. For more information, please go to www.energiekamer.nl.

Much attention for tariff regulation

Regulation of the tariffs of the grid administrators attracted a lot of attention in 2008. Grid administrators are companies that manage an energy transmission grid. Their tariffs are regulated by the NMa, because grid administrators are natural monopolists and are therefore not stimulated to become more efficient. Every three to five years, the NMa establishes a method that is used in the annual calculation of the tariffs. Four such method decisions have seen the light in 2008: two for all regional grid administrators of electricity and natural gas, and two for the national grid administrators of electricity and natural gas.

The former two will result in a cutback in the regional grid administrators' revenues of 5 per cent on average for the period of 2008 till 2011. In practice, this will translate into a saving of €130 on an average household's energy bill. The regional grid administrators' tariffs have been widely debated in the last two years. In 2007, the NMa concluded that, in earlier periods, the grid administrators made more profits than what would have been considered reasonable. The new method decisions will see the tariffs be tightened further. However, this has not ended the transmission-tariffs debate. After the method decisions had been published, the grid administrators objected that the tariff regulation was too strict to guarantee a basic quality level, while consumer organizations claimed that the regulation was not strict enough. For more on the theme of tariff regulation, go to page 32.

The NMa has also issued method decisions for TenneT and GTS. The method will enable TenneT to calculate the transmission tariffs for 2008 till 2011. The method decision prescribes, among other things, that TenneT needs to save 2.1 per cent per year on its revenues in the next three years. With the method decisions, the NMa regulates the tariffs for three tasks of GTS: natural-gas transmission, balancing of incoming and outgoing gas flows, and the quality conversion of natural gas. This method decision is of vital importance to the market. The previous method decision was set aside by the judge in 2005 because of objections raised by GTS.

Developments in energy legislation

The Independent Grid Administration Act (Won) came into effect on July 1st, 2008. The act requires energy companies to segment their trade and production division from their grid division. In 2008, the NMa started to assess the first segmentation plans of energy companies. Also, several company visits have already taken place to check on the compliance with the requirement of a so-called 'fat grid administrator'. This requirement means that grid administrators have to carry out all the essential tasks themselves, such as grid maintenance, and that these cannot be outsourced to third parties.

In 2008, carrying out enforcement and compliance tests for the Ministry of Economic Affairs, the NMa was actively involved in several amendment projects. These amendments concern:

– Changes to the current Electricity Act 1998 and Gas Act with regard to, for example, the balancing regime, gas connections, quality and congestion management. The proposed measures are partially based on results from the 2006 evaluation of both acts. At the time of writing, the bill had still not been brought to Parliament.
– Changes to the current Electricity Act 1998 and Gas Act based on the so-called 'Free-Market Model Bill'. This bill proposes, among other things, the introduction of so-called 'smart meters', introduction of the suppliers' model, an information-exchange system between market parties (the information protocol), and the one-off incorporation of the cost benefits of the free-market model into the transmission tariffs. .
– A bill that proposes the regulation of the heat supply to consumers, the so-called 'Heat Act', with a new tariff-regulation system that is based on the principle that consumers connected to district heating should not pay

more than consumers that have central-heating units. This bill has already been passed by Parliament and will result in an additional oversight task for the NMa.

Fines

In 2008, the NMa imposed fines, totaling €1.5 million, on three Dutch regional grid operators, Rendo, Essent and Continuon for violation of the Dutch Gas Act and Electricity Act. The regional grid operators have not compensated on time more than 4,750 of their customers that suffered power failures of more than four hours. Under the compensation scheme, customers of grid operators are automatically entitled to a standard compensation after having suffered power failures. The scheme acts as an incentive for grid operators to resolve such power failures as quickly as possible. A small-scale client's compensation amount for a failure that lasts four to eight hours is €35. That amount is increased with an additional €20 for every four hours that the failure is still not resolved after those initial eight hours. Rendo has objected the fine.

The NMa has imposed a €50,000 fine on Dutch energy company Essent Retail Energie B.V, because it had provided the NMa with incomplete files on complaints. Essent is officially required to supply the NMa with this kind of information, because it is used in the NMa's analyses of the handling of complaints by energy companies. The omission came to light only after a company inspection had been conducted at Essent.

Other decisions

Dutch gas-trading company GasTerra did not charge excessive prices for natural gas
Independent study results reveals that, on average for the various analyzed years, GasTerra's wholesale tariffs for *large-scale* end-users were in line with estimated tariffs in a hypothetical, competitive market. Wholesale tariffs for *small-scale* end-users have, on average for the analyzed years, also been in line with estimated tariffs, with the exception of 2007, in which they have been considerably higher. The NMa has therefore come to the conclusion that, ultimately, GasTerra's tariffs have not been excessive, but it will keep a close watch on price developments. The NMa will examine price developments for the years 2008 and 2009, and expects to publish its findings in the first half of 2010. Several complaints, tip-offs and indications that the NMa had been receiving for the last two years were the reasons for the study.

Tension in the air

Regulation of the electricity and gas network operators has led to tensions between consumers and operators. Consumer interest groups say consumers pay too much, network operators complain they barely have any leeway to guarantee the quality level. Setting the tariffs means steering a middle course between these two interests. Indeed, the NMa needs to protect consumers, while at the same time making sure that companies invest enough in their networks. The supply reliability guarantee cannot be put at risk.

Study into profits

After the publication of a 2007 study by the NMa into the profits of regional grid operators, the subject of tariff regulation has been front and center ever since. Carried out in the context of regulation evaluation, the study revealed that between 2001 and 2007 consumers saved € 1.9 billion on their energy bills. However, the evaluation also revealed that regulation could have been even stricter. Over that same time span, network operators made € 393 million more profit than the NMa deemed reasonable.

The study sparked off a lively debate on regulation methods, the responsibilities of network operators, and the duties and powers of the NMa. Consumentenbond, the leading Dutch consumer interest group, and others demanded that network operators pay back the profit surpluses to their consumers. The NMa was called to account first: the NMa had set the tariffs too high, so the surpluses had to be claimed back as a result, according to consumers.

Efficiency-stimulating tariff cut

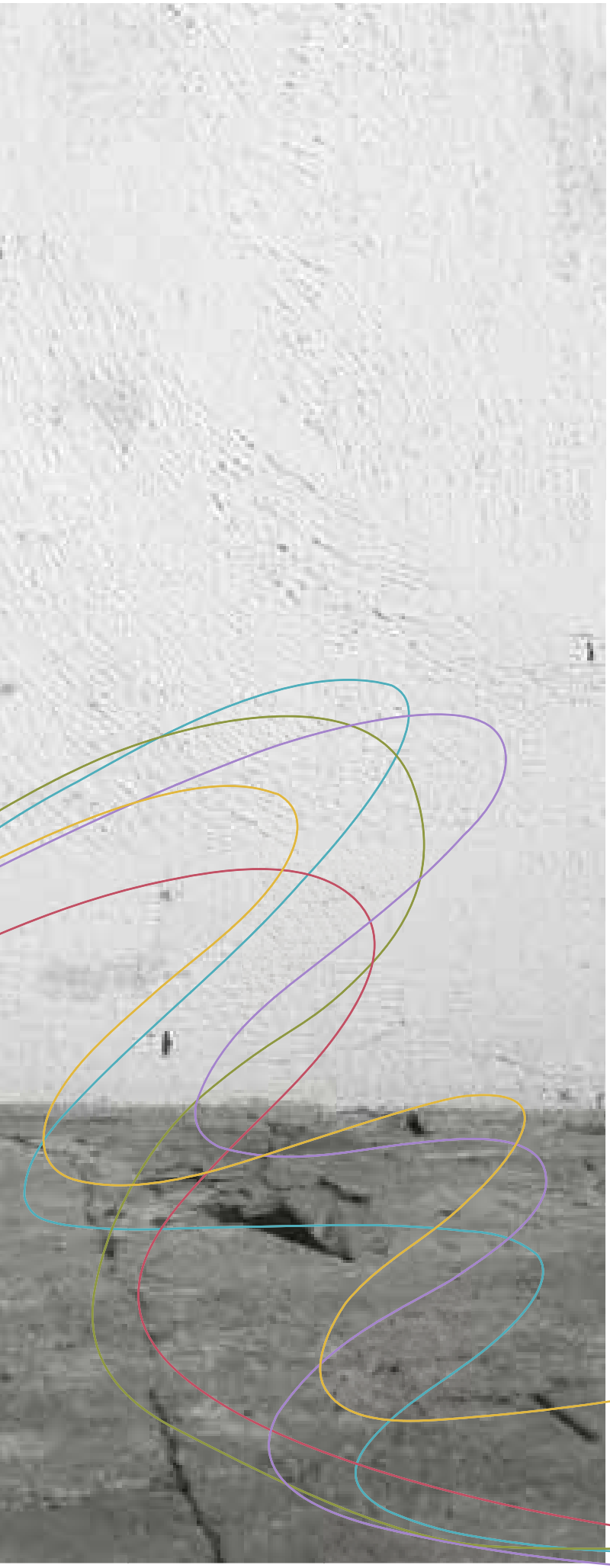
However, claiming back profits is not possible. Current legislation does not offer the NMa that ability, particularly if the network operator has stuck to the rules, since these were designed in such a way that network operators are stimulated to become more and more efficient. Every three to five years, the NMa calculates what percentage the tariffs can be lowered with for each regulation period. This so-called efficiency-stimulating tariff cut is based on the average, expected efficiency improvement in the industry. The network operators are thus stimulated to increase efficiency, which will translate in even lower tariffs in the next regulation period (see page 29).

The network operators' actual efficiency levels in any period can only be calculated afterwards. If an operator was able to operate more efficiently after the implementation of the efficiency-stimulating tariff cut, then the profits are his, but so are the losses in case he was not. So the system stimulates network operators to operate more efficiently, just like in a normal market.

Network operators: tariffs are too low

The efficiency-stimulating cuts that the NMa set for the new regulation period (2008-2010) translate into a 5 per cent decrease of the tariffs from the previous period. Although this cut is still seen as too small by consumer organizations, network operators complain that the new tariffs are too low. The tariffs the NMa sets need to cover all network management costs, including maintenance, investments, and operational costs. Network operators claim that these costs cannot be covered with the newly set tariffs, possibly jeopardizing the supply reliability guarantee. The NMa *does* take these concerns into account though. When setting the efficiency-stimulating cuts in the tariffs, the NMa takes into consideration the financial stability and necessary investments of each network operator, thus making sure that each company can bear the reduced revenues.

Network operators regulation creates a certain tension. The NMa needs to protect consumers against the monopolies of the network operators, while at the same time ensuring that the supply reliability guarantee is not put at risk. Network operators should earn enough for maintenance and investments. By using a fixed method when setting the tariffs, the NMa makes a clear choice. Once the method has been set, the level of the tariffs can no longer be the subject of discussion.



Transport

The Office of Transport Regulation is charged with industry-specific oversight of the rail industry, the aviation industry, the pilotage industry, and other public transport. Responsibility for the legislation thereof lies with the Minister of Transport, Public Works and Water Management

Railway Act

Fines for ProRail

As a result from three investigations into Dutch network infrastructure manager ProRail's role as manager, the NMa has imposed fines totaling €1.702.000, as well as imposing an order subject to periodic penalty payments for violations of the Dutch Railway Act. In the first investigation, ProRail had provided the railway undertakings with incorrect and incomplete information in the 2007 Network Statement.

The second investigation concerned the procedures of the 2007 timetable. ProRail had still allocated capacity to itself, at the expense of the already allocated capacity to railway undertakings, after the capacity allocation process for the 2007 annual timetable had already been completed, thus violating the Dutch Railway Act.

The third investigation concerns the capacity allocation on the so-called Valley Line, which runs from Amersfoort to Ede-Wageningen. ProRail's actions in the capacity allocation process disadvantaged Connexxion, and ProRail has also exceeded the time limit to perform a so-called capacity analysis. As the capacity allocation for the Valley Line had led to conflicts between Connexxion and competitor NS Reizigers, ProRail was supposed to perform such an analysis, because it offers possible solutions to bottlenecks. ProRail appealed all of these cases.

Conflicts Railway Act
The NMa handled a total of 9 complaints under the Railway Act. For example, NS Reizigers filed a complaint with the NMa about ProRail exceeding various time limits in the 2008 Network Statement. Exceeding time limits may be damaging to railway undertakings' operational management. That complaint has led to the NMa ruling that ProRail needed to observe time limits, which it had set in its own Network Statement, that are used in the process of capacity allocation for the 2008 annual timetable.

Railway undertakings Syntus, Arriva and Veolia filed complaints about how ProRail had scheduled its maintenance works in the 2008 annual timetable. The NMa ruled that both ProRail and the railway undertakings should look at each individual case in which scheduled maintenance works interfere with the transport requests by railway undertakings, and then work out a solution for each case on an individual basis. Furthermore, ProRail has to treat all capacity requests equally when allocating capacity, both from rail transport companies as from ProRail itself for maintenance works. ProRail is therefore required to include a dispute settlement procedure in the Network Statement for settling conflicts between network maintenance and transport requests, provided ProRail does not chair any dispute settlement committee. Railway undertakings definitely have an interest in such a procedure, since their operational management depends on ProRail's allocation.

Having received a complaint from NS about the infrastructure charge, the NMa ruled that ProRail could not pass on the increase of the infrastructure charge to NS the way it intended to do so, because this would be inconsistent with the principles that ProRail itself attached to the infrastructure charge. The fact that only NS was faced with the increase (and not the other undertakings), without any objective justification, was seen as discriminatory. As a result, NS needs to pay ProRail €24 million less than ProRail initially had in mind it would charge, though the NMa's ruling has become the subject of a new dispute.

Market-based IT purchasing by ProRail
At the request of the Dutch Parliament, the NMa has investigated whether ProRail's IT purchasing met market-based standards. It was concluded that, thus far, this has not yet been the case, which can be explained by two reasons: the method of tendering, and the (small) number of suppliers. Moreover, certain activities are not yet put out to tender. However, ProRail is currently pushing through concrete projects aimed at improvements. The NMa has therefore ruled that no additional measures are needed right now.

New foundation for certification of railway undertakings
The NMa received an indication that ProRail has allegedly abused its dominant position – it is the sole manager of the Dutch network infrastructure. ProRail had informed the railway undertakings that it wanted to start working with permanent staff and certified companies only, as a result of a number of accidents that had earlier occurred during maintenance works. These works had been performed by ProRail and/or by undertakings that were contracted by ProRail and who had contracted independent contractors. ProRail felt it had no control over the independent contractors that worked on behalf of the undertakings that ProRail contracted. ProRail's decision could have led to exclusion. After consultations between the NMa and ProRail, an independent foundation has been created that is charged with certification of railway undertakings. In addition, a revised certification procedure has been submitted to all relevant market parties. And it is now also possible for a certified independent contractor to join a partnership.

Pilotage Act
The NMa has approved an adjusted cost allocation system for the pilotage industry. Such a cost allocation system is used in the annual process of setting the pilotage tariffs. For the first time ever, the NMa has set the pilotage tariffs. The cost allocation system's application has been essential in determining whether the tariffs have been cost-oriented. The NMa has taken up the proposed pilotage tariffs for

2009 of the Netherlands Pilotage Corporation (NLC), but it has made some remarks on the information about the planned quality and the efficiency.

Passenger Transport Act 2000
In 2008, municipal public transport companies had to comply with new standards with regard to the mandatory annual statement, including the requirement for them to have separate bookkeeping systems for rail and bus transport. After reviewing the statements, three of them were good. One statement has been approved after it had been adjusted at the request of the NMa. Reviewing the final statement will likely be completed in early 2009.

Apart from carrying out its oversight activities, the NMa has, on numerous occasions, also made contributions to the lawmaking process that will ultimately lead to adjusting the Passenger Transport Act 2000 as a result of the Roefs motion (municipal public transport companies are exempted from tendering obligations), and of new EC regulations.

Aviation Act
The NMa approved the new cost-allocation system for Amsterdam airport Schiphol in 2007. Following a June ruling of the District Court of Rotterdam, the NMa included a more detailed motivation in the earlier decision. In November, two complaints were filed with the NMa about the tariffs that Schiphol set in late October 2008, based of the cost-allocation system, and which come into effect on April 1st, 2009. Handling of these complaints will be completed by spring 2009. The complaint that easyJet had filed about the tariffs that came into effect on November 1st, 2008, has been dismissed because the request had been filed after the legal term had expired.

Market scan water transport industry
The NMa carried out a market scan into the domestic water transport industry. Several specific segments in the industry are highly concentrated, and some competitors have entered into close collaborative agreements. Following the results of the market scan and because of concrete tip-offs and indications coming from the market, the NMa will keep a closer watch on competition in this industry and will actively investigate possible violations of the Dutch Competition Act.

Balancing act on the rails

ProRail has run into the NMa on a number of occasions throughout 2008. As network infrastructure manager, ProRail is often faced with difficult choices. Sometimes a choice conflicts with the Railway Act, or the NMa believes a different choice would be in place.

The Dutch railway market

In line with European directives, railway infrastructure and rail transport in the Netherlands have been separated from one another since 1995. Laid down in the current Railway Act, effective since 2005, ProRail and the NMa have been charged with management and oversight respectively. Passenger and freight transport and rail network management are no longer provided by the same organization, as ProRail maintains the railway network, used by multiple railway undertakings. The freight transport market has been completely liberalized, while passenger transport on the main network, predominantly in the urban western part of the Netherlands, will be exclusively provided by railway undertaking NS until at least 2015. Regional passenger transport is provided by railway undertakings that have been awarded public transport concessions.

ProRail's two hats

ProRail is charged with network management and needs to ensure the network is and stays in excellent condition. ProRail is also capacity manager. All transport undertakings wanting to use the infrastructure need to go through ProRail first, who will then allocate the scarce network capacity. This requires a transparent and fair allocation system, as equal treatment of all parties ensures a level playing field for all competitors.

ProRail and the NMa

Under the Railway Act, the Office of Transport Regulation (VK) is the unit within the NMa that regulates, among others, the Dutch railway market. Its tasks include making sure that parties honor their agreements, as well as that access to the railway network and to the capacity allocation process is fair, transparent and non-discriminatory. The VK also keeps a tab on the tariffs that ProRail charges the undertakings, the so-called infrastructure charge. In case of violations of these rules, the VK has the power to impose a fine or an order subject to periodic penalty payments on a party. However, it is not always necessary to impose sanctions, as the VK often attempts to find a solution through diplomatic means first when problems arise.

ProRail's tough choices

When it allocates capacity, ProRail needs to take into consideration the needs of both passenger and freight transport undertakings, as well as its own needs with regard to the capacity it will perform maintenance works on. Moreover, the safety of the railroad workers also plays a role. As maintenance works performed on a rail section render it useless for transport, they are usually carried out at night or on the weekend.

Sections with capacity to spare are obviously not the problem. But when capacity becomes scarce, dilemmas creep in. Should ProRail allow more freight transport on section A at the expense of passenger transport? Will national carrier NS be offered more room at the expense of the regional carrier on section B which is used for both national and regional traffic? On top of that, ProRail can better meet its own statutory obligations if more capacity is withdrawn from the annual timetable in the short and medium term for maintenance works. In the long run, this will result in less train cancellations due to maintenance backlogs.

Conclusion

ProRail hopes to find the right balance between the different needs. In instances where ProRail, railway undertakings or other parties cannot seem to find common ground, they turn to the NMa for help. The NMa will stop ProRail if regulations are violated. The NMa sees to it that ProRail treats all parties equally, even in cases where ProRail also applies for capacity.

Financial services

Its market structure and its wider significance to the economy have made the financial services industry an area of attention since 2003. Populated by relatively few large players, some markets border on oligopolies. On top of that, the complexity of many a financial product, combined with the interdependencies between players, makes the industry relatively non-transparent. In regulating this industry, the NMa closely works together with the industry-specific regulators: the Netherlands Authority for the Financial Markets (AFM) and the Dutch Central Bank (DNB).

Mergers and acquisitions

Financial crisis led to NMa crisis team

The NMa has given its view on several issues related to the government intervention at Fortis Bank. September saw Fortis stocks taking a pounding as a result of the credit crunch. National governments and the Benelux central banks wanted to intervene to prevent the bank-insurer giant from collapsing. The NMa has the statutory task to review mergers and acquisitions, and to assess the effects they might have on competition. It can step in immediately in case of an emergency situation at any financial institution, in which case the NMa will then swiftly draw up an opinion, as agreed upon between the NMa and the DNB. An NMa crisis team investigated what the consequences of several takeover scenarios would be for competition on the Dutch financial market, and it analyzed remedies that would counter anti-competitive problems in case of takeovers. In the end, the Dutch government has, for the time being, become owner of Fortis Netherlands including ABN Amro

Netherlands. However, in the event that new concentrations between players in the financial industry come into focus, the NMa might once again come into action.

Concentration regulations of pension funds.
In a draft document on the application of concentration regulations to pension funds, the NMa writes that all types of pension funds may be seen as undertakings within the meaning of the Competition Act. That would entail that concentrations in which pension funds are involved therefore need to be notified of in advance if these exceed the legal turnover thresholds. The final version is slated for the first quarter of 2009.

Enforcement

Market scans into funeral insurances and auto repair
The NMa has carried out a market scan in the Dutch funeral insurance industry. The market scan focused in particular on the so-called pre-paid or pre-need funeral insurances. The risk of anti-competitive problems with this type of funeral insurance is estimated to be average to high. The high level of concentration as well as the high barriers to entry are indications that competition in this market is restricted. The NMa invites everyone to report any possible impediments to competition.

Additional payments are seen as the industry's main concern. Relatives often face substantial additional payments, unexpectedly so since they had assumed everything would have been covered by the insurer. Lack of transparency and communication, such as different interpretations of the insurance policy conditions, may contribute to the notion of additional payments for funerals and burials being unexpectedly high. Communicating clearly with consumers will lead to more transparency, if they are told what exactly is covered and what is not. The NMa calls for the industry to become more transparent, as this will benefit the functioning of the market.

Auto repair industry
The NMa is conducting a market scan in the auto repair industry, surveying more than 2,000 auto repair shops. This market analysis is the result of having received numerous complaints from auto repair shops over the fact that many insurers refer their customers to pre-selected auto-repair shops in case of car damage. The NMa wants to use this market scan to find out to what extent insurers are at the wheel of directing auto repairs in the Netherlands and whether this impedes competition. The market scan results will determine whether further investigation is needed.

Vision document on SEPA introduction
The NMa has published a vision document about the introduction of the Single Euro Payments Area (SEPA). SEPA will make it easier for consumers and undertakings to make international financial transactions using a current account. The NMa is a staunch proponent of a smoothly running European payment market, to which SEPA will contribute.

The NMa sees risks as well as opportunities. The NMa is particularly worried about claims of Dutch banks that there would be no future for the Dutch debit card system, called PIN, once SEPA has been introduced, while PIN is one of the most efficient and affordable payment systems in Europe. Openly speculating about the demise of PIN will only undermine its competitive position in advance vis-à-vis other payment systems. Another risk is setting deadlines to the transition period. Banks jointly deciding to no longer offer existing payment products would suggest the conclusion of mutual agreements, which would result in harmonization or restriction of the product range. Such agreements may impede competition and may therefore be in violation of the Competition Act. Despite such risks of competition becoming possibly impeded, the NMa definitely sees opportunities for more competition in the payment industry. In this regard, it is critical that new parties are granted access to the technical standards, and that this access is transparent, non-discriminatory, and that it is feasible under reasonable conditions.

The financial crisis and competition

The turmoil in the financial world has led to a crisis that profoundly affects the real economy. On the relationship between the crisis and competition, EU Commissioner for Competition Ms. Kroes said that competition regulations do not stand in the way of reaching a solution, but are in fact part of one. At the end of the day, it is vital to the industry that the NMa carries out its task as usual. Competition will always remain an essential incentive, making undertakings more robust, a valuable characteristic, particularly in times of crisis. It leads to a wider range of choices, to higher quality, and to lower consumer prices. This is a welcome development, particularly in markets where confidence and financial stability are of the essence. If financial oversight would set out stricter rules, it would still be possible to apply competition law by, for example, including financial stability as a factor in the assessment of concrete cases. In two not-to-be-specified cases, the NMa already provided the Netherlands Bankers' Association (NVB) and its fellow regulators with specific guidance with regard to the balance between competition law and several plans to counter the crisis.

Food & Agriculture

Appearing in the NMa Agenda for the first time in 2008, the food and agricultural industry appears to have a higher risk of collusive behavior, judging from economic analyses and a constant flow of incoming indications. The industry is characterized by many small companies that have traditionally often collaborated to support each other. Collaborations on larger scales run the risk that they violate competition law. In the food-processing industry and in the retail industry, only a handful of players are active. The NMa makes sure that these players do not abuse their positions.

Mergers and acquisitions

Acquisition of Quality Bakers by Bakkersland approved
The acquisition of Dutch baking company Quality Bakers by fellow baking company Bakkersland has been approved. Sufficient competitive pressure is exerted by competitors and will remain to be so. At least one other major baking company, Bake Five, is active on this market, apart from the new combination. Furthermore, supermarkets can start their own bakery, or transfer parts of their purchasing to different bakeries, according to an NMa survey. The dominant position of the new combination therefore poses no threat.

Enforcement

Price-making process of bread
The NMa investigated the price development of Dutch bread. Having consulted with the NMa, BEKO, the buyers' association of the Dutch baking industry, announced it would no longer give advice on prices. Correctly predicting one's competitors' prices becomes easier if advices on prices are given. The NMa also investigated the price-making processes of several other consumer staple products besides bread.

No further investigation into beer prices
The NMa investigated whether breweries, by mutual agreement, had jointly raised beer prices during the carnival season (around February/March). According to the breweries, the price increases were needed to compensate for rising commodity prices, particularly for malt and hops. The NMa established that commodity prices had indeed risen, though it could not be established that the breweries had indeed harmonized their prices. The collected information thus gave not rise to conduct any further investigation.

Process of improperly influencing price-making of bulbs suspended
The NMa has suspended its investigation into anti-competitive conduct by a number of Dutch lily-bulbs growers. Trade organizations issued written statements that they will not make any recommendations on limiting production.

The Royal General Association for Bulb Culture (KAVB) and the Cooperative Dutch Bulb Center (CNB) made recommendations to bulb growers about limiting the production of certain bulb species. The economic theory of supply and demand predicts that prices will rise when supply is limited, including artificially reduced supply. Trade organizations are allowed to publish objective information, for example, on general price development or trends in production volumes of various bulb species. Calls for or advice on limiting production are prohibited however. Undertakings should independently develop their commercial strategy with regard to price and production quantities, regardless of what their competitors do.

The NMa will check whether the organizations honor their promises. It will keep a close watch on the Dutch bulb industry, with a turnover of 500 million euro.

Animals

Agreements with regard to boar castrating with the use of anesthesia do not violate Dutch competitions laws, according to an informal opinion of the NMa. Dutch pork meat is predominantly produced from boars castrated without the use of anesthesia. Intent on improving animal welfare, a number of organizations wants to completely end the practice of boar castration, with or without the use of anesthesia, in 2015 at the latest. To this end, agreements are made with parties involved, such as Dutch supermarket trade association CBL, the Central Organization for the Meat Industry (COV), the Dutch Organization for Agriculture and Horticulture (LTO Nederland), and the Dutch Pig Farmers' Union (NVV). These parties wanted to introduce a measure that would make it possible to have boar castrating with always the use of anesthesia. This would lead to supermarkets, those that are member of CBL, only carry fresh pork meat from boars castrated with the use of anesthesia. The agreements include, among other things, compensation for pig farmers that unwillingly incur additional costs to anesthetize the animals. The agreements that have been made are not expected to impede competition. The NMa did not have any objections against the agreements, as long as slaughterhouses will still be able to also buy boars that have been castrated without the use of anesthesia.

Frisian horses

In response to a complaint, the NMa investigates the system of breeding limits that the Royal Society 'The Friesian Horse Studbook' (KFPS) uses. In its fight against inbreeding, KFPS sets limits to the number of breeding stallions can have. The complainant found this system too restrictive. Having consulted with the NMa, KFPS promised it would evaluate the system in light of the Competition Act and new scientific developments, and it would switch to the least restrictive method in fighting inbreeding. The NMa will check whether KFPS keeps its promise.

The effect of the NMa's work

This theme explains how the choices the NMa makes in its work lead to positive effects for the Dutch economy. After all, the goal is to have more consumer welfare.

Anticipation

Each year, the NMa conducts a telephone survey among small and medium enterprises on the competitive pressure they perceive. Its findings reveal how these undertakings reckon with the NMa's activities, which is the so-called 'anticipatory effect'. This effect is significant because increased compliance with the law means the NMa does not need to step in as much. Approximately 25 per cent of those surveyed in 2008 indicate that rulings by competition authorities have an effect on their way of doing business in the market. That number is slightly down from 2006 (31 per cent) and 2007 (27 per cent). Almost two-thirds of the undertakings surveyed think the chances of getting caught from violating the Competition Act are much too slim, which indicates there is a need for tougher legislation. The importance of fines to the anticipatory effect is reflected in the responses to the question whether the level of the sanctions that the NMa imposes acts as a powerful deterrent. Almost 53 per cent of the undertakings that have responded to this question either somewhat or completely agree with this statement. Furthermore, almost 84 per cent think it's good that the NMa can also fine the individuals that have pulled the strings of a cartel besides fining just the undertakings.

Calculation of the direct effect

Quantifying the anticipatory effect as well as the deterring effect of sanctions has proved to be difficult[1]. The NMa does however measure the effects of its oversight activities (both general and industry-specific) that can be directly calculated, because this helps support the justification of competition legislation and the effectiveness of compliance therewith. The method that was developed in 2004, and whose origins can be traced back to the 2002 Annual Report, was critically examined in 2008, partly because of a conference on outcome calculation, which the NMa organized in the fall of 2007. The result of the adjustments is that the method for competition oversight and regulation have become more consistent within the organization. Furthermore, its scope has been increased as the Office of Transport Regulation and more decisions by the Office of Energy Regulation have been incorporated into the calculations. The current method looks at future, quantifiable effects of the decisions that the NMa has made. In addition, it also looks more explicitly at the effects of the NMa's actions on production efficiency. According to this method, oversight by the NMa in 2008 has saved Dutch consumers approximately €700 million.

That figure is actually in the lower ranges, as it was based on conservative assumptions with regard to the price effect of a single action. Moreover, regulation decisions such as method decisions by the Office of Energy Regulation of 2008 also have an effect on the prices that network operators set. In addition, imposing remedies in a merger case or the effects of decisions with regard to cartels are expected to have an effect on the market for more than just one year. When this effect is included, it is better to look at the moving average, which is €360 million for 2008. Captured in that figure, the year effect is actually spread out over three years. The effect of decisions from previous years is partially included, which creates a more accurate picture of the outcome's trend.

These calculations still only include the direct, short-term effects of formal decisions. That means that any anticipatory effect, such as with oversight of mergers and acquisitions, has not yet been incorporated in these figures. Also not incorporated are other activities by the NMa, such as the publication of guidelines, informal opinions, or alternative enforcement actions, because it is difficult to actually quantify these with any confidence. However, the other instruments certainly have an effect, as it contributes to the rules of the game in the market becoming clearer. And that brings us another step closer to the NMa's ultimate goal: 'making markets work.'

1 According to a recent OFT study, the anticipatory effect might be as much as five times the effect that can be directly calculated based on decisions. Gordon, F. en D. Squires (2008,The deterrent effect of UK competition enforcement, The Economist, 156 (4), pp. 411-432.

Personnel

Organization

The NMa has been an Autonomous Administrative Authority (ZBO) since July 2005, headed by a Board. In April 2008, the Dutch name of the Office of Energy Regulation was changed from 'Directie Toezicht energie' into 'Energiekamer'. Also, the Merger Control and Antitrust Departments have seen a merger themselves, forming the newly created 'Competition Department' as of June 2008.

Employees

The NMa's HRM-policy has the following objectives:

1 Attracting new employees;
2 Offering individual, tailor-made support to employees and managers to help them in their work and in their careers;
3 Offering excellent working conditions and realizing acceptable levels of absenteeism.

Influx

Attracting enough new high-quality employees is the first objective of the HRM department. The job market was still pretty tight for most of 2008. To organizations such as the NMa, tight job-market conditions mean putting extra effort in recruiting and retaining good individuals. That is why recruitment communication is one of the NMa's top priorities. The NMa is committed to building a reputation as an employer par excellence, catering to different target groups on the job market. The NMa wants to be permanently visible, and will carefully select from its range of recruitment instruments, such as the internet, in-house company days, its staff's personal networks, and recruitment agencies. For example, the first ever Nmasterclass, held in 2008 for students in their final year, was a huge success and will be repeated in 2009. The NMa succeeded in balancing outflow and influx, but needed more time to do so than originally planned. On December 31st, 2008, the NMa had 405 employees (386.8 FTEs).

Offering support to employees and managers

As in previous years, plenty signed up for training courses offered in 2008. The results of the 2007 employee' satisfaction survey have led to a concrete plan on how to manage employee development in a structured and coherent way. Initially intended for primary-process employees in pay scales 10-14, the plan will eventually also focus on other employee groups. Launched in late 2008, it is expected that this ambitious project, titled 'Impulse', will make the NMa a more desirable employer, yielding a positive effect on the influx of new employees and thus reducing outflow. Also, managers play an important role in Impulse: though each employee is in control of his/her own career, support from managers is essential in career development.

Working conditions and absenteeism

The absentee rate in 2008 at the NMa was 4.52 per cent. Absence of less than six weeks was 2.06 percent, while absence exceeding six weeks was 2.46 per cent. Although these figures have gone down since 2007, the NMa remains determined to bring this rate down even further.

Employee participation

In 2008, five meetings were held between the Board and the NMa's works council. The current works council, installed on April 1st, 2008, was involved in the reorganization of the Office of Energy Regulation, the introduction of a digital-document management system, and in how to implement the current administration's program towards a leaner and more effective government. It also participates in the project group on 'Impulse'. One of the works council members sits on the departmental works council of the Ministry of Economic Affairs.

Critical success factor	Monitoring instrument	NMa's desired level	Realized in 2008
Personnel scores	Influx	10% minimum - 20% maximum	19.1%
	Outflow	10% minimum - 20% maximum	19.6%
	FTE vacancy rate	5% maximum	6.5%
	Percentage of women in pay scale 14 or higher	32%	32% (53.3% managerial positions)
	Male/female ratio	50% - 50%	51% - 49%
Recruitment -communication results	Duration of vacancies	85% filled within 3 months	78.9%
	Participation in job fairs	12 per year	12
	In-house company days at the NMa	Twice per year	2
Training and development	Training expenses as a percentage of average earnings	3%	4.1%
	Feedback from exit interviews	75% of employees leaving the organization have exit interviews	75.6%
Absenteeism	Absentee rate	3.8% maximum	4.5%

Table 2 The NMa as employer

Finance

This chapter contains the summary 2008 financial report of the NMa's civil service apparatus, including the Office of Energy Regulation and the Office of Transport Regulation (VK).

I
NMa (civil service apparatus)

The VK is financed by the Ministry of Transport, Public Works and Water Management (V&W) via the budget of the Ministry of Economic Affairs (EZ). Fines imposed by the VK are transferred to V&W. EZ allocates resources for personnel and materials to the NMa by means of a budget letter (see table 3). The NMa (and the Ministry of Economic Affairs) use cash-based accounting. Cash expenditure is a natural consequence of this.

The NMa did not exceed its budget in terms of liabilities or expenditure, and thus stayed within its budget. On the liability level, the NMa underspent by just over €1 million. The NMa already informed EZ in August 2008 that it would not spend this €1 million. With respect to its cash expenditure, the NMa underspent by €0.5 million. Part of the expenditure is expected to be realized in 2009. With respect to income, 64 per cent of the budget was realized. In 2008, the level of reported income was approximately €33.2 million. The majority of this income is from fines imposed in 2008 and earlier. In 2007, fines worth a total of €28.5 million were received.

Description	Liabilities	Expenditures	Receipts
Budget letter	44,948	45,055	51,804
Realization	43,623	44,513	33,209
Underspending	1,325	542	18,595
As percentage	2.95%	1.20%	35.89%

Table 3 Realization with respect to the budget letter (in thousands of Euros).

Description	Allocated budget 2008	Realization 2008	Realization 2007
Total personnel	31,612,000	28,340,732	26,823,604
Total materials	13,336,000	15,281,842	17,904,876
Total	**44,948,000**	**43,622,574**	**44,728,480**

Table 4 Liabilities (amounts in Euro)

Pricing principles
All amounts are included at their nominal value. The full amount of the receivables continues to be included until they are declared uncollectable after being considered to be irrecoverable.

Liabilities

In 2008, the NMa's personnel-related liabilities (table 4) have increased, while the materials-related liabilities have decreased. The increase in personnel-related liabilities is the result of successfully lowering the vacancy rate, as well as of additional tasks for the NMa resulting from the Independent Grid Administration Act (WON).
The decrease in materials-related liabilities comes mostly from a decrease in the NMa's rental obligations. Because of settlements of previous years, there was some uncertainty in 2007 about the correct rental obligations through the Government Buildings Agency. In 2008, it was clear what the correct payment of the annual rental obligations were.

Expenditure

Looking at expenditure, it is a similar picture with that of liabilities.
The difference with liabilities in table 4 is that liabilities from previous years have also been paid in cash. Table 5 shows that realized expenditure in 2008 was almost 99 per cent of the allocated budget.

As was the case in 2007, cash-based accounting was used in 2008. The cash budget was therefore not distributed over ledger accounts. That is why the 'Allocated budget' column is empty (table 6, page 52). Salary costs have increased because of pay increases, as laid down in the collective labor agreement for government officials, and because of a lower vacancy rate. Other personnel-related costs, such as training courses, one-off extras / small gifts for personnel, have not increased. Temporary employees have been hired, because not all vacancies could be filled with permanent staff, tight labor market conditions, and uncertainty about the increase of the total FTEs. Like in 2007, the NMa has received a temporary budget for the construction industry dossier in 2008. The expenditures for temporary hiring are included under 'temporary employees, with a total budget of €906,404.

Description	Allocated budget 2008	Realization 2008	Realization 2007
Personnel	31,612,000	29,051,713	27,495,191
Material	13,443,000	15,461,402	18,968,453
Total	**45,055,000**	**44,513,115**	**46,463,644**

Table 5 Expenditure (amounts in Euro)

Ledger account and description	Allocated budget 2008	Realization 2008	Realization 2007
Personnel			
400000 Salary costs		22,105,559	19,780,919
400001 Overtime		23,106	21,506
400002 One-off extras / Small gifts personnel		516,629	666,263
400019 Welfare		12,223	9,374
410000 Internship and committee payments		21,257	27,860
410020 Interim management		353,561	817,944
410021 Advice on organization and staffing		82,973	95,717
410039 Services between government agencies		205,277	0
410033 Temporary employees		4,087,136	4,731,573
415002 Training		902,938	833,140
415003 Recruitment		462,134	319,911
415004 Other personnel costs		42,460	2,123
416012 Redundancy schemes		236,461	188,862
Total personnel		29,051,713	27,495,191
Total material		15,461,402	18,968,453
General total	**45,055,000**	**44,513,114**	**46,463,644**

Table 6 Expenditures (amounts in Euro)

Income

An entry of €17.4 million has been included as High Trust in the NMa category in the EZ budget. Income has been included in table 7, which are mostly payments of the fines and statutory interest by undertakings. In 2007, fines repaid to companies and statutory interest totaling €562,369 were deducted from this income. The receipt of the fees is based on the NMa's cost recovery decision [see Bulletin of Acts and Decrees, 2006 717]. The Office of Energy Regulation's income is based on the 2008 Energy Cost Recovery scheme [see Bulletin of Acts and Decrees, April 13th, 2007, issue 72].

Description	Allocated budget 2008	Realization 2008	Realization 2007
Competition	46,400,000	28,548,885	22,191,119
Fees – mergers	2,785,000	1,932,777	1,104,500
Office of Energy Regulation	2,619,000	2,726,949	2,619,087
Total	**51,804,000**	**33,208,611**	**25,914,706**

Table 7 Income (amounts in Euro)

Fines receivable reported as memorandum items

Objections and appeals are still open in several large cases. These postpone the obligation to pay. The receivables relate to the fines imposed by the NMa on businesses, plus the legal interest accrued and minus the income (€28.5 million). Reductions of fines and interest payments as a result of court rulings have already been included €23.4 million). The collection of fines has contributed the most to the decrease compared to 2007. The NMa held bank guarantees worth of €8.4 million on December 31st, 2008. Claims worth of €1.6 million have been filed with receivers in relation to bankruptcies.

Description	2008	2007
Construction	23,551,829	*Not specified in 2007**
Bicycles	15,735,522	
Mobile telephony	30,319,583	
NH8	18,525,183	
Public Green	1,137,896	
Home care	7,866,445	
Shrimps	4,354,316	
Other	8,381,200	
Competition	109,871,974	147,776,435
Office of Energy Regulation	1,861	1,861
Total	**109,873,835**	**147,778,296**

Table 8 Outstanding debts and receivables reported as memorandum items as of 31 December 2008 (amounts in Euro)

Description	Liabilities	Expenditures	Income
Budget letter	586,000	586,000	0
Realization	568,000	568,000	0
Underexpenditure	18,000	18,000	0
Percentage	**3.07%**	**3.07%**	**0.00%**

Table 9 Realization versus budget (amount in Euro)

II ZBO Board of the Dutch Competition Authority

This section includes the summary financial reports of the NMa Autonomous Administrative Agency (ZBO) over 2008. The Ministry of Economic Affairs allocates resources to the ZBO for personnel costs by means of a budget letter.

Pricing principles
All amounts are included at their nominal value.

Act on Disclosure of Top Income Earners in Publicly Funded Sectors (Wopt)

The WOPT Act, which came into effect on March 1st, 2006, stipulates the disclosure of incomes in government and other sectors that are financed from public funds and that are higher than the salary of Ministers. For the NMa, this relates to the income of the Chairman of the Board.

In 2008, Mr. Kalbfleisch was remunerated on the basis of a non-civil service appointment as Chairman of the Board. In total, this amounted to €230,311.

Business operations

Responsibilities and testings

This section has been set up in line with the structure of the departmental Annual Report of the Ministry of Economic Affairs.
The Board of the NMa is responsible for the efficiency and effectiveness of the internal processes to ensure that the risks of non-realization of the objectives are optimally controlled. For the non-financial processes, however, the internal processes and the applicable control measures can never fully guarantee that no significant defects will occur. To be able to assume this responsibility, a vast range of instruments has been deployed in the area of planning, control and accountability (plan of action, monthly reports, quarterly reports, quarterly meetings, half-yearly report and annual report), personnel policy (performance interviews, abridged assessments, personal development plans, job descriptions, career policy, training courses, integrity policy and individual plan of action), process descriptions (and their evaluation), and security (including information security). Last but not least, decision-making takes place in a prescribed and structured manner at Board meetings. This prescribed and structured manner entails, among others, that people submitting agenda items for the Board meeting must address the following aspects: "possible consequences/risks (personnel, financial, social, political, administrative, etc.)", "relationship with or dependence on other documents/processes", "coordinated with..." and "other opinions within the NMa".

Legitimacy of the budget implementation

Based on the above, we declare that the internal processes have efficiently and effectively led to the realization of objectives, to the development of policy information and to a good level of financial and material management. The internal audits, the inspections by the Audit Department and the supervision by the Board of Financial Economic Affairs of the Ministry of Economic Affairs show that there have been no unlawful acts of any significance with respect to liabilities, expenditure, income and the trial balance. In our opinion, this sufficiently guarantees the legitimacy of the liabilities, expenditure, income and trial balance. Indications or allegations of fraud have been internally notified of, in accordance with the Regulation implementation Integrity policy EZ. There has been no fraud in 2008 that has been of material importance to the annual account.

Bottlenecks in the achievement of the objectives

In the past year, there were a number of bottlenecks that made it difficult to achieve the objectives. Where possible, these bottlenecks were resolved using the abovementioned instruments:

- The absentee rate was 4.5% in 2008. This exceeded the desired level of 3.8%. It meant that less capacity than planned was available. However, it is considerably lower than in 2007 (5.74%).
- In June 2008, the Merger Control and Antitrust Departments have merged to form the newly created Competition Department, obviously requiring investments in personnel and procedures. First impressions are positive and that the merger has met its expectations.
- Hiring and retaining qualified personnel (particularly in senior positions) remains an issue organizationwide, because the NMa's terms of employment fiercely competes with those of the corporate world and of other regulators.
- Management has followed up on the results of an employee' satisfaction survey.
- There was a relatively high outflow in 2008, though it must be noted that individuals experienced in competition law and regulation are hard to come by. Experienced NMa employees are desirable employees. This means that new employees need to be trained. This may have affected the NMa's performance and/or lead times.
- The uncertainty about the interpretation of new legal tasks and the lack of clarity on expanding the number of personnel to handle these tasks make it difficult to react decisively. Point in case is the Heat Act, where the NMa is charged with additional tasks, without being allocated resources to expand the number of employees.

Improving business operations

In 2008, the first pilot projects have taken place for the Document Management System, resulting in the decision to continue the phased roll-out of the system. This will take the NMa one step closer to a paper-free working environment.

In 2008, the first steps have been taken towards a more structured range of training courses for new and more experienced employees. First experiences will be seen in 2009.

The management information system was further expanded in 2008, resulting in the budget holders having direct access to up-to-date financial reports, as well as production figures and absentee levels. This will enable them to proactively use that information to their advantage.

The ultimate aim of shared office space for all NMa employees has not yet been achieved. In 2008, however, more NMa employees were housed in the same tower. In 2009, the NMa will do more to realize this objective.

The Hague, April 7th, 2009

Pieter Kalbfleisch
Chairman of the Board of the NMa

Auditors' certificates

Status jaarrekening

De verkorte jaarrekening van de NMa over 2008 zoals opgenomen in dit jaarverslag, is gebaseerd op het departementale jaarverslag 2008 van het Ministerie van Economische Zaken en de interne jaarrekening van de NMa over 2008.
De Algemene Rekenkamer, die het departementale jaarverslag jaarlijks onderzoekt, zal op de derde woensdag in mei haar oordeel hierover in een rapport aan de Staten-Generaal aanbieden. In dit rapport kunnen opmerkingen worden gemaakt over het financiële beheer en/of de jaarrekening van de NMa. De Auditdienst van het Ministerie van Economische Zaken heeft deze interne jaarrekening in het kader van de controle, bedoeld in artikel 66 van de Comptabiliteitswet, gecontroleerd en hierbij een goedkeurende verklaring verstrekt.

Accountantsverklaring

Wij hebben de in dit Jaarverslag NMa 2008 op pagina 50 t/m 53 opgenomen verkorte jaarrekening, die deel uitmaakt van de interne jaarrekening van de NMa over 2008, gecontroleerd. De verkorte jaarrekening bestaat uit:
- de staten van verplichtingen, uitgaven en ontvangsten met de financiële toelichtingen daarbij;
- de posten van de saldibalans van de NMa per 31 december 2008 met de toelichting daarbij;
- de in dit Jaarverslag NMa 2008 op pagina 55 opgenomen bedrijfsvoeringparagraaf over de comptabele rechtmatigheid en de getrouwe weergave van de uitkomsten van de begrotingsuitvoering over 2008.

Verantwoordelijkheid van de Raad van Bestuur van het ZBO NMa
De Raad van Bestuur van het ZBO NMa is verantwoordelijk voor het opmaken van de verkorte jaarrekening van de NMa die de uitkomsten van de begrotingsuitvoering getrouw dient weer te geven, alsmede voor het opstellen van de bedrijfsvoeringparagraaf, beide in overeenstemming met de Comptabiliteitswet 2001 en de daaruit voortvloeiende regelgeving. Deze verantwoordelijkheid omvat onder meer het ontwerpen, invoeren en in stand houden van een intern beheersingssysteem relevant voor het opmaken van en getrouw weergeven in de financiële overzichten van de uitkomsten van de begrotingsuitvoering, zodanig dat deze geen afwijkingen van materieel belang als gevolg van fraude of fouten bevatten, het kiezen en toepassen van aanvaardbare grondslagen voor financiële verslaggeving en het maken van schattingen die onder de gegeven omstandigheden redelijk zijn.

Verantwoordelijkheid van de accountant
Onze verantwoordelijkheid is het geven van een oordeel over de verkorte jaarrekening op basis van onze controle. Wij hebben onze controle verricht in overeenstemming met Nederlands recht. Dienovereenkomstig zijn wij verplicht te voldoen aan de voor ons geldende gedragsnormen en zijn wij gehouden onze controle zodanig te plannen en uit te voeren dat een redelijke mate van zekerheid wordt verkregen dat de financiële overzichten geen afwijkingen van materieel belang bevatten.

Een controle omvat het uitvoeren van werkzaamheden ter verkrijging van controle-informatie over de bedragen en de toelichtingen in de financiële overzichten.
De keuze van de uit te voeren werkzaamheden is afhankelijk van de professionele oordeelsvorming van de accountant, waaronder begrepen zijn beoordeling van de risico's van afwijkingen van materieel belang als gevolg van fraude of fouten. In die beoordeling neemt de accountant in aanmerking het voor het opmaken van en getrouw weergeven in de financiële overzichten van de uitkomsten van de begrotingsuitvoering relevante interne beheersingssysteem teneinde een verantwoorde keuze te kunnen maken van de controlewerkzaamheden die onder de gegeven omstandigheden adequaat zijn maar die niet tot doel hebben een oordeel te geven over de effectiviteit van het interne beheersingssysteem van de NMa. Tevens omvat een controle onder meer een evaluatie van de aanvaardbaarheid van de toegepaste grondslagen voor financiële verslaggeving en van de redelijkheid van schattingen die de Raad van Bestuur van het ZBO NMa heeft gemaakt, alsmede een evaluatie van het algehele beeld van de financiële overzichten.

Wij zijn van mening dat de door ons verkregen controle-informatie voldoende en geschikt is als basis voor ons oordeel.

Oordeel
Wij zijn van oordeel dat de verkorte jaarrekening op alle materieel van belang zijnde aspecten in overeenstemming is met de jaarrekening waaraan deze is ontleend. Voor het inzicht dat vereist is voor een verantwoorde oordeelsvorming omtrent de getrouwe weergave van de financiële informatie van de NMa en voor een toereikend inzicht in de reikwijdte van onze controle dient de verkorte jaarrekening te worden gelezen in samenhang met de volledige jaarrekening, waaraan deze is ontleend, alsmede met de door ons daarbij op 19 maart 2009 verstrekte goedkeurende accountantsverklaring.

Den Haag, 7 april 2009

Auditdienst van het Ministerie van Economische Zaken

Was getekend	*Was getekend*
Drs. P.H. Staats RA	P.H.M. Verschoore RA
Senior auditor	Audit manager

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Den Haag, 7 april 2009

Auditdienst van het Ministerie van Economische Zaken

Was getekend	*Was getekend*
Drs. P.H. Staats RA	P.H.M. Verschoore RA
Senior auditor	Audit manager

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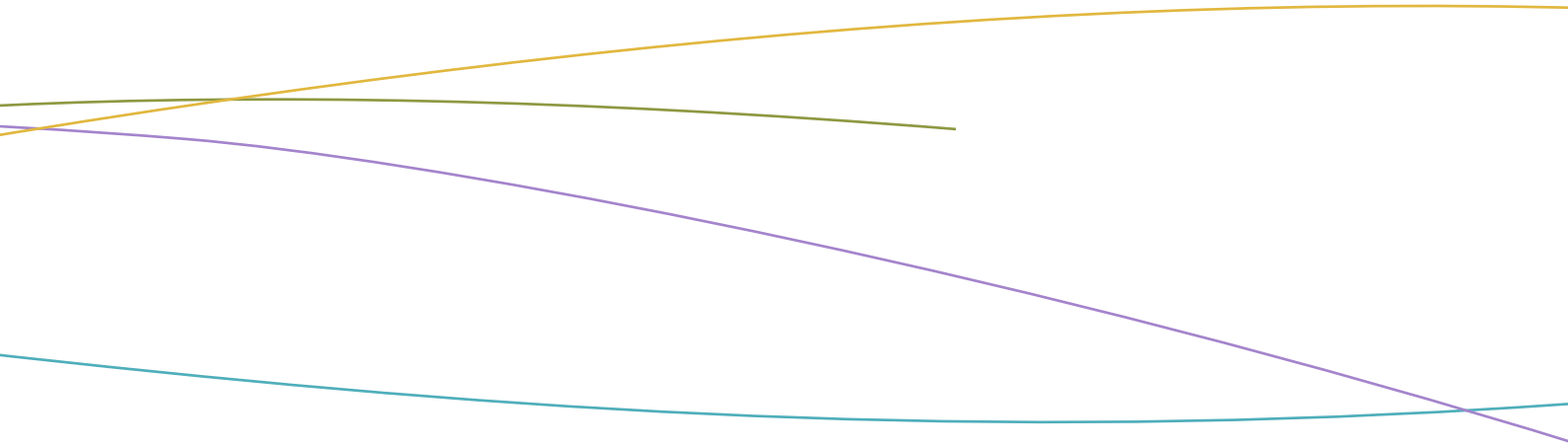

Contact

Address

Muzenstraat 81
2511 WB Den Haag
The Netherlands

Mail address

P.O. Box 16326
2500 BH Den Haag
The Netherlands
T +31 70 330 3330
F +31 70 330 3370
I www.nmanet.nl

ConsuWijzer, consumer information portal

T +31 70 330 1306
I www.consuwijzer.nl (in Dutch only)

Business queries

T +31 70 330 1306