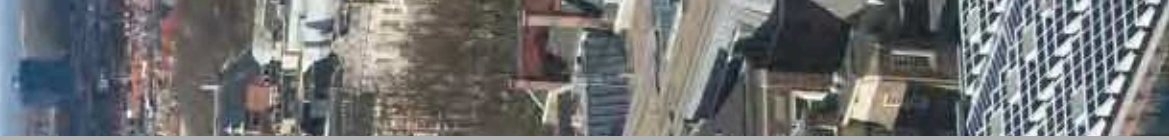


Annual report

2009 | weighing interests



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Key figures

Key figures NMa 2009		2007	2008	2009	Comments 2009
Competition					
Statement of Objections and Fines					
	Number of formal investigations under competition law	25	22	24	
	Number of formal investigations resulting in a Statement of Objections (establishing a reasonable suspicion that the Competition Act was violated)	4	11	15	
	Number of investigations completed by means of an alternative instrument	10	3	2	
	Number of investigations in which the formal investigation was suspended due to insufficient evidence	11	8	7	
	Number of cases in which a fine and/or an order for periodic penalty payments was imposed	6	6	12	
	Total amount of fines in competition cases (x € million)	9,5	9,0	4,5	
Complaints and informal opinions					
	Complaints settled in relation to violations of the Competition Act	65	29	24	
	Informal opinions	0	1	1	
Concentrations					
	Revenues from notifications and licenses (x € million)	1,1	1,9	1,2	
	Notifications of mergers, acquisitions and joint ventures (concentrations)	108	129	90	
	Withdrawn notifications	7	8	7	
	Exemption from the waiting period	1	2	6	
	Decisions on notifications of concentrations	106	121	82	
	License required for concentration	4	4	1	
	License applications	5	3	4	
	License applications withdrawn	3	-	1	
	Decisions on license applications	3	2	2	
Concentrations					
Railway Act					
	Number of investigations by Office of Transport Regulation	10	2	4	
	Number of formal investigations resulting in a Statement of Objections	4	-	-	
	Number of investigations completed by means of an alternative instrument	3	2	3	
	Number of cases in which no violation was established	3	-	1	
	Number of completed sanctions cases	1	4	-	
	Total amount of fines in transport cases (x € million)	-	1,7	-	
	Number of completed complaints related to the Railway Act	2	7	3	
	Advisory notices to the Minister of Transport	-	-	4	
Aviation Act					
	Number of requests for tariff assessment resulting in a decision	3	-	2	
	Approval decision on cost allocation system	1	1	1	
Pilotage Act					
	Decisions Pilotage Act	-	5	3	
Passenger Transport Act					
	Completed cases involving local transport companies	12	4	6	
	Number of cases resulting in a court ruling	1	-	-	
	Advisory notices to the Minister of Transport	-	-	2	
Energy					
	Revenues from contribution scheme energy (x € million)	2,6	2,7	2,9	
	Method decisions	25	8	-	
	Implementation decisions	74	103	69	
	Enforcement decisions	10	8	11	
	Advisory notices to the Minister of Economic Affairs	12	16	21	
	Dispute resolution	64	46	30	In contrast to 2007, the numbers of 2008 and 2009 reflect the number of completed procedures rather than the number of handled requests
	Number of energy cases in which a fine and/or an order subject to periodic penalty payments was imposed	2	5	9	
	Total amount of fines in energy cases (x € million)	0,3	1,6	0,8	
Administrative appeals					
	Completed administrative appeals in competition cases	107	73	18	
	Completed administrative appeals in energy cases	44	72	42	
	Completed administrative appeals in transport cases	2	8	1	
Judicial appeals					
	Judicial appeals completed by the District Court of Rotterdam against decisions in relation to competition	33	61	45	including 20 construction industry-related cases
	Judicial appeals completed by the Trade and Industry Appeals Tribunal against decisions in relation to competition	10	9	8	including 2 construction industry-related cases
	Judicial appeals completed by the District Court of Rotterdam against decisions in relation to energy	31	22	39	
	Judicial appeals completed by the Trade and Industry Appeals Tribunal against decisions in relation to energy	-	-	-	
	Judicial appeals completed by the District Court of Rotterdam against decisions in relation to transport	2	2	6	
	Judicial appeals completed by the Trade and Industry Appeals Tribunal against decisions in relation to transport	2	2	9	
Outcome					
	3-year rolling average (x € million)	317	356	328	
Budget and personnel					
	Total budget granted (x € million)	45,7	44,9	49,4	
	Number of employees on December 31st	392	399	438	
	Ratio men/women	51%/49%	51%/49%	51%/49%	
	Average age of staff	37	37	37	

Annual report

2009 | weighing interests

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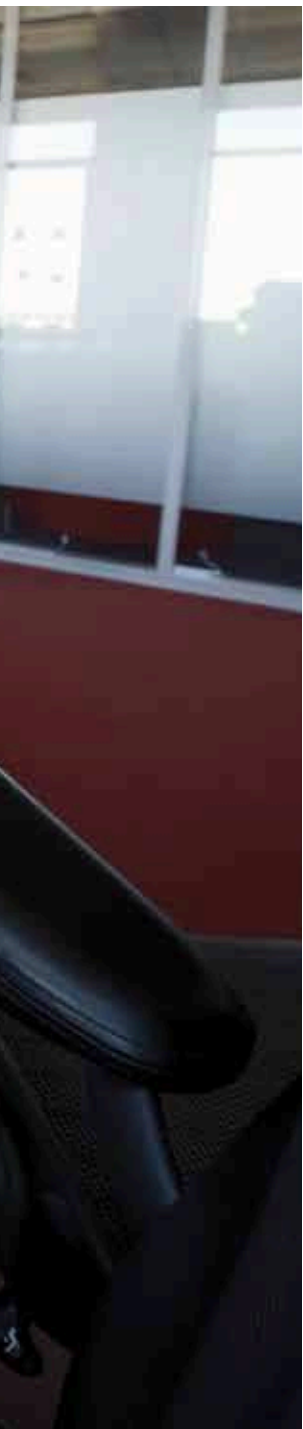


The Board looks back on 2009

Last year, in the 2008 Annual Report, the Board of the NMa said it feared that 2009 would be a difficult year for the Dutch economy. Indeed, it turned out to be the first full year of regulation in a time of economic crisis. Much has already been said about this issue, both on a national level as well as on an international level. Competition authorities across Europe have come to the conclusion that there is no reason to relax competition oversight, a point that was re-emphasized by incoming European commissioner for competition Joaquín Almunia, successor to Neelie Kroes, at his installation in February 2010. Moreover, the crisis has neither led to a change in the regulatory frameworks for the energy and transport industries.

‘Making markets work’

The crisis cannot be used as an excuse for creating a situation that, in the long run, may have adverse effects on the Dutch economy. If history has taught us anything, it is that anti-competitive measures may actually slow down economic recovery, and lead to irreversible and permanent market distortions. The NMa’s mission therefore remains the same: ‘making markets work.’ However, this does not take away the fact the NMa does indeed take into account the specific problems that the crisis is creating. Competition authorities not only have the instruments that help achieve the objectives of competition policy, but they also have the capabilities to advise governments and undertakings on how to deal with the effects of the economic crisis.



Accounting for our actions

In 2009, the NMa imposed fines totaling € 5.3 million for violations of the Dutch Competition Act and of energy and transport regulations. The number of fines has increased, but the total amount is lower than that of 2008 (which was € 12 million). This discrepancy is explained by the different natures of the cases the NMa handled. Cases vary each year, and so do the turnover totals of the undertakings involved, which, to a large degree, determine the level of the fines. The number of reports establishing a suspicion of an anti-trust violation increased in 2009 to 15. However, sanctions are not always imposed in the same year. In addition, the NMa has also assessed 84 concentration cases.

The NMa has issued a total of 80 decisions in energy cases, has resolved 30 disputes, and has given advice to the Dutch Minister of Economic Affairs in energy cases 21 times. The NMa launched 4 investigations in the transport industry, of which 3 were completed by a different instrument than a report. The Dutch Minister of Transport, Public Works and Water Management received advice from the NMa in 6 cases.

Furthermore, the NMa has also completed a total of 60 appeals in all areas of regulation. More key figures of the NMa can be found on page 2.

Outcome

The outcome of the NMa's actions to Dutch society is estimated at € 328 million, which is a 3-year rolling average. This outcome is almost seven times the NMa's annual budget. The NMa's outcome is determined using a method that was revised in 2008, and was explained in the 2008 Annual Report. This method consistently determines the direct effects of the NMa's actions in connection with its tasks of competition oversight and regulation of the energy

and transport markets. The calculation method can also take into account future effects that NMa decisions have, insofar these effects can be quantified.

The NMa in a state of flux

The NMa saw a number of changes in 2009. René Jansen and Gert Zijl resigned as members of the Board. The NMa owes them a large debt of gratitude. On October 1, Henk Don and Jaap de Keijzer were installed as new members of the Board.

Also on October 1, the Office of Energy Regulation and the Office of Transport Regulation merged and became the Office of Energy and Transport Regulation. Furthermore, in late 2009, the Board gave the order to explore possibilities of creating a single operational management department. See page 73 as well for the organization chart.

‘Between 2005 and 2009, leniency played a role in 40 per cent of cartel cases’

Policy rules on fines and leniency

The relationship with the Minister of Economic Affairs has also changed, without compromising the NMa's independence. Since October 1, 2009, the NMa's implementation rules on fines and leniency have been replaced with the Minister's policy rules. The NMa continues to be the body that sets the fines, as well as the one that determines whether or not an undertaking qualifies for leniency. Leniency is internationally recognized as an important instrument for enhancing the effectiveness of compliance. Between 2005 and 2009, leniency played a role in approxi-

mately 40 per cent of the investigated cartel cases, and the NMa received more than 50 leniency applications in that same period (excluding the fast-lane procedures related to the construction-industry cases). It is thus a constant source of potential cartel cases. Not all applications contain enough information to launch an investigation, but the quality of information in recent applications has risen. In addition, it is expected that, in time, the abovementioned rate of 40 per cent will only increase, as this has been the experience of the European Commission, which has had a longer history of working with this instrument.

The 2009 Annual Report

In this Annual Report, the NMa is accounting for its oversight actions in 2009. Just as in previous years, most of the attention is devoted to the focus industries, which have been mentioned in the NMa Agenda: financial services, food- and agro industry, health care, energy and transport.

This year's Annual Report will have a first: a separate section that is entirely devoted to a single subject, which is 'public interests.' It was once again evident last year that the way the NMa takes public interests (e.g. health care quality or environmental concerns) into account in its decisions greatly affects its authority as regulator. This special section offers the opportunity to explore this issue in more detail and to describe the dilemmas the NMa is faced with. The NMa looks at these from every angle, an approach that is cleverly reflected in the annual report's design and photography.

Our hope

In times of crisis, competition helps economic recovery. Effective oversight leads to dynamic markets, positively affecting economic growth as well as consumer welfare. The Board hopes that, by enforcing sound oversight, it contributes to a stronger Dutch economy, today and tomorrow.

The Hague, the Netherlands, April 22, 2010



Pieter Kalbfleisch
Chairman of the Board of the NMa

Performance of the NMa

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This section below gives a summary of several important aspects of the NMa's performance, which are unrelated to its actions in the focus industries. By listing these aspects, the NMa is meeting some of the Dutch Minister of Economic Affairs information requests.

Lead times

The NMa pays close attention to the lead times of its core processes, which is reflected, for example, by the fact that they are part of the controlling information of the directors and the Board. In order to increase transparency, the NMa has included in this annual report information on its internal targets and to what extent these have been achieved. More detailed information and explanations can be found in the annex on page 72. The explanation below only applies to competition cases, since this is what the NMa receives the most questions about.

With regard to the lead times of cartel and abuse cases, the NMa targets to have 90 per cent of these cases completed within 20 months, counting from the official launch of the investigation by the Competition Department until the (penalty) decision has been drawn up by the Board. This is an internal target figure only, and, as such, is not considered an official maximum. However, under Section 6, ECHR, the NMa is required to decide within 'a reasonable amount of time.' The NMa aims to act properly, which is reflected by (a) the high standards that the NMa's argumentation must meet and (b) by the NMa fully respecting the rights of the accused party and of possible other interested parties. The NMa has nevertheless succeeded in completing a substantial share of the penalty and objection procedures within the target period. The abovementioned target figure for completing cartel and abuse cases is trending upwards (see annex). In 2009, the NMa completed 86 per cent of the cartel and

abuse cases, in which a penalty was imposed, within the internal target of 20 months. The average lead time was more than 14 months.

International comparison

In 2009, international antitrust and competition law journal the Global Competition Review once again compiled a ranking of all competition authorities around the world. The NMa was awarded 3.5 stars (category 'good'), just like in 2008, thereby securing a joint ninth place on the GCR's world ranking. Average lead times for comparable procedures in countries that had been awarded a similar or better rating by the GCR varied between 18 and 36 months – lead times in Spain and France are 18 months, in Belgium 20 months, in Germany 24 months, in Switzerland 30 months, and in the UK 36 months.

Anticipation by undertakings

Each year, the NMa conducts a telephone survey among small and medium-sized businesses 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. Almost 28 per cent of those surveyed in 2009 indicate that rulings by competition authorities have an effect on their way of doing business in the market, which is a slight increase over 2008 (25 per cent).

Complaints about the NMa

In 2009, the NMa received a complaint about the Office of Energy Regulation's methods and provision of information. The Board rejected the complaint, because it did not concern

a concrete action of the NMa vis-à-vis the complainants. In another instance, a complaint about the processing speed of a specific competition case was withdrawn by the complainant.

Cooperation

National

Since March 2009, six regulators in the Netherlands have started working together in the Consultation Forum of Regulatory Bodies (MTB), which are the Netherlands Competition Authority (NMa), 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), and the Dutch central bank DNB. The Forum's aim is to gain new insights, and to adopt a joint approach wherever possible. At the MTB's first meeting, participants were divided into several expert groups and discussed various topics, including civil liability of regulators, and enforcement communication strategy. The latter was the main topic in a follow-up meeting held in the fall of 2009, organized by the AFM and the Dutch Tax and Customs Administration. The NMa also enjoys good relations with other non-MTB bodies for the exchange of information, including the Dutch Public Prosecution Service, the Dutch Fiscal Information and Investigation Service/Economic Investigation Service (FIOD-ECD), the Dutch Tax and Customs Administration, and Statistics Netherlands (CBS).

International

On an international level, the NMa contributes to European developments related to competition law and market integration, such as freight transport or the creation of a northwestern European energy market. More information on international collaboration with regard to sector-specific oversight can be found in the relevant chapters.

On a European level, the NMa, together with the Dutch Ministry of Economic Affairs, is part of the European Competition Network (ECN). The NMa is regularly represented in advisory committees, where decisions are taken on the European Commission's cases related to cartels, concentrations and abuses of dominant positions. In order to harmonize the uniform interpretation of European competition law, the NMa in 2009 took part in discussions on the revised European block exemption, the guidelines on vertical restraints, and on the new guidelines on horizontal restraints.

On a global level, the NMa is active in the International Competition Network (ICN) and, together with the Dutch Ministry of Economic Affairs, in the Organization for Economic Co-operation and Development (OECD). Sharing each other's knowledge among fellow competition authorities is the primary objective of ICN, where less experienced authorities can learn from the more experienced ones. In June 2009, chairman of the Board of the NMa Pieter Kalbfleisch became a member of the ICN Steering Group for three years. In addition, the NMa in 2009 was actively involved in, among other things, the working groups of Unilateral Conduct and Agency Effectiveness. Competition authorities work together in these working groups in order to develop a common approach when implementing competition policy and enforcing competition oversight. At the 2009 ICN Annual Conference in Zürich, Switzerland, the NMa was officially selected as the organizing authority of the 2011 ICN Annual Conference, which will be held in May 2011 in The Hague.





General

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As in previous years, the NMa in 2009 focused on a wide range of markets. The NMa's most important actions in its so-called focus industries, as designated in the 2008-2009 NMa Agenda, are listed in separate sections in this Annual Bulletin. The element of surprise is a vital part of any enforcement strategy. This means that the NMa also takes actions in industries other than those that have been designated as focus industries. Below is an overview of some notable activities in non-focus industries in 2009.

Enforcement

Swimming pool chemicals distributors fined

Five Dutch swimming pool chemicals distributors in November were imposed fines of more than € 2 million. One undertaking, although having taken part in the cartel, was not imposed a fine because it had confessed the cartel to the NMa, having filed a leniency application. One undertaking's fine has been reduced after an objection was filed. The NMa considered it proven that the cartel engaged in illegal cartel activities for more than 7 years in connection with the sale of swimming pool chlorine to swimming pools, which use this chlorine to disinfect pool water. The cartel had a market share of 90 percent and had existed long before 1998, when the Dutch Competition Act came into effect. Its objective was to 'keep the market calm' by sharing customers (swimming pools). The cartel participants used a so-called swimming pool list. Moreover, they convened twice a year and also contacted each other outside these 'formal' meetings in order to maintain the customer sharing system.

Painting cartels fined

Since June 2009, the NMa has imposed fines on 16 different painting companies. Between 2004 and 2006, these companies were involved in six cartels (in various compositions) participating in various public tenders for painting contracts in the Eindhoven metro area, a city in the south of the Netherlands. Prior to submitting their own bids for these tenders, the painting companies in question divided the work, harmonized their bids, and in some cases even agreed on mutual compensations. The facilitator to these cartels, a cost engineering firm, has been fined – a first for the NMa. The fines in all of these cases total € 434,000.

Landscaping firm fined

The NMa imposed early December a fine of € 138,000 on a landscaping firm based in the southern Dutch province of Limburg. The District Court of Rotterdam considered it proven that, in 2004, this undertaking and eight other undertakings met each other and harmonized their bids prior to five public tenders put out by the municipality of Maastricht. The tenders involved the maintenance of the municipal landscape. In December 2005, the NMa imposed a fine of more than € 1 million on these eight undertakings. A number of these undertakings raised objections against the NMa's previous conclusion that the evidence for the involvement of the landscaping firm in question in the cartel had been insufficient. The judge weighed the evidence differently than the NMa did, and ruled that the landscaping firm had indeed violated the Competition Act, just like the other eight undertakings had that had already been fined. The NMa has therefore decided to impose a fine on the landscaping firm after all.

Fines for not cooperating in an investigation

A former employee of an undertaking has been imposed a fine of € 100,000. In addition, two former CEOs of another undertaking were each fined € 150,000. The NMa had

demanding information from all of these individuals in connection with official NMa investigations. Under the Dutch General Administrative Law Act, everyone is required to cooperate in such investigations. By repeatedly refusing to answer questions posed by the NMa, they failed to provide information, which constitutes a violation of their legal obligation to cooperate, on the basis of which the NMa has imposed said fines. If it was not for the obligation to cooperate, the NMa would have a hard time doing its job properly. When setting fines, the NMa takes into account individuals' personal financial situations. However, both CEOs refused to disclose their financial situations, and the NMa was therefore forced to use an estimate, taking into account their former positions. The maximum fine the NMa can impose for non-cooperation in an investigation is € 450,000.

‘Without the obligation to cooperate, the NMa would have a hard time doing its job properly’

Investigations in the construction industry

In January, the NMa carried out dawn raids at various construction companies in the southern Dutch province of Limburg. Concurrently with the NMa's investigation, the Dutch Public Prosecution Service (OM) also conducted an investigation. The NMa's investigation was prompted by wiretap transcripts that the OM had provided the NMa with. The wiretaps were done in connection with an investigation into bribery of government officials by a construction company. The NMa will draw up reports in 2010 against several of the undertakings that were dawnraided.

No antitrust investigation into online retailing

The NMa does not see any reason to launch an investigation into manufacturers and suppliers that supply products to web retailers. After various media reports about suppliers allegedly treating web retailers differently than regular retailers, the NMa in 2008 publicly called for retailers to report any problems they have encountered with regard to web retailing. In addition, the NMa sent out two extensive questionnaires in the white goods industry and in the watch industry. Most of the reactions to the questionnaires, as well as most of the indications the NMa had received, lacked documents that could be used as evidence by the NMa, such as contracts, letters, and emails. In the instances that such documents indeed had been included, these documents did not generate enough leads to launch an investigation.

No violations on auto repair market

No violations of the Competition Act have been established on the auto repair market, the NMa concluded after having carrying out an extensive market analysis, launched in part because it had received a substantial number of reports on the anti-competitive role that insurance companies allegedly played on the auto repair market. Insurance companies steer auto repairs when they influence their customers' choices for an auto repair shop by, for example, paying the repair costs directly to the auto repair shop, by offering a discount on their customers' deductibles, or by offering replacement transportation. A survey commissioned by the NMa reveals that insurance companies steer 40 percent of car repair cases and 16 percent of windshield damage cases. The survey's results have led the NMa to conclude that individual Dutch insurance companies presently do not have a dominant position on the auto repair market. The current collaborations of several Dutch insurance companies have no buyer power either. Each of the alliances' market shares does not exceed 15 percent.

Complaints about abuse of GasTerra's abuse of its dominant position rejected

The Dutch Commodity Board for Horticulture (PT) and the Dutch Association of Fertilizer Producers (VKP) have filed complaints against GasTerra for natural-gas tariffs being too high, possible price discrimination, and unreasonable contractual conditions. After an extensive investigation, the NMa came to the conclusion that GasTerra did not have excessive tariffs on a structural basis between 2001 and 2007. Furthermore, the NMa believes that the complaints do not give enough reason to suspect that there is price discrimination that can be considered abusive. The contested contractual conditions do not violate the Dutch Competition Act, according to the NMa

Merges and acquisitions

Media company De Persgroep acquires majority interest in publishing company PCM

The NMa ruled in early July that Flemish media company De Persgroep was allowed to acquire a majority interest in Dutch publishing company PCM Holding, under the condition that NRC Handelsblad and nrc.next, two of PCM's national newspapers, are sold. De Persgroep has a majority interest in Amsterdam-based newspaper Het Parool. PCM Holding publishes Dutch national newspapers NRC Handelsblad, nrc.next, de Volkskrant, Trouw, and also newspaper AD, in cooperation with Dutch media company Wegener. In attaching the abovementioned condition, the NMa expects that competition on the market for local and regional papers in the Amsterdam region is safeguarded. In addition, local, regional and national competition between NRC Handelsblad and nrc.next on the one hand, and De Volkskrant, Trouw and AD on the other hand, will increase. In addition, the NMa in mid July allowed PCM Holding to buy out the stake of Wegener in AD Nieuwsmedia (ADN),

which was created in 2005 by PCM and Wegener for publishing AD. The buy-out will result in PCM having full control over AD. The acquisition is not expected to lead to an impediment to competition, despite the strong combined position of ADN and PCM in a number of areas in the Randstad, the densely populated, urbanized area in the western part of the Netherlands. Competitive pressure that the PCM newspapers exert on AD – and vice versa – is limited. It is therefore unlikely that, with the acquisition, PCM will be able to profitably push through a price increase or a reduction of the quality of AD.

Joint venture of municipality of Amsterdam and Reggefiber in optic-fiber company GNA

The NMa has conditionally approved that Dutch optic-fiber company Reggefiber Group and the Amsterdam Development Corporation (OGA), a municipal organization, take joint control over optic-fiber company Glasvezelnet Amsterdam (GNA). Reggefiber Group is a joint venture of Dutch telecom company KPN and Reggefiber. GNA currently has a long-term contract with telecom company BBned. Ensuring that BBned would not be disadvantaged by the planned joint venture, the NMa laid down the condition that BBned would have the opportunity to switch to the regulated network of Reggefiber Group at any point in the future.

The approval is in line with earlier decisions that the NMa issued on December 19, 2008 and on July 28, 2009, in which specific conditions were imposed on Reggefiber Group. The conditions guarantee, among other things, that telecom companies have access to the joint venture's optic-fiber network in a non-discriminatory way and against a tariff that has been capped. Furthermore, these decisions also guarantee that all undertakings Reggefiber Group has control over must offer access (to their networks) under the same conditions. The NMa therefore did not have any additional antitrust objections against the joint venture.

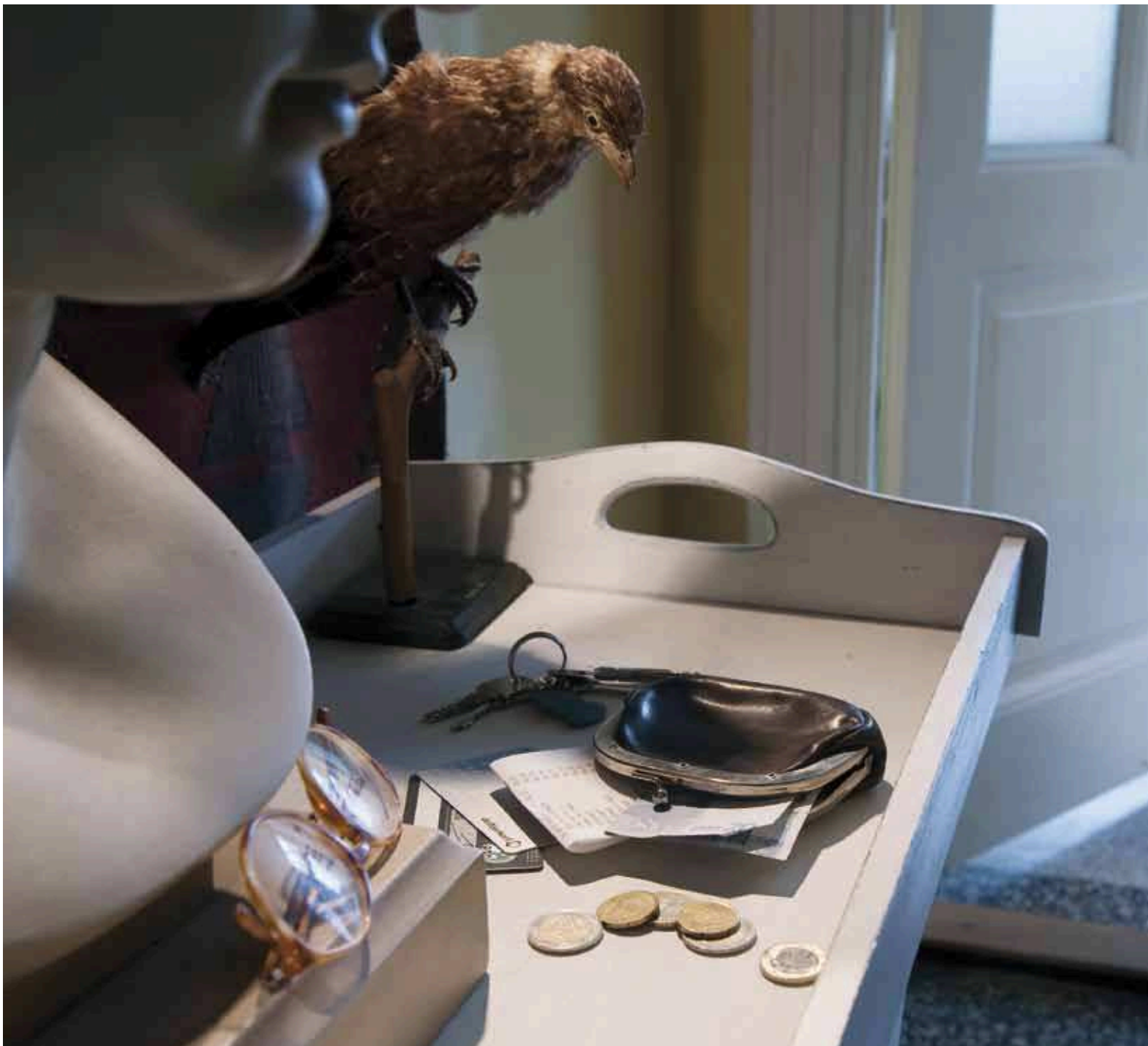
Joint venture in industrial-water industry

The NMa approved in June the creation of the joint venture Evilim Industriewater by Dutch water companies Evides Industriewater and Waterleiding Maatschappij Limburg (WML). An overwhelming majority of industrial-water buyers, a study revealed, collect and supply industrial water themselves, meaning they are not dependent on industrial-water suppliers. Industrial water is water that is used as production resource or as raw material in production processes. Moreover, only after the creation of the joint venture will Evides Industriewater become active in the southern Dutch province of Limburg. The concentration will therefore not have any anti-competitive consequences on this market. On the market for water treatment, buyers will have plenty of alternatives, in part because of the presence of several large international players.

'It took five years before the first Amicus Curiae request was made'

Amicus Curiae

On December 3, 2009, the judge in interlocutory proceedings of the District Court of Amsterdam ruled in a case, brought by former officially Kia-recognized car repairers. The ruling was based on the first ever involvement by the NMa as so-called Amicus Curiae. In 2004, national competition authorities were granted the power to act as a party in civil proceedings to ensure that European competition law is interpreted and applied uniformly. Despite repeated calls from scholars and lawyers over the years, it took five years before the first request was made by a judge.





Financial services

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The financial services industry deserves the NMa's attention because of its wider significance to the economy and its market structure – relatively few players that have substantial market shares. The complex nature of many a financial product makes the industry relatively non-transparent. Several market studies have therefore been carried out, next to several antitrust investigations. In addition, the NMa has given governments and companies advice (advocacy and guidance).

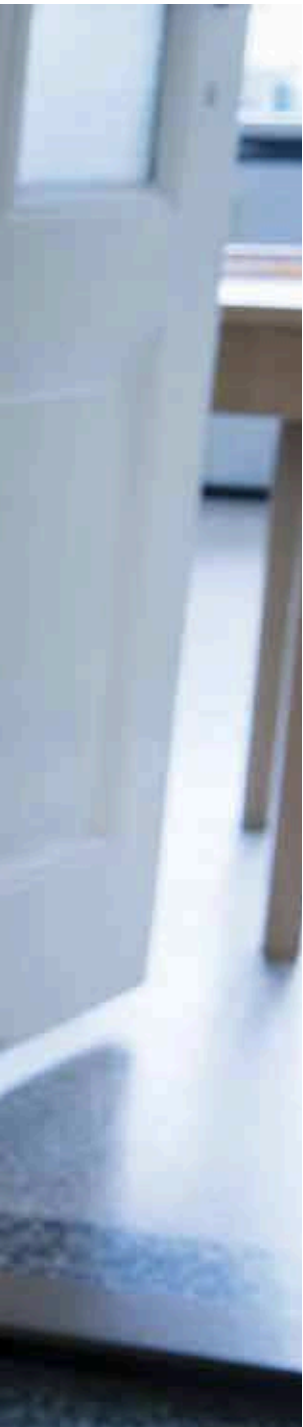
Enforcement

NMa involved in managing the financial crisis

Over the last year, the NMa has had regular contact with the Dutch Ministry of Economic Affairs, the Dutch central bank, the European Commission, and the Dutch Ministry of Finance to discuss options aimed at mitigating risks of anti-competitive effects caused by the financial crisis and other developments in the financial industry. Emphasis in advocacy was laid on guaranteeing there would be sufficient opportunities to enter the market and on preventing market disruptions due to the support the Dutch government provided to various financial organizations, and to the government now owning the major banks ABN Amro and Fortis.

More competition possible among banks

The NMa completed in March an antitrust investigation into interest rates that Dutch banks charge small and medium-sized businesses (SMBs) when giving them business loans. SMBs are usually charged a base interest rate, which includes a fixed interest-rate surcharge. This surcharge was



the same at all banks for all SMB customers between 1990 and mid 2007. Larger businesses were not charged this surcharge. The NMa believes that this observed ‘parallel’ behavior among banks might be explained by the individual market power of banks vis-à-vis SMBs, or by banks implicitly mirroring each other’s behavior because of the limited number of providers. Three major banks have a combined market share of 85 percent.

‘More competition possible for SMB business loans among banks’

No violation of the Competition Act was established, but the NMa did make some recommendations in order to improve competition, which should make it easier for SMBs to switch banks. Banks could provide more information on the various aspects of a loan application, enabling SMBs to better compare banks. Banks could make it easier for their customers to switch banks. Furthermore, SMBs should consider getting their products and services from different banks or they could ask their banks for credit options without a base interest rate that includes a fixed interest rate.

Study into tying practices of banks

In October, the NMa commissioned Dutch market research agency TNS NIPO to find out to what extent banks were forcing small and medium-sized businesses (SMBs) to purchase additional products, such as checking accounts and insurances, when taking out a loan. SMBs had submitted tip-offs and indications about tying practices, which prompted the study. In addition, businesses were being asked about their relationships with their banks and what obstacles they encountered when switching banks.

Updated payment services covenant

The NMa was involved in the revision of the payment services covenant, which had been drawn up in light of the harmonization of European payment services, a process that aims at increased competition among different payment service providers. The most crucial element of the covenant is the fact that payment cards similar to regular debit cards in terms of functionality should not become more expensive in the next five years, and that parties take steps to stimulate efficient payments without impeding competition. The NMa stressed innovation. Providers offering new products with significant improvements should be able to introduce these products in the market and should not be restricted by the tariff guarantees.

Keeping an eye on costs for payment methods

In February and March, the NMa carried out a so-called baseline measurement among Dutch banks, Visa, Mastercard, and organizations that sign contracts with retailers about the tariffs for the use of their payment methods such as debit cards and online banking services. Information was requested from these companies. The results revealed that it is worthwhile for consumers if they first made a comparison of the various payment methods’ tariffs and then made a choice. Tariffs that business customers pay per transaction do not vary that much, yet even these business customers would benefit from switching. The trend of these tariffs can be analyzed once a second measurement has been carried out sometime in 2010. The study should be able to explain what the effects of the creation of the joint European payment market in 2008 are on these tariffs.

Applicability of Dutch Competition Act clarified for pension funds

The NMa in May published the 'Implementation regulation on pension funds', stating that all pension funds are considered undertakings within the meaning of the Dutch Competition Act, because they carry out economic activities. The implementation regulation gives guidance by removing the uncertainty about the Competition Act's applicability for Dutch pension funds

Mergers and acquisitions

New trading platform for stocks and derivatives

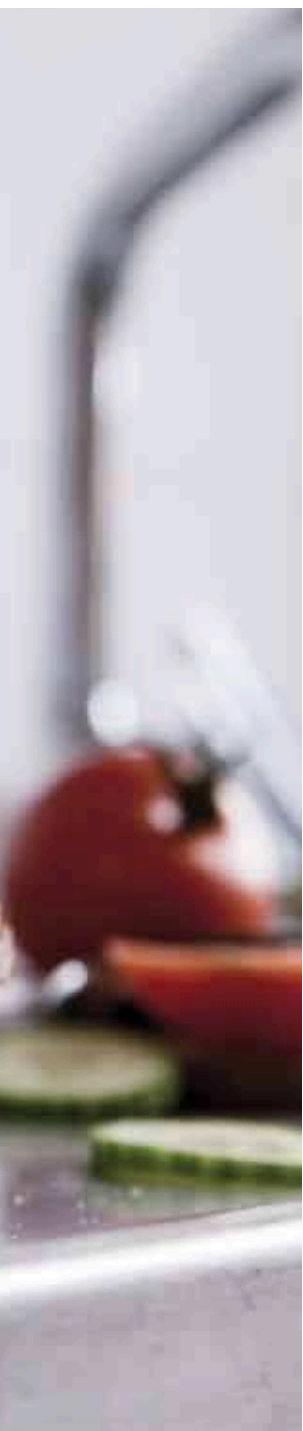
The NMa has greenlit the planned joint venture of retail broker BinckBank and derivatives trading company Optiver. The joint venture is a new trading platform for stocks and derivatives that would compete with the trading platforms of NYSE Euronext Amsterdam. BinckBank and Optiver have indicated that other banks (so-called brokers, competitors of BinckBank) will be admitted in the foreseeable future, as well as competitors of Optiver (so-called marketmakers) in the longer run.





Food and Agriculture

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Global liberalization of agricultural markets combined with the profound changes in the Common Agricultural Policy of the EU have increasingly made competition in the food and agricultural industry a given. Its market structure, characterized by high levels of concentration in various segments and by homogenous products, poses a higher risk of competitive restrictions. In the last two years, the food and agricultural industry has seen several cartel investigations. Furthermore, the NMa has increased transparency in the price-forming mechanism of the food production chain. Finally, the second half of 2009 also witnessed a rise in the number of merger notifications.

Enforcement

Cartel investigation in flour industry

In late 2009, the NMa drew up reports against a number of companies in the flour industry, an industry that has caught the attention of competition authorities abroad as well. The companies in question have the opportunity to defend themselves at a hearing, both in writing or orally, after which the NMa will decide whether or not the violation can be established, and if so, what penalty is imposed. Penalties in these cases can be as high as 10 percent of the undertakings' global turnover.

Investigation into undertakings in fruit and vegetable industry

The NMa has carried out dawn raids at eight undertakings specialized in selling fruit and vegetables. In addition, various individuals have been heard by the NMa. The investigation was launched because of information the NMa had received which could indicate that growers and undertakings specialized in selling fruit and vegetables may have been engaged in cartel activities. The Belgian competition authority has also carried out dawn raids in the same industry in Belgium.

‘Flour cartel suspected by NMa’

More transparency of price-formation mechanism in food production chain

The NMa has studied the price trends of potatoes, onions, cucumbers, bell peppers, apples, bread and eggs. It launched the study because of the rise of food prices in recent years and because of the indications it has been receiving from, among others, the Dutch Consumer Association (Consumentenbond) and the Dutch Federation of Agriculture and Horticulture (LTO). The NMa looked into the levels of retail prices, costs, and margins in various links of the production chain. It then analyzed the development of the retail prices and margins for the period of 2005-2008. It also assessed whether any of the links in the production chain had such a market position that it was able to improve its margins by unilaterally raising its prices.

Prices in the industry, in all links in the chain, from producer to supermarket, have substantially increased in the period investigated by the NMa. However, these increases in the Netherlands have been less steep in comparison with the

European average. Despite the trend of Dutch price levels, the price increases have not always led to an improvement of the margins in various links. Supermarkets have apparently been unable to unilaterally raise these products' prices profitably at the expense of producers and consumers in the period of 2005-2008. Consumers prices of these products are largely composed of wholesale and supermarket costs.

In roundtable discussions, the study's findings were discussed with senior industry representatives, setting off a debate on the functioning of the chains in order to make the agro-food industry as a whole more transparent. The positive reactions to this approach have bolstered confidence.

Mergers and acquisition

Fine for providing incorrect information in notification of an acquisition

The NMa has imposed a fine of € 468,000 on soft drink producer Refresco Holding (Refresco) for having provided incorrect and incomplete production data when it notified the NMa in September 2008 of its acquisition of Schiffers Food. On the third try, Refresco finally provided the NMa with the right data, which revealed that, among other things, Refresco's production capacity was actually substantially larger than earlier assumed on the basis of earlier data. The fine marked the first time the NMa imposed a fine under its expanded fining powers when the amendments to the Dutch Competition Act of October 1st, 2007 came into effect. The maximum fine for providing incorrect or incomplete data has been raised from € 22,500 to € 450,000 or, should that be higher, at least 1 percent of the undertaking's turnover.

Merger of four co-operative grower associations approved

The NMa ruled that the merger between four co-operative grower associations (Coöperatieve Telersvereniging Tradition, Coöperatie WestVeg, Unistar Coöperatie, and Coöperatieve Telersvereniging Brassica-Group) did not require any license. These associations produce, among other things, eggplants, cucumbers, bell peppers, and tomatoes. The NMa saw no reason to assume that this merger would significantly impede competition on the Dutch market or on a part thereof.

NMa approves acquisition of dairy activities

Danish-based dairy products producer Arla Foods was allowed to acquire virtually all of the dairy activities of its Dutch rival Koninklijke FrieslandCampina. This has been part of the agreement that Friesland Foods and Campina had reached with the European Commission in order to get approval for their merger.

Jumbo conditionally acquires supermarket chain Super de Boer

The NMa has approved the acquisition of 300 stores of supermarket chain Super de Boer by rival chain Jumbo. The acquisition was approved under the condition that the Super de Boer store in the city of Bunde is sold to a third party because it would otherwise create a local antitrust problem in the area of Meerssen.

Joint venture FloraHolland and Landgard

Co-operative flower auction FloraHolland and Landgard Blumen & Pflanzen were allowed to create a joint venture. FloraHolland and Landgard will consolidate their activities in connection with flower and plant sales on the auctions in Venlo, Lüllingen (Germany) and Herongen (Germany) to a single location.





Health Care

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More and more health care sectors are becoming regulated markets. The NMa has therefore once more focused much of its attention on advocacy and guidance. After all, competition in the health care industry is still a relatively new concept. Changing market structures have led to expansion and rising numbers of collaborations in the industry. The NMa in 2009 received 14 health-care-related merger notifications.

Enforcement

Consultations on Health Care Guidelines

In September, the NMa held a public consultation with market parties, such as health care providers and health insurers. The consultation resulted in suggestions for new topics and examples in a revised edition of the Health Care Guidelines. The main reason for revising them was because the health care industry often claims that it is not always clear what is allowed under competition law. For example, the industry indicates that it sometimes senses a certain tension between the Competition Act on the one hand, and the desire to cooperate and chain care on the other hand. It is essential that the NMa offers guidance and that it relates to current topics in health care, thereby taking away uncertainty.

To take away existing uncertainty, the NMa and the Dutch Healthcare Authority (NZa) have jointly drawn up a consultation document on cooperation in health care groups. Health care groups are organizations composed of primary-care providers with whom health insurers sign contracts

in order to coordinate and provide chronic-illness care (for illnesses such as diabetes, COPD and heart failure) in a certain region to improve health care quality. Both the NMa and the NZa regularly receive indications that market parties often have a hard time understanding what is legally allowed regarding cooperation.

‘The NMa offers guidance by addressing current issues in health care’

NMa carried out a market scan into day care

In late 2008, former Dutch State Secretary of Education, Culture and Science (OCW) Sharon Dijksma asked the NMa to find potential antitrust bottlenecks in the day care market by carrying out a market scan. The market scan’s results have been incorporated in the report ‘Functioning of the day care market’, which was sent to OCW in early November 2009. Some aspects appear to hinder market entry, such as finding the right location, the long time it takes to recoup investments, and the uncertainty over future government policy.

Mergers and acquisitions

Quality of care was the decisive factor in approval of hospital merger

Having conducted an extensive investigation, the NMa gave its approval for the merger of Walcheren Hospital (located in the southwestern Dutch city of Flushing) and the Oosterschelde Hospitals (located in the southwestern cities of Goes and Zierikzee). The merger safeguards the quality of essential basic hospital care in the central region of the province of Zeeland. The NMa attached strict conditions

to the merger, ensuring that the claimed improvements in quality are guaranteed and that prices will not much deviate from the national average. In its decision, the NMa came to the conclusion that, after the merger, patients in central Zeeland will be left with very few options, and that the merger hospital will virtually have a monopoly position. Other small Dutch hospitals have the option of turning to nearby, larger (academic or top clinical) hospitals compensating for possible shortcomings – an option the hospitals in central Zeeland, a peninsula in the sparsely populated southwestern corner of the Netherlands, do not have, due to its isolated geographical position. Because a merger was necessary to guarantee the continuity of hospital care in this region, the NMa approved this merger, albeit under the strictest of conditions. The NMa also looked into the opinions of the Dutch Healthcare Authority (NZa) and of the Netherlands Health Care Inspectorate (IGZ) before it formulated its decision. More information on this merger can be found in the special section on page 48.

Emergency decision on acquisition of Meavita Hulp The Hague by Asito

In February 2009, it became clear that care provider Meavita was in financial trouble. Domestic-care provider Thuiszorgservice Nederland, part of facility-service provider Asito, wanted to acquire the domestic-care activities of Meavita Hulp The Hague in that municipality. It had therefore sought approval for the acquisition even before the NMa had finished the substantive review. Given the immediate threat of Meavita Hulp The Hague’s bankruptcy, the NMa issued an emergency decision approving the acquisition, and thereby ensuring the continuity of Meavita’s care services and work. Once the substantive review was finished several weeks later, the acquisition was formally approved.

NMa approves acquisition of VZA by AMC

The Amsterdam-based Academic Medical Center (AMC) was given the green light to acquire Dutch ambulance service provider VZA Groep (VZA), whose services include the provision of emergency and patient transport services, and which operates mostly in the Amsterdam metropolitan area. It is unlikely that this acquisition of an ambulance service provider by a hospital will result in a significant impediment to competition. The NMa first examined what options the new organization would have in influencing the ambulances' destinations, which, in practice, is very limited. Ambulance service providers are legally required to provide reliable health care. This means they have to transport a patient to the nearest hospital that is able to provide the appropriate treatment or care. Amsterdam has eight hospitals, spread out across the city, which means the odds that all of the ambulances would go to AMC are quite slim. It is expected that the (few) additional revenues would not weigh up against the costs. In addition, a study looking into the potential effects on the competitive positions of other hospitals revealed that only a small portion of all patients that are treated by a hospital is transported thereto by ambulance. It is therefore unlikely that, as a result of the acquisition, the competitive positions of the other hospitals would be significantly harmed. The Dutch Healthcare Authority (NZa) was consulted in this case.

Mergers in the second phase

Most health care mergers were able to go through smoothly. Only in some cases did the NMa find it necessary that a license would be required. The outcome of these license applications was still unknown at the time of writing.

According to the NMa, the planned concentration of Pleyade Foundation and Catharina Foundation might impede competition on the markets of nursing home care, psychogeriatric and somatic home care in the municipality of Arnhem and/or in the greater Arnhem area, a city in the eastern part of the Netherlands.

In June, the NMa concluded that a merger between two mental health care institutions in the southern Dutch province of Noord-Brabant, Arkel and GGZ Oost Brabant, might impede competition on the markets of clinical and non-clinical mental health care for adults and seniors, and on the market of non-clinical mental health care for children and young people.

Finally, health care providers Carinova Leiboorn Groep, Vèrian and Sutfene withdrew their merger license application, when the NMa stated its provisional objections. The planned merger may have led to the providers no longer being stimulated to provide good care at a good price.





Transport

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A department of the NMa, the Office of Energy and Transport Regulation is charged with oversight on railway infrastructure managers ProRail and Keyrail, Amsterdam airport Schiphol, the Dutch pilotage industry, and the municipal public transport companies of Amsterdam, The Hague and Rotterdam. Its mission is to make transport markets work by monitoring markets and bringing about permanent behavioral changes. In 2009, the then Office of Transport Regulation celebrated its fifth anniversary, holding a convention themed ‘Customized oversight’.

Railway

Dispute settlement between ProRail and transport companies

Under the Dutch Railway Act, transport companies and other stakeholders have the opportunity to submit a dispute to the NMa. Dutch railway undertaking NS complained about ProRail’s interpretation of the 2008 access agreement and of an NMa decision of June 3, 2008, in which a specific increase of the infrastructure charge (the tariff for using the infrastructure) was rejected. The NMa partially ruled in NS’ favor, but it rejected the request of imposing an order subject to periodic penalty payments, because ProRail had already stated it had come to an agreement with NS. A second dispute involved railway undertaking DB Schenker and the so-called performance scheme ‘quiet wagon kilometers’, which financially rewards undertakings whose noise emissions are reduced when utilizing low-noise rolling stock. The performance scheme discriminates between freight rolling stock and passenger rolling stock. ProRail was unable to explain why it discriminated between the two types of

rolling stock. The NMa thus ruled that the discrimination was arbitrary. ProRail was ordered to adjust the performance scheme within a reasonable period of time.

Monitoring the rail market

The NMa in 2009 published the fourth Rail Monitor, a current overview of the Dutch rail industry. With the input of railway undertakings, the Office of Transport Regulation was able to adjust its plans so that its activities would better address the problems identified by the industry.

‘The Office of Transport Regulation turned five in 2009’

Policy advice in connection with Dutch Railway Act and Europe

The NMa in 2009 gave advice in a number of issues by carrying out four feasibility and enforceability analyses. This concerned the modification of the Dutch Railway Act to Regulation 852/2008 on freight corridors, amending the Decision designation of main railways, the modification of the Dutch Railway Act and the 2000 Passenger Transport Act to Directive 2007/58 and the Dutch Government’s position in connection with the evaluation of the Dutch Railway Act.

The NMa is also active on an international level. In close cooperation with other European railway regulators, the NMa safeguards non-discriminatory access to railway markets at an international level. In 2009, one of the results of this international cooperation is that the European railway infrastructure managers agreed to share information with railway regulators on rejected capacity requests.

Amsterdam airport Schiphol

Dispute settlements

In 2009, the NMa handled two disputes concerning the tariffs and conditions of Amsterdam Airport Schiphol – one was filed by KLM/Barin (the trade organization for airlines active in the Netherlands), while the other was filed by British airline easyJet. In the former case, the NMa partially ruled in KLM/Barin’s favor, and Schiphol had to lower its airport tariffs by 5.35 million. Schiphol appealed against this ruling. In the latter case, easyJet claimed that the tariffs Schiphol uses discriminates between passengers that start their journey at Schiphol and passengers that transfer at the airport. In addition, the tariffs were allegedly neither cost-oriented nor fair. The NMa found no evidence for these claims and therefore rejected the complaint. EasyJet appealed against this ruling.

Regulation: NMa made the right choices

In connection with the evaluation of the Dutch Aviation Act, the Minister asked the NMa to investigate Schiphol’s dominant position. This investigation will be completed in 2010, and will be taken into account when evaluating the Act. In the evaluation, the NMa will put forward its view on the regulation of Schiphol. The NMa’s starting point is that, from an economic point of view, regulation should be effective and that legislation should be enforceable.

Furthermore, Directive 2009/12/EC on charging airport fees came into effect in 2009. This Directive needs to be implemented in the Dutch Aviation Act in 2011. The NMa is helping the Dutch Ministry of Transport, Public Works and Water Management with these adjustments. In addition, the NMa has advised the ministry regarding a directive on security tariffs, which the European Commission is currently preparing.

Financial account of Schiphol

Last year, Amsterdam airport Schiphol provided its second ever financial account of its revenues and expenses. The NMa reviewed Schiphol's account and ruled that it had to leave out the depreciation costs of the land on which the Polderbaan runway was constructed.

Pilotage

Before it assessed the annual tariff proposal of the Dutch registered pilots, the NMa had carried out a study into the efficiency levels of the pilots. The NMa consulted extensively with the pilots and with regional and national customers groups. In July 2009, the NMa was faced with the proposal to increase the tariffs for 2010 with 19.27 percent compared with 2009. The NMa urged the pilots to lower the proposed increase to 1.4 percent. Based on the findings of the efficiency study, the NMa came to the conclusion that the pilots' proposal would insufficiently help achieve the most efficient method in connection with the planned quality level. The NMa has therefore set the new 2010 pilotage tariffs 2.8 percent lower than the 2009 tariffs.

Public transport companies

Preliminary investigation into the regional public transport market and Qbuzz

As a result of the motion introduced by Dutch MPs Aptroot and Van Mastwijk, the NMa carried out a preliminary investigation into the functioning of the regional public transport market and into the current competitive situation therein, focusing on the new bus company Qbuzz and its shareholder NS Dutch Railways. Based on the preliminary investigation, there are no reasons to give priority to a further investigation.

Policy advice in connection with the Dutch Passenger Transport Act 2000

The NMa has established that the municipal public transport companies in 2009 met the legal requirements for accounting and financial intra-holding relationships. In addition, the NMa explored the implications of a motion introduced by Dutch MP Roefs, which proposed to let the so-called City Regions (local semi-governmental bodies) decide for themselves whether to put out to tender the public transport concession in their region (which would mean transport companies would compete for the concession), or to award the concession to a municipal public transport company without a tender. The NMa is of the opinion that a different incentive needs to be incorporated if the incentive of tender procedures disappeared, which would guarantee that municipal public transport companies will continue to aim for efficiency and quality for consumers.





Energy

One of the NMa's departments, the Office of Energy and Transport Regulation is charged with oversight on the energy markets. Its mission is to make energy markets work, safeguard safety and protect consumers. The NMa is working towards a situation where consumers on an integrated European market are always assured of affordable, reliable and sustainable energy.

Consumer market

More and more consumers are switching

The number of consumers that switch has increased yet another year: in 2009, 12 percent of consumers switched, compared to 9 percent in 2008. Furthermore, 29 percent indicate that they are not averse to switching, compared to 23 percent in 2008. Switching can result in big savings for consumers – depending on the type of contract, savings can be as high as € 180 for natural gas and € 140 for electricity, according to the Monitor Energy Markets.

The NMa has taken various steps to increase consumer confidence in the energy market, including setting requirements the network operators' administrations need to meet, and ensuring that switching goes smoothly. As a result of these steps, the NMa and the energy companies have achieved that consumers have become increasingly satisfied with their suppliers, as noted in the Monitor Energy Markets 2009. In addition, the NMa drew up in 2009 the Guidelines on Information Provision, which should result in consumers being provided with clear and comprehensible information.

The NMa also offers information to compare energy providers with, such as on Dutch consumer information portal Consuwijzer. The NMa monitors the quality of the price comparison websites in order to increase consumer confidence in being able to find good comparative information on prices. Finally, the NMa keeps an eye on customer-recruitment activities of energy providers. The NMa has stepped up its cooperation efforts with the Dutch Consumer Authority and with the Dutch telecommunications regulator OPTA, for example, with regard to the so-called Do Not Call register against unwanted direct marketing phonecalls.

‘More and more consumers are switching energy suppliers’

Wholesale market

A well-functioning wholesale market is critical in having a secure and affordable energy supply to consumers. The market should be characterized by well-functioning trading platforms on which numerous traders are active, supported by operators that accommodate the market and by efficient networks with sufficient cross-border capacity and national transmission capacity.

However, the Netherlands and the rest of Europe are not there yet. The natural-gas market is hindered by limited availability of cross-border capacity and by limited access to flexibility. Flexibility enables new entrants on the natural-gas market to match their supply to peak and non-peak demand. Utilization of cross-border connections on the electricity market continues to rise, but there is still room for improvement.

Improving the West-European energy market

An important step has been taken on a European level towards completing the internal European energy market with the adoption of the so-called Third Package, which includes legal measures for liberalizing the energy markets, the most important of which concern stringent unbundling requirements, additional measures with regard to consumer protection, the creation of a European Agency for regulators, an increased role for the national regulators for improving the cooperation between the various national network operators.

Until the pan-European internal market has been fully realized, the NMa is active on a more regional level to integrate the national markets for natural gas and electricity of the Netherlands with those of its neighbors by intensifying cooperation. The Gas Regional Initiative North West (GRI NW), chaired by the NMa, aims to tackle concrete cross-border issues with regard to transparency, investments and capacity with help and direct involvement of regulators, ministries, network operators and network users. For example, in 2009, much insight has been gained in the Northwest European investment climate for cross-border infrastructure. The three most important areas for improvement are the compensation method, transparency in connection with investment processes, and coordination.

With regard to electricity, results have also been achieved on a European level – regulators and the national grid administrators have reached agreement on harmonized auction rules for trading cross-border transmission capacity between the Netherlands, Belgium, Luxembourg, Germany and France.

Domestic market

Another important topic in 2009 was dealing with scarcity of transmission capacity on the domestic electricity network. Network operators are legally required to have enough transport capacity available and to grant access to the grid, which are vital elements of a well functioning electricity market. With the publication of the Vision Document on Transmission Scarcity, the NMa contributed to working towards a solution which would enable more (sustainable) production capacity to become connected, and to increase utilization of the existing network at current safety levels. This vision document has in part been the result of a dispute filed with the NMa. The NMa often settles disputes, for example, between a network operator and a user who is faced with regional scarcity, a network operator's discontinuation policy, or the explanation of the tariff code.

The NMa has taken away the contractual shortage of quality conversion, which converts high-calorific gas into low-calorific gas. A contractual shortage means that, technically speaking, there is enough capacity, but that all of the capacity has already been fully booked in contracts. This contractual shortage has been a significant obstacle to gaining access to the Dutch natural gas market. An NMa decision has abolished advance conversion booking, and it has changed the procedure of high-calorific gas conversion, thereby improving the functioning of the market.

Innovation

The NMa has released a consultation document on innovation. Based on the consultation's findings, the NMa will critically review its regulation methods whether they sufficiently simulate competition, thereby stimulating the network operators' innovative strength, making them better prepared for the future.

Regulating the network operators' tariffs

As in previous years, the NMa in 2009 spent time on regulating the tariffs of operators of electricity and natural-gas networks. Traders, suppliers and consumers of energy are forced to use these networks, because their operators are natural monopolists. That is why both costs and revenues are regulated by the NMa.

The 2010 tariffs

Each year, the NMa sets the tariffs for the operator of the national network for natural gas, Gas Transport Services (GTS), for the operator of the national grid, TenneT TSO, and for the regional electricity and natural gas network operators.

Netherlands Court of Audit and Dutch Trade and Industry Appeals Tribunal endorse method of regulation

In 2009, the Netherlands Court of Audit (AR) launched an investigation into the way the NMa enforced its regulation over the last few years. The AR acknowledged that the NMa made the right choices in its enforcement. In order to carry out its regulation tasks in the future even better, the NMa has released a position paper in which ideas about the future of network management regulation are discussed in a critical and scientific way.

The method that the NMa uses to regulate the tariffs is laid down in a so-called method decision, forming a critical element of the regulatory framework. The natural-gas network operators have filed an appeal against this method decision with the Dutch Trade and Industry Appeals Tribunal (CBB). The CBB dismissed all substantive grounds of appeal. This means that the regulatory system has been set, and that other consumers continue to benefit from lower tariffs.

Also in 2009, so-called efficiency-stimulating tariffs cuts have been set for GTS, based on the method decision. Using these tariffs cuts, the tariffs for network users are determined, while stimulating GTS to work more efficient and to reduce its costs. The overall effect of these cuts is an annual real reduction of the tariffs of 5.4 percent.

‘The Netherlands has one of the most reliable networks in Europe at the moment’

NMa focuses on network reliability

The Netherlands has one of the best networks in Europe at the moment. In order for this network to remain one of the best calls for excellent management and maintenance of these networks on a permanent basis. In 2008/2009, the NMa reviewed the so-called ‘Quality and Capacity Documents’ (KCDs) of the network operators for the second time. Using these KCDs, network operators need to demonstrate that they have sufficient capacity to transport electricity and natural gas from their sources (the supplier) to businesses or households. In addition, all of their procedures need to be up to standard, and network operators need to have the right network information in order to safeguard the network’s quality. The review revealed that not

all of the network operators’ procedures were up to standard, nor did they contain the correct information regarding the networks. Fines have therefore been imposed on five network operators: NRE Netwerk, Obragas Net, Netbeheer Haarlemmermeer, Westland Infra Netbeheer and Delta Netwerkbedrijf. The NMa imposed a binding instruction on Stedin.

Independent Grid Administration Act (Won)

The Independent Grid Administration Act (Won) states, among other things, that energy companies need to split off their trading and production units from their network unit. Plans on how they planned to comply with this requirement had to be sent to the NMa before July 1st, 2009. These plans should include, among other things, the legal structure of the organization before and after the split, including a time schedule of the steps needed to be taken. They also need to indicate how the integrated company’s assets are distributed among the network operator and the split-off units. In addition, the network operator needs to prove in his plan that he has economic control of the network, at least from July 1st, 2008, and that he is able to independently carry out the statutory operating tasks. Finally, these plans need to explain how it is guaranteed that the splitting costs are not somehow incorporated into the tariffs. In 2009, these plans were reviewed by the NMa, some of them negatively, and were then forwarded to the Minister of Economic Affairs.

The NMa and public interests

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Public interests and competition

When enforcing competition law, various interests need to be weighed. Several 'hard' economic interests play a role, but, from time to time, less tangible factors come into play as well, sometimes called 'public interests' or 'non-economic interests.' Public interests are social interests that, completely or partially, need to be protected by the government. Whenever markets fail, public interests may be involved. Yet public interests are much more than just failing markets – they may also have political origins, such as redistribution or paternalism.¹ It is tempting to regard this effort to balance various interests as a rather mystical affair, one that requires administrative bodies to have a high degree of discretionary freedom. In this special section on 'public interests', the NMa attempts to lift this 'veil of mysticism'.²



Welfare as the purpose of competition law

It is fair to say that welfare is nowadays considered to be the main, if not the only purpose of competition law. Choosing welfare as the main purpose of competition law implies that competition should not be considered as an end in itself, but rather as a means to an end: increasing prosperity. Though having said this, economists have widely diverging opinions on what the 'right' definition of welfare should be. In a nutshell, their discussion boils down to the question of whether we should accept restrictions to competition, simply because they lead to a 'bigger pie' for society as a whole (more welfare to be shared), or whether we should also look at the consumers' share of that pie. Proponents of the so-called 'total welfare standard' argue that only the size of the entire pie matters. In their view, restrictions to competition are allowed, provided they have a positive effect on total welfare, irrespective of their effect on consumer welfare. This is a sensitive issue since it not only touches upon welfare creation but also on its distribution.

In general, competition authorities are reluctant to accept the total welfare standard as their primary criterion. We need to be aware of the fact that, particularly in situations that are on the verge of becoming a monopoly, the total welfare standard and the consumer welfare standard will point in opposite directions. Quantifying the seriousness of the inefficiencies we would then face will prove to be very difficult. The definition of the consumer welfare standard has at least one benefit: it has a certain safety margin, albeit an arbitrary one, by making it more difficult to justify situations that are almost monopoly situations.

The next question is: how do we make sure in practice that consumers receive their 'fair share' of the yet-to-be-realized benefits? Normally, the answer would be to have enough competition. Article 101 TFEU is a general prohibition of anti-competitive agreements and concerted practices.

However, under its third paragraph, efficiency-enhancing forms of collaboration between undertakings are exempted from this prohibition. When enforcing Article 101, paragraph 3, TFEU, remaining competition usually guarantees that consumers are passed on a fair share of the benefits. Consumer welfare is the starting point here.

'consumer welfare is the starting point'

In practice, this implies a standard that says: *collaborative agreements are good as long as they are profitable for the companies involved as well as for consumers*. If an agreement meets the requirements of Article 101, paragraph 3 TFEU, there are strong indications that it would also lead to more welfare. However, the same does not hold true the other way round. It is conceivable that an agreement leads to an increase in welfare but fails to pass the test of Article 101, paragraph 3, because it would lead to a loss of consumer welfare.

Public interests and market failure

Public interests that have been discussed in case law and literature in connection with competition law cover various areas, including social policy, industrial policy, regional policy, environmental policy and cultural policy. Some of these seem to have been dismissed as a rationale for special treatment under competition law. Economists generally agree that restriction of competition is not a good way to stimulate industrial and regional development.

However, a small number of special public interests are taken more seriously. The best known examples are environmental considerations and consumer protection. These interests are sometimes called 'non-economic interests', but, on closer



1. Definition of Baarsma and Theeuwes.
2. This is modified version of an article by Pieter Kalbfleisch, titled 'The Assessment of Interests in Competition Law: A Balancing Act' published in: Mario Monti e.a. (ed.) Economic Law and Justice in Times of Globalisation; Festschrift for Carl Baudenbacher; Nomos verlag 2007, p. 455-474.

inspection, they can be often just as economic or non-economic as other interests that we are already used to dealing with. Normally speaking, environmental protection is justified by the desire of preserving scarce natural resources, which can be welfare-enhancing in itself. If consumer protection is at stake, it is often because of an information asymmetry between suppliers and customers. In such cases, compensating measures may protect consumers from taking wrong decisions, making them potentially welfare-enhancing.

These examples show that arguments with respect to special public interests tend to be brought into play when there is some kind of market failure. In fact, the concept of market failure is closely related to the *raison d'être* of competition policy itself: it definitely serves a purpose, because many markets exhibit a natural tendency towards becoming monopolistic, which can be seen as a form of market failure.

There are three causes of market failure offering a relevant framework for a general assessment:

- **Asymmetric information:** providers of goods and/or services often have more information about certain aspects, such as quality, than their customers do.
- **Public goods:** some goods and/or services are generally considered useful, though these cannot be consumed individually. Protection against air pollution, for example, is in everybody's interest, but no one can buy his/her own share of clean air. It is usually the government that takes the initiative in producing or financing a public good. And the government is able to ensure that everyone chips in, and that no one is shirking (*free rider problem*).
- **External effects:** consumption of certain goods may affect the welfare of others. For example, driving a poorly maintained car could compromise the safety of other drivers. If car owners did not take this potential effect into account in their considerations, it could result in an underconsumption of car-maintenance services.

The classic solution to market failure is government intervention. When the government steps in on public-interests grounds, competition rules usually do not apply. In reality however, governments often leave responsibility for market intervention to the market participants themselves, for example, in the form of self-regulation. Every competition authority has had their share of firms and sectors invoking public interests in defense of their anti-competitive rules and bylaws. If we really want competition law to stimulate welfare, we cannot categorically dismiss all arguments that are based on market failure. But on the other hand, how are we supposed to carefully and critically weigh these arguments, knowing that the ones who bring forward special public-interest arguments often have their own interests in restricting competition as well?

'The classic solution to market failure is government intervention'

Indeed, when it comes to the question of how to take public interests into account in the assessment of anti-competitive agreements or transactions, a competition authority may find itself in a somewhat delicate situation. On the one hand looms Scylla, who makes us seem a market-fundamentalist, a firm believer of the problem-solving capabilities of the free market. And on the other hand is Charibdis, forcing us to strike a balance between all kinds of interests to a degree that stretches an administrative body beyond its capacity. So the question is how the NMa, when reviewing cases, should assess claims related to public interests and weigh these against potential antitrust objections.

Herman Wijffels: question & answer



H.H.F. (Herman) Wijffels

(IJzendijke, March 13, 1942) Mr. Wijffels studied economics at Tilburg University. In his professional career so far, he has held numerous high-profile positions, including chairman of the board of Rabobank Netherlands, chairman of the Social and Economic Council of the Netherlands, the Dutch representative at the World Bank, and chief negotiator in the government formation talks of 2006 for the fourth Balkenende administration. He is currently co-chair of Worldconnectors, as well as professor of Sustainability and Social Change at Utrecht University.

Assessing public interests

Coping with market failure by concluding anti-competitive agreements brings several potential problems with it. In the case of collective goods, external effects, or information asymmetry, it is difficult to reconcile such a solution with retaining the self-correcting function of the market, more specifically with retaining consumers' freedom of choice. On the one hand, it may be necessary, in order to avoid the free-rider problem, to have the solution to market failure cover the entire market. On the other hand, if consumers are left with too little to choose from, the competition authority bears an even greater responsibility to weigh the pros and cons of a potentially anti-competitive agreement.

This raises the question of how a competition authority can measure the value of the special interest such an agreement aims to protect. When a public good is at stake, it is virtually impossible to directly measure the value that the public attaches to that good. Determining the value of a public good thus entails a political decision on the creation of the public good in question. So if a competition authority wishes to take into account a public interest, it should find out whether there is a political basis that can justify the anti-competitive restrictions. Such a justification would ideally rest on a political decision that clearly defines the policy objective that is involved, as well as the role that self-regulation is expected to play in achieving this objective. When such justification is not available, a competition authority has a much harder time to strike that balance between the different interests involved.

In the so-called STIBAT case, the NMa approved the collaboration between battery producers and importers with respect to the collection and processing of used batteries. In its assessment, the NMa acknowledged that preventing environmental damage can be welfare-enhancing. More specifically, the specific welfare-enhancing effect of this process concerned the

superior logistics of the system in comparison with individual collection and processing. A combination of political and economic data formed the basis of the assessment of this case, including a political decision that mandated battery recycling in the interest of environmental protection.

Conclusion

The purpose of competition law is to promote welfare. Competition law's task should thus be twofold: on the one hand, maintaining competition to let markets be sufficiently self-correcting, and on the other hand, offering room for clear efficiency gains that do not, or at least not too much, obstruct this self-correcting mechanism. In that regard, the NMa needs to carefully and critically weigh all arguments, while being aware of the fact that those who bring forward special public-interest arguments often have their own interests in restricting competition as well.

What is your opinion on the markets' role as guiding mechanism in our economy?

Answer of Mr. Wijffels (part 1):

One way of matching the various decisions of actors in society is to let markets guide this process. Other forms of coordination include government regulation and self-regulation, whether by mutual agreement or not. Finding the right balance between these different forms is primarily a matter of political preferences and choices, which ideally are based on finding the most efficient way of achieving public objectives.

Markets are thus a means in this coordination process, and not an end in itself. It is therefore advised to regularly check whether markets as a coordination mechanism are (still) effective in achieving public objectives. First and foremost, that is a job of the government, which is supposed to determine the right mix of coordination mechanisms, and, by extension, of those that are charged with enforcement and oversight.

Competition authorities cannot limit themselves to a mere mechanical enforcement of regulation, since they are also called upon to take into consideration the end objective, being public effectiveness, in their assessments of concrete cases. This hardly makes it any easier for the NMa, but it does make it more interesting and socially relevant. Go to page 56 for more.

Public interests in the energy industry

Energy is of vital importance to society. Without natural gas, we would not be able to comfortably heat our homes and offices. And life without electricity would be almost unimaginable. Well functioning energy markets are essential in providing consumers with affordable, reliable and clean energy. Government plays a major role here because of the energy market's imperfections: networks are natural monopolies and production supply is highly concentrated, thereby endowing certain parties with market power. Network reliability is a public good. Another characteristic of energy consumption are its side-effects on the environment. By regulating networks, integrating national markets, providing oversight on the consumer market, and facilitating sustainable energy, the NMa is helping to safeguard public interests, which are: affordability, reliability, and sustainability.



Affordability

A natural monopoly

Without any oversight on the energy market, affordable energy would not exist, as market power creates a risk for too high an energy price. Market power is an intrinsic characteristic of energy markets, in part because of the crucial role of transport networks in electricity and natural gas supply. High investment costs make it economically impossible to simultaneously have multiple networks (in a region or country). Efficient utilization of networks is maximized if their management is centralized. Network management is therefore a natural monopoly. In addition, access to these networks is critical to producers, traders, and energy consumers. Oversight mostly consists of tariff regulation and quality control. Tariff regulation ensures that energy consumers are not paying too much for energy transport, since it stimulates network operators to operate as efficiently as possible. Furthermore, the regulated tariffs should enable network operators to make all the necessary investments, which are (roughly) specified by quality control. Regulation of the energy networks is thus aimed at safeguarding multiple public interests: affordability *and* reliability.

‘Regulation safeguards affordability and reliability’

This regulation offers direct benefits to energy consumers: in 2010, they will be paying approximately € 1 billion less on energy transport. There are no indications that these tariff benefits have come at the expense of the energy networks’ reliability. For several years now, the average annual downtime in the Netherlands has been approximately 25 minutes per customer, which is low by international standards. Neither are there any indications that the technical quality of the infrastructure has deteriorated. However, past performance is no guarantee for future results. For example, it is conceivable that

investments that are necessary for a sustainable energy supply may have a different risk profile than investments in the past had. And if such is the case, it needs to be seen how regulation can be adjusted accordingly.

Unequal distribution of energy sources

Another cause of market power, and thus of risk of higher prices, is the unequal distribution of energy sources, both within the Netherlands as on a global scale. The world’s main oil and gas reserves are primarily located in a limited number of countries, such as Russia and in the Middle East, giving them a dominant position in the energy markets. The Netherlands is one of the few European nations possessing considerable amounts of natural gas. The Dutch gas reserves are predominantly located in the northeast of the Netherlands in the so-called Groningen gas field. It is not just characterized by its size, but also by its high pressure, making it easy to increase or decrease production. Only one company, GasTerra, has been granted access to this special field, which thus enjoys a strong market position.

Another concentrated market is the electricity market, albeit to a smaller degree. This market is prone to market-power abuse by incumbent producers, because it is virtually impossible to store electricity, entry into the market is not easy, and because electricity demand fluctuates over time.

Removing obstacles to cross-border trade would be an effective step in stimulating competition in the wholesale markets for electricity and natural gas. One of the most successful steps in increasing the geographical market for electricity has been the so-called market coupling with Belgium, France and Luxembourg. This has increased transport-capacity utilization at the borders, and has led to fewer price differences between these countries. Border capacity with Germany will soon be increased as well, another step closer towards integration of the northwestern European electricity market. Another success



of the electricity wholesale market has been the completion of NorNed, the electricity cable between Norway and the Netherlands.

The wholesale market for natural gas appears to have a harder time to mature into a true market. Various problems still exist in this market, such as the inefficient utilization of cross-border transport infrastructure. Transport capacity for gas import is allocated on a 'first come, first serve' basis, causing newcomers to encounter problems when acquiring transport capacity. Transport capacity allocation would become more efficient if an auctioning mechanism were used. Greater market integration will increase energy affordability, because border capacity would then pose less of a bottleneck for international trade.

‘Transparency is crucial to consumers’

Having oversight on the consumer market is another prerequisite for providing affordable energy to consumers. Oversight here would mostly consist of increasing transparency, thereby enabling consumers making better choices to purchase energy at the lowest price. Furthermore, consumers are protected against prices that are too high (through the so-called 'safety net scheme'), while consumers are increasingly looking for the lowest prices themselves.

Reliability

Reliable energy provision is another public interest. Without any active government involvement, energy networks would be less reliable than socially desirable. This public interest is based on the so-called public-good character of energy networks. The level of security of supply is mainly determined by

the general state of the network – a power failure anywhere on the network will equally affect all users. Because security of supply is a public good, individual energy consumers may want to benefit from the efforts of others by paying too little on reserve capacity of the network. Without government intervention and centralized coordination, too little will be invested in reserve capacity. Government policy is thus needed to guarantee security of supply for electricity and natural gas, in which process the national network operators play a vital role – both GTS and TenneT are completely government-owned.

The NMa not only sees to it that these network operators work efficiently, but also that they properly carry out their task of safeguarding the networks' security of supply. This oversight on the networks' quality levels also applies to the distribution networks. Quality control is aimed at realizing optimal energy-network reliability. Optimal in this context means that not all efforts go into trying to have zero power failures at the expense of everything else, and that the energy infrastructure has enough buffers that any failure can be dealt with. It is always about balancing reliability with affordability. In order to make sure that network operators are able to find that optimal balance, both efficiency and reliability incentives have been incorporated into the regulation. When setting the right incentives for reliability, the NMa not only looks at legislation, but also at the value consumers attach to a reliable energy supply.

Improving the functioning of the wholesale markets indirectly contributes to the energy supply's reliability. If electricity and natural gas wholesale markets function well, market participants are able to make investments themselves. In a market environment, decisions are made at lower levels, with the energy price having a coordinating effect, and thus achieving a better balance between affordability and reliability than if the government made all the investment decisions.

Herman Wijffels: question & answer

What is your view on the trend towards affordable, reliable and renewable energy in the Netherlands and in Europe?

Answer of Mr. Wijffels:

Affordability and reliability are crucial aspects, but for them to become truly future-proof, we should particularly look into renewable energy. Energy markets are currently in the first phase of transitioning towards energy consumption from permanently available renewable sources. Two reasons for this transition are:

1. Existing sources, such as oil and natural gas, are finite, and will become more and more scarce in the next few decades; and
2. Consumption of fossil fuels has seriously negative side-effects, which not only include carbon dioxide emissions, but also fine particles and nitrogen.

Sustainability

Less pollution

A third public interest relating to energy, next to affordability and reliability, is sustainability. After all, environmental effects are a clear sign of market failure, with serious consequences to society. Consumption of fossil fuels (coal, oil and natural gas) leads to emissions of, among other compounds, carbon dioxide, nitrogen dioxide, and fine particles. The adverse effects of, for example, carbon dioxide emissions are likely to be considerable, while profound structural changes in the economy are needed to realize a substantial reduction in emissions. If there is no government intervention, market participants do not incorporate these effects into their strategy: the number of parties involved is simply too large (virtually everyone), while some do not even exist yet (future generations). Without a (global) government policy, this external effect will lead to excessive (from a public perspective) consumption of fossil energy.

‘Greenhouse emissions need to be reduced’

Environmental measures

Greenhouse gas emissions need to be reduced. And to achieve this goal, governments are using a wide range of instruments. For example, since 2005, the EU has been using an emission-trade system, capping the total emission volumes of participating parties (the so-called emission ceiling). The system enables these parties to trade each others’ emission rights. At first, only major energy consumers, such as power plants and energy-intensive industries, could use the system, though it was gradually expanded to smaller energy consumers as well. Various countries, including the Netherlands, have imposed charges on the consumption of electricity and natural

gas. Furthermore, renewable-energy producers often receive subsidies in order to make renewable energy more competitive with fossil fuels.

In the regulation affecting them, network operators are given enough leeway with their tariffs, enabling them to make (efficient) investments to facilitate the production of sustainable energy. The NMa is currently investigating the desirability and feasibility of offering network operators additional financial leeway in order to get their networks more in line with changes in the supply of energy, while retaining the incentives to effective network management. In addition, the NMa is supervising the fuel-mix disclosure efforts of producers on the consumer market, allowing consumers to choose between relatively more, or relatively less renewable energy. One of the core elements of this fuel-mix disclosure is supervision of the issuance and use of the Guarantees of Origin for the generation of sustainable energy. This system guarantees that generation from renewable energy sources has indeed been generated from such sources, and that such energy is not sold twice. It is clear that, as energy regulator, the NMa also takes into account the public interest of sustainability.

New, renewable energy technologies have become available, but have not yet reached the point that they are competitive. Energy policy is thus aimed at changing the competitiveness of both fossil fuels (by making them more expensive, e.g. carbon dioxide surcharges) and of renewable energy (by subsidizing investments in renewable energy sources). In effect, it is about phasing out old technologies (fossil fuels) and phasing in new ones (renewable energy), both at a faster rate. Antitrust policy, as well as its enforcement should follow suit too, and, as one of many government instruments, it should stimulate and steer the energy market towards sustainability.

Public interests in health care

An often heard fear among the public is that, as a regulator, the NMa would primarily be protecting economic interests. It is argued that, because companies pursue profits, markets disregard the interests of customers. In industries such as health care, public interests (e.g. quality of health care) would thus be at risk. On the contrary: it is the other way round. The Competition Act actually helps to provide consumers with affordable and good health care.



The playing field

Health care quality is the subject of intense debate at the moment, including cost control, the rise of health care behemoths, less attention to quality, and collaborations between providers in the health care chain. These are all subjects that shape the playing field in which the NMa must carry out its duties. The NMa's actions make antitrust policy almost tangible for consumers. If the NMa takes action in industries to which people attach great emotional value, the NMa is intensely scrutinized whether it overemphasizes the importance of competition, where quality is considered vital.

The government wants competition. Market players are generally better than the government at finding out what consumers are interested in. Lower prices are obviously important, but are only relevant in combination with the quality that is offered for them. Consumers are often prepared to pay a little extra for more quality. Quality in the broadest sense of the word plays an important role for providers that have to promote their products or services in a competitive environment, a process the NMa has oversight on. Health care that is affordable *and* good – that is what the NMa aims for.

A recent hospital merger care

The recent merger between two hospitals in the southern Dutch province of Zeeland is a good example of a case where health care quality was at risk. The hospitals argued that, if they did not merge, they would be too small to meet certain health care quality standards, for example, the number of specialists, as well as the minimum amount of medical procedures a hospital is expected to carry out in order to maintain a certain level of expertise. They argued that a domino effect would occur: too small a number of medical procedures

hinders the necessary subspecialization process, making medical professions unattractive, ultimately leading to unfulfilled positions. According to the hospitals, certain partnerships would be forced to merge in order to fill duty rosters, and to prevent them from being abolished. Such a development would then also take down other, thereto-related specialisms.

Expansion and quality improvement

The merger of these two hospitals would lead to an almost-monopoly situation. The NMa was therefore – unsurprisingly – not too thrilled to approve the merger, despite the fact that the hospitals argued it would benefit health care quality in Zeeland. They could not convince the NMa that they would be unable to meet existing quality standards. They did not progress beyond unfounded ideas and assumptions.

‘The merger of the hospitals in Zeeland would lead to an almost-monopoly situation.’

In the eyes of the NMa, expansion does not automatically equal quality improvements and cost control, especially not if there is hardly any competition left after a merger. However, it cannot be ruled out that the economies of scale resulting from the merger, whether they be cost savings or quality improvements, can be so substantial, that the merger would have a net benefit to consumers. The two hospitals in Zeeland therefore had to convince the NMa that, in their case, expansion was necessary to produce cost savings and quality improvements that outweighed the elimination of mutual competition. The NMa wanted to be sure that the claimed quality improve-



ments were real and also big enough that the merger would truly have a net benefit to consumers. The hospitals also had to prove that merging was absolutely necessary, meaning that less radical alternatives would be unable to yield the same result.

A unique situation

The NMa began to consult with various stakeholders, such as general practitioners, patient organizations, and the largest health insurers in that region. All of them confirmed that the merger was expedient for the necessary quality levels. Like with any merger case in the health care industry, the Netherlands Healthcare Authority (NZA) was consulted as well. When it comes to arguments regarding quality, the NZa relies on the judgment of the Dutch Health Care Inspectorate (IGZ), which, as objective expert, is capable of assessing the relationship between organization size and minimum quality levels.

And the IGZ did just that, in no uncertain terms no less. According to the IGZ, expansion was a prerequisite to continue meeting the quality requirements. It argued that it was necessary that the hospitals' patient populations merged, otherwise a number of essential services for the region could no longer be offered, such as a higher level of intensive care, needed for serious accidents for example. The NMa found the hospitals' isolated location to be of overriding importance: patients in Zeeland are unable to fall back on high-level health care or a university hospital within a reasonable radius, which would have compensated the shortcomings of the hospitals in question. All of these aspects make this situation so unique: no other Dutch hospital is or has been in a similar situation.

Safeguards for consumers

Two issues however had still not been resolved. Although IGZ confirmed that, without a merger, the necessary quality requirements would not be met, it was still not certain that they would be met if the merger was approved. Furthermore, it could not be ruled out that health insurers and, by extension, consumers, would have to pay a disproportionately high price for the quality improvement after the merger. The Dutch Competition Act luckily offers options of compensating for such risks by making firm arrangements with parties about their conduct in the new situation. The hospitals proposed to introduce a price cap, based on the national average, a price level that is determined by supply and demand. In addition, they made firm commitments on carrying out a number of necessary quality improvements, such as an improved level of intensive care and of the emergency department for the treatment of complex traumas. These commitments ultimately tipped the balance in favor of approval.

In many ways, the Zeeland hospitals case was a unique case. It showed that the NMa is putting consumer interests first, and that it, from that perspective, carefully weighs the pros and cons without blindly relying at market shares. The objective has always been that the people of Zeeland are offered affordable health care of high quality.

Public interests: a discussion

Several senior NMa officials recently sat down with Christopher Townley (hereafter: CT), lecturer at London's King's College and author of the book 'Article 81 EC and public policy', to talk about public interests and competition. Below is an edited version of their discussion. The quotes of the NMa officials are indicated by 'NMa'. For the sake of readability, some parts have been paraphrased. All quotes are personal opinions and do not reflect any official position of the NMa.



Short summary of Mr. Townley's book

The Commission's Guidelines on the application of Article 101 TFEU (until recently Article 81 EC) say that consumer welfare is the sole purpose of EU antitrust law. In his book (Article 81 EC and Public Policy, 2009, Hart), Mr. Townley argues that this is not in line with the Treaty nor with the way the Court of Justice (CoJ) and the General Court (GC, formerly the Court of First Instance) interpret European antitrust rules. For example, in last year's Glaxo-ruling, the CoJ confirmed that consumer welfare is not the sole purpose of Article 101 TFEU. In addition, both the CoJ and the GC take in account considerations of public interest, such as environmental protection and public health, in their assessments when applying European antitrust rules. Mr. Townley states that the Commission does not always follow its own policies and that it often takes into account public-policy objectives. He argues that this approach is endorsed by the Council, the Member States, and European Parliament, and that, normatively speaking, it is also right to do so. After all, the EU legal system is trying to create a society where undertakings exhibit moral behavior. Because public interests are taken into account in the application of Article 101 TFEU in so many ways, the book concludes with an attempt to find a way that is feasible and takes into account the relevant objectives.

The question: 'a moral society'?

(NMa 1:) 'You ask: "Do we want firms just to make as much money as possible for their shareholders or do we want them to behave in a moral and socially responsible way?" My question in return would be: "Can we trust private firms with those public interests?" Are they not often trying to disguise their own interests into claims and arguments that sound quite noble and good, when, in fact, they are really serving their own interests? How can we distinguish one from the other?'

(CT:) 'Adam Smith argued that, if we acted in our self-interest, we would be able to create value for everybody. Those in favor of seeing consumer welfare as competition law's sole purpose are not worried when companies are pursuing their own interests, because this may generate social benefits – it is therefore not necessarily a problem. We should instead focus on the results of behavior, and less on the motivations of firms. With corporate social responsibility becoming more and more important in society, what we definitely should not do is discouraging companies to find an optimal balance between socially relevant objectives, even if this could undermine consumer welfare.'

(...)

(NMa 2:) 'As a regulator, you have to find a balance. You have to make choices. And, there is no such thing as a free lunch, which is a very important notion. If you choose to pay more attention to sustainability, for example, you have to pay a price elsewhere. Always.'

(...)

The problem: market failure and government failure

(NMa 3:) 'We feel the tension in those cases. We feel that, based on competition law, we sometimes have to make decisions that are not going to be popular. In recent years, from a political point of view, this has become a growing problem. We need to do something about this: we need to be an integral part of society, and not stand on its fringes.'

(NMa 4:) 'Well, the problem is we constantly have to deal with self-regulation. Why this choice for self-regulation? It is about



balancing between market failure and government failure. In certain situations, it might be very difficult for governments to regulate things on its own. Self-regulation can be better than regulation by the government, as long as you keep an eye on it.'

(NMa 2:) 'If the government wanted to help a certain sector, it has to do it by itself. But it often chooses not to, out of fear that all kinds of industries would come knocking at its door asking for support as well. So the problem is passed on to the industry in question, which is told it has to solve it through self-regulation, but ultimately finding its way to the NMa anyway, requiring the NMa to intervene in what essentially is a political problem.'

(NMa 5:) 'It would be so much better if the government did play its part or if it agreed to detailed evaluations of the results of self-regulation'

In practice: ideal v. real

(NMa 3:) 'That sounds like an ideal world. But we don't live in an ideal world.'

(NMa 6:) 'I do not think we will ever be able to take into account all interests.'

(NMa 7:) 'A Dutch economist once famously said that you can only use one instrument for one policy objective. Never use an instrument for more than one objective. So, should we abuse competition law for different objectives? In my view, it should be solely aimed at 'making markets work'. If other forms of market failure came up, the government should introduce additional policies.'

(CT:) 'I do not agree. The EU Treaty tells us to take into

account other interests as well. So the discussion should be about how can we do it best? And that is really difficult. But I believe you cannot completely trust firms to do it themselves. You can suggest them the right approach, but if they fail to do it properly, you could step in. Perhaps the following example will shed some light. In the United Kingdom, we have the problem of binge drinking: people go out, drink as much as they can, get sick, start fights, and smash windows. This is truly a social problem, with enormous costs to the national health care service and to victims. One of the things that need to be done, and which obviously is not the only thing, is raising alcohol prices. UK lawmakers have taken note of this idea and have started criticizing Tesco, the UK's largest super-market chain, because their alcohol prices are below cost price. However, Tesco's responded saying: "We are not going to raise our prices, because consumers would then run to our competitors. We would love to agree with competitors on jointly raising our alcohol prices, but competition law says this is not allowed." So it is up to lawmakers then. This is a similar situation as in the Netherlands. Nobody wants to take responsibility, while everybody agrees there is social problem.'

So what do we do? We could take the economist's view and say this is not the right instrument, and that competition should be left alone. Leave it to the government. But the government is not going to intervene, because general elections are coming up. The last thing they want to do is raising prices. So do we then say it is a political choice? Fair enough. However, not stepping in is a policy choice as well.'

(NMa 7:) 'This example supports my point of view. Why should we step in, if government does not want to? We have our own tasks. We should focus on the functioning of markets.'

(NMa 2:) 'If you say a competition authority should promote competition: I agree. But in reality, we have to promote wel-

Herman Wijffels: question & answer

What is your view on the role of guiding mechanism that markets play in our economy?

Answer Mr. Wijffels (part 2):

The market itself is an impartial coordinator without any preferences, though it is on the market where preferences of economic actors are revealed. If free markets lead to socially undesirable results, the market cannot be blamed, but rather the actors' preferences. So if everybody took into account potential adverse effects on society and environment, both short-term and long-term ones, free markets would yield much better results in those areas than they currently do. And since people are not doing this enough right now, other coordination tools need to be brought into play, such as legislation and self-regulation. From that perspective, the NMa is the enforcing body, having a major responsibility for the effective functioning of markets.

fare. So you have to take it into account.'

(NMa 4:) 'Then you would have to use a different social-welfare standard. That is different, from what we do now.'

(NMa 2:) 'No. It is too easy to say that government has to do it. We are also part of the government!'

(...)

(NMa 1:) 'The problem is finding a common denominator for different interests. The government should provide a framework with the objectives of the relevant form of self-regulation. The NMa could then limit itself to, for example, checking the proportionality of the agreements.'

A way out: transparency

(NMa 8:) 'In terms of our reputation as an authority, it is almost as if you can never do it right. If you took the economist's point of view saying this is not the right instrument, everybody would accuse you of having a tunnel vision. But if you went further and took additional policy objectives into account, people would say: "What are you doing? You have gone way too far." So what is our way out?'

(CT:) 'What you can do, is taking all interests into account, with the best of intentions. Assess as transparent as possible whether and what policy objectives are relevant. Private enterprise and the government should not interfere with the market, unless there is pretty good reason to do so. It is not you who has the final word: the judge has. And if the judge disagrees, that is okay too in a way, because he makes it clearer. If the government steps in, it is vital that it is done openly and as transparent as possible.'

No matter what you do, you are always going to annoy at least someone. Have the courage to do what you think is right. We all make mistakes. That is the excitement, but also the nightmare, of being the competition authority. How do we make the best evaluation? And how do we explain it to the public? I believe transparency is really, really important here.'

(...)

This view on the NMa's role also implies that its role should be interpreted dynamically. In other words: if legislation remained unchanged, but circumstances evolved, there should be room to rule differently than in earlier similar cases. A good example is the ever increasing trend of striving for sustainability. Sustainable production processes often call for increased cooperation within production chains. Producing reusable end products may require making firm arrangements with suppliers, regarding specifications, development costs, return conditions, and prices in the various steps of the chain. Securing raw materials in a sustainable way (e.g. in the cacao industry) leads to a much closer cooperation and synchronization process with partners, both within the chain and in the industry, including on the price-formation mechanism. What we are seeing, is that where open markets used to exist between parties, contractual relationships are gradually replacing them.

In these changing times, it is the NMa's job to find its course by, on the one hand, making room for forms of collaboration that are aimed at sustainability, but which may restrict competition, and, on the other hand, making sure that those collaborations are not abused at the expense of consumers.

Finance

This section contains the shortened version of the 2009 financial report of the NMa's civil service organization, including the Office of Energy and Transport Regulation, and of the autonomous administrative authority NMa.

I NMa (civil service organization)

The Dutch Ministry of Economic Affairs (EZ) directs funds for staff and resources to the NMa, which are allocated by means of a budget letter (see table 1). The Office of Transport Regulation (VK, part of the Office of Energy and Transport Regulation) is financed by the Ministry of Transport, Public Works and Water Management (V&W) through the budget of EZ. Fines imposed by the VK are transferred to V&W. The NMa (and EZ) use cash-based accounting. Cash expenditure is a natural consequence of this. Personnel and material budgets of the expenditures are therefore not further specified, but those of the liabilities are.

The NMa did not exceed its budget in terms of liabilities or expenditure. On the liability level, the NMa underspent by € 3.1 million. With respect to cash expenditure, the NMa underspent by € 2.7 million. Part of the underspending is expected to be realized in early 2010.

In 2009, the level of reported income was € 13.1 million. The majority of this income comes from fines imposed in 2009 and earlier. In 2009, income from fines and interest totaled € 9.8 million.

Overview 2009

Table 1 Realization with respect to the budget letter (in thousands of euros).

Description	Liabilities	Expenditures	Receipts*
Budget letter	50,068	49,908	0
Realization	46,899	47,199	13,098
Underspending	3,168	2,708	13,098
As percentage	6.33%	5.43%	0
*) Also see the explanation of receipts of table 5.			

Pricing principles

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

Liabilities

Table 2 Liabilities (amounts in euros)

Description	Allocated budget 2009	Realization 2009	Realization 2008
Total personnel	34,096,000	30,956,470	28,340,732
Total materials	15,971,000	15,942,681	15,281,842
Total	50,068,000	46,899,151	43,622,574

In 2009, the NMa's personnel-related and materials-related liabilities (table 2) have increased compared to 2008. This increase has a number of reasons: an expansion of the tasks of the NMa with the adoption of the Dutch Heat Act, the oversight on network operators' financial management, the decision on energy bills, the Electricity and Natural Gas Market Act, and the policy rule on private grids. Another reason for the increase is the salary adjustment. Meanwhile, the Dutch government's program towards a leaner and more effective government has had a mitigating effect on expenditures on outsourcing and services between government agencies.

With regard to liabilities, the NMa underspent € 3.1 million. The NMa already informed EZ in August 2009 that it would not spend € 0.6 million. The NMa budget subsequently included an expected realization of € 49.4 million. The main reasons for the underspending are:

- 1 Not all tenders for the 2011 ICN Convention were completed before December 31, 2009, meaning that approximately 5 500,000 less in liabilities has been realized;
- 2 in 2009, the Board froze the outsourcing budget, which has resulted in approximately 5 500,000 being less realized;
- 3 The lease contracts for the 15th and 16th floor of the Zurich Tower were finalized later than anticipated. Because of this delay, the NMa did not start paying rent

for these floors until December instead of May.

Furthermore, the related termination and remodeling costs were lower than anticipated. In 2009, the NMa realized a net reduction of 5 500,000 on its rental expenses;

- 4 Failure to fill open positions in 2009 resulted in an underspending; the number of open positions in 2009 was about 22.

Expenditure

Table 3: expenditure (amounts in euros)

Description	Allocated budget 2009	Realization 2009	Realization 2008
Personnel	34,096,250	31,666,420	29,051,712
Material	15,811,250	15,532,830	15,461,402
Total	49,907,500	47,199,250	44,513,114

Looking at expenditure, the NMa in 2009 underspent € 2.7 million compared to the allocated budget (table 3). Part of this underspending is expected to be realized in early 2010. The picture here is similar to that of liabilities. The discrepancy between realization and allocation is primarily explained by the open positions, and the postponed starting date of rental payments for the additional floors. The difference with liabilities in table 2 is that liabilities from previous years have also been paid in cash. Table 3 shows that realized expenditure in 2009 was approximately 95 per cent of the allocated budget.

Table 4: expenditures (amounts in euros)

Ledger account and description	Allocated budget 2009	Realization 2009	Realization 2008
PERSONNEL			
400000 Salary costs		24,726,710	22,105,557
400001 Overtime		25,323	23,106
400002 One-off extras / Small gifts personnel		658,407	516,629
400019 Welfare		1,935	12,223
410000 Internship and committee payments		40,912	21,257
410020 Interim management		528,122	353,561
410021 Advice on organization and staffing		108,522	82,973
410033 Temporary employees		3,804,533	4,087,136
410039 Services between government agencies		65,060	205,277
415002 Training		1,125,812	902,938
415003 Recruitment		393,411	462,134
415004 Other personnel costs		69,986	42,460
416012 Redundancy schemes		90,912	236,461
416013 Redundancy costs		26,775	
<i>Total personnel</i>	<i>34,096,250</i>	<i>31,666,420</i>	<i>29,051,712</i>
<i>Total material</i>	<i>15,811,250</i>	<i>15,532,830</i>	<i>15,461,402</i>
General total	49,907,500	47,199,250	44,513,114

As a result of the additional duties the NMa was charged with, and because of the salary increases as already agreed upon in the collective labor agreements for government employees, total personnel expenditures have increased 9 per cent compared with 2008. Outsourcing expenditures have decreased 2 per cent, and temporary hiring expenditures have decreased 7 per cent. Total material expenditures in 2009 have increased 0.5 per cent compared with 2008.

Income

Table 5 Income (amounts in euros)

Description	Allocated budget 2009*	Realization 2009	Realization 2008
NMa general (012)	0	229,574	28,548,885**
Office of Energy Regulation general	0	1,001	0
NMa fines – non-construction industry (011)	0	7,178,771	0
NMa fines construction industry (010)	1.400,000	1,637,838	0
NMa fees (050)	1,085,000	1,197,000	1,932,777
Office of Energy Regulation contribution scheme (020)	2,869,000	2,853,749	2,726,949
Total	5,354,000	13,097,933	33,208,611

*) budget up until the fall report.

**) the 2008 figure is referring to fees and general income.

In 2009, fines and interest received totaled € 9.8 million. Reimbursed fees and interest (€ 1 million) have been deducted. The income from fees are based on the Decision regarding NMa fees [see Dutch Government Gazette 2006 717], while the income of the Office of Energy Regulation is based on the regulation Energy Fees 2009 [see Dutch Government Gazette 2009 78] .

Outstanding debts and receivables

Table 6 Outstanding debts and receivables reported as memorandum items as of 31 December 2009 (amounts in euros)

Categorie	2009	2008
Construction	19,934,944	23,551,829
Energy	800,000	
Bicycles	16,517,508	15,735,522
Mobile telecommunications	31,830,480	30,319,583
NH8	19,450,160	18,525,183
Public green	911,340	1,137,896
Home care	7,616,526	7,866,445
Shrimps	4,571,198	4,354,316
Other	6,024,333	8,381,201
Total	107,656,488	109,871,974
Office of Energy Regulation	1,861	1,861
Total general	107,658,349	109,873,835

The NMa and Office of Energy Regulation's receivables of 2009 (€ 5.3 million) and previous years are composed of fines imposed on undertakings, plus the legal interest accrued and minus the income. Objection and appeal procedures in several major cases have not yet been concluded, thereby postponing the obligation to pay. Reductions of fines and interest payments as a result of court rulings have already been included (for 2009 € 1.8 million). Fines plus the legal interest accrued in 2009 was € 9.8 million. In 2009, an amount of € 1.0 million has been paid back after objections and appeals. Claims worth of € 1.0 million have been filed with receivers in relation to bankruptcies. The NMa held bank guarantees worth of € 8.4 million on December 31, 2009. This includes an escrow account of € 1 million.

II ZBO Board of the Dutch Competition Authority

This section contains the shortened version of the 2009 financial report of the NMa Autonomous Administrative Agency (ZBO). 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.

Total 2009

Table 7 Realization versus budget (amounts in thousands of euros)

Description	Liabilities	Expenditures
Budget letter	703	703
Realization	703	703
Underexpenditure	0	0
Percentage	0,00%	0,00%

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 ZBO NMa, this relates to the incomes of the chairman of the Board, and of a member of the Board.

In 2009, Mr. Kalbfleisch was remunerated on the basis of a non-civil service appointment as chairman of the Board. In total, this amounted to € 239,658. Mr. Zijl was remunerated on the basis of a non-civil service appointment as member of the Board. His appointment was discontinued in 2009. Mr. Zijl's total remuneration over 2009 was € 257,035. This exceeding of the Wopt limit is caused by agreements made several years ago at the time of his appointment by the Minister.

Human Resources

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1 Organization

The NMa has been a so-called Autonomous Administrative Authority (ZBO) since July 2005, headed by a Board. On October 1, 2009, the Office of Energy Regulation and the Office of Transport Regulation merged into the Office of Energy and Transport Regulation. On July 1, 2009, the NMa started a project called 'Study into Reorganization of Operational Management', followed by the Board's decision on September 29, 2009 to launch the project 'Exploring the Creation of Operations Department'.

2 Employees

The NMa's HR policy has the following objectives:

- 1) Attracting new employees;
- 2) Offering individual, customized support to NMa staff to help them in their work and in their careers;
- 3) Offering support to NMa managers in the execution of their tasks;
- 4) Offering excellent working conditions and realizing acceptable levels of absenteeism.

Influx

The HR Department's first objective is attracting enough high-quality employees. The economic crisis also affected the job market in 2009: outflow was halved compared to 2008, while the number of open applications saw an increase in late 2009. It should come as no surprise that the NMa in 2009 easily managed to counterbalance the outflow with a high influx. However, in 2009, it took more time to fill positions - longer than the three months the NMa aims for. It continues to be crucial for organizations as the NMa to attract high-quality staff and to keep them. That is why recruitment communication, and employee development and education are 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. The first ever NMasterclass held in 2008 for senior students was a huge success, and two more were held in 2009, with more to come in 2010. On December 31, 2009, the NMa had 437 employees (417.298 FTEs). The NMa was awarded an additional 23 FTE in 2009 as a result of the adoption of the Dutch Heat Act. However, these additional FTEs administratively came into effect on January 1, 2010, which is why the employee utilization rate on December 31, 2009, exceeded 100 percent.

Employee and manager development

When selecting a new employer, an important criterion for current and future employees, both the young and the more experienced, is the existence of a comprehensive development and education program. The NMa has the ambition of being an employer par excellence, as reflected by its commitment to employee education and development. On July 9, 2009, the first brochure of the newly created NMa Academy was presented to the Board. The NMa Academy helps with and advises the departments, managers and staff on their questions about education and development. The first training program of the NMa Academy, 'managing NMa professionals', started in mid September. Other training programs on offer drew considerable interest as well.

Working conditions and absenteeism

The absentee rate in 2009 at the NMa was 4.7 per cent. Absence of less than six weeks was 2.09 per cent, while absence exceeding six weeks was 2.66 per cent. These figures have slightly gone up compared to 2008 (4.5 per cent). The NMa remains completely determined to bring these rates down.

Employee participation

In 2009, six meetings between the Board and the NMa's works council (OR) were held. Two OR members had to be temporarily replaced in 2009 due to pregnancy leave. A third member was replaced permanently. These new members have taken up their new tasks with much enthusiasm. The OR in 2009 was involved in, among other projects, the selection process for two new Board members, the merger

of the Office of Energy Regulation and the Office of Transport Regulation, exploring the creation of an Operations Department, and the introduction of a new document management system. Other projects included the so-called 'One EZ' project, as well as the Dutch government's program towards a leaner and more effective government. One of the OR members sits on the departmental works council of the Ministry of Economic Affairs.

Table 8: The NMa as employer

Critical success factor	Monitoring instrument	NMa's desired level	Realized in 2009 (FTEs)
Utilization-related figures	Influx	10% minimum - 20% maximum	17,7 %
	Outflow	10% minimum - 20% maximum	9,5 %
	Employee utilization rate	95 %	102,9 %
	Percentage of women in pay scale 14 or higher	32 %	33,3 % (42,4 % managerial positions)
	Male/female ratio	50 % - 50 %	52,2/ 47,8% (50,8/ 49,2 % in # of people)
Recruitment-communication results	Duration of vacancies	85% within three months	70,8 %
	In-house company days at the NMa	12 times per year	11
	In-house company days at the NMa	2 per year	2
	Number of applicants	-	1.365
	Number of positions filled	-	89
Training and development	Percentage of earnings spent on training courses	3 %	4,1 %
Exitinterviews	Percentage of exit interviews held	75 %	77,3 %
Absenteeism	Absentee rate	3.8% maximum	4,7 %

Business operations

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Responsibilities and tests

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, semi-annual 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 2009 that has been of material importance to the annual account.

Bottlenecks in the achievement of the objectives

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

- The absentee rate was 4.7% in 2009, comparable to 2008 (4.6%). This exceeded the desired level of 3.8%. It meant that less capacity than planned was available.
- In October 2009, the Office of Energy Regulation and Office of Transport Regulation merged into the Office of Energy and Transport Regulation, obviously requiring investments in personnel and procedures. First impressions are positive and that the merger has met its expectations.
- In October 2009, preparations started for the creation of the Operations Department by merging the departments of HR, Finance, and Information Management and

Administration. Finalization of this merger is expected in March 2010.

- Hiring and retaining qualified personnel (particularly in senior positions) remains an organizationwide issue, because the NMa's terms of employment fiercely compete with those of the corporate world and of other regulators. Outflow in 2009 was lower than in 2008. However, it should be noted that expertise in competition and regulation remains scarce in the present job market. Senior NMa employees are sought after individuals on the job market. This means in part that new employees need to be trained and educated. These issues may have affected on the NMa's performance and/or lead times.
- Difficulties with finding sufficiently qualified staff for the NMa's new legal tasks it has been charged with, combined with the hiring freeze on temporary staff make it difficult to react decisively – examples include the Heat Act, the oversight on network operators' financial management, the decision on energy bills, the Electricity and Natural Gas Market Act, and the policy rule on private grids.
- The introduction of a document management system claimed much of the NMa's internal capacity in 2009. It was decided in late 2009 that the system's introduction be moved to 2010.

Improving business operations

In 2009, the NMa Academy was launched. When selecting a new employer, an important criterion for current and future employees, both the young and the more experienced, is the existence of a comprehensive development and education program. The NMa has the ambition of being an employer par excellence, as reflected by its commitment to employee education and development.

The management information system was completed in 2009. Future versions would include features such as improved overviews of employee capacity by making planning tools available within the departments.

The ultimate goal of a single office building for all NMa employees was almost achieved in 2009. In 2010, all NMa departments but the archive will be housed in the Zurich Tower, realizing a more efficient operation, as well as facilitating clearer and more effective communication.

The Hague, the Netherlands, April 22, 2010



Pieter Kalbfleisch
Chairman of the Board of the NMa

Auditors' Certificate I

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Status jaarrekening

De verkorte jaarrekening van de NMa over 2009 zoals opgenomen in dit jaarverslag, is gebaseerd op het departementale jaarverslag 2009 van het ministerie van Economische Zaken en de interne jaarrekening van de NMa over 2009. 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 2009 in het hoofdstuk Financiën opgenomen verkorte jaarrekening, die deel uitmaakt van de interne jaarrekening van de NMa over 2009, 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 2009 met de toelichting daarbij;
- de in dit Jaarverslag NMa 2009 in de bedrijfsvoeringparagraaf over de comptabele rechtmatigheid en de getrouwe weergave van de uitkomsten van de begrotingsuitvoering over 2009.

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 verant-

woorde 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 17 maart 2010 verstrekte goedkeurende accountantsverklaring.

Den Haag, 22 april 2010
Auditdienst van het ministerie van Economische Zaken

Was getekend

Drs. P.H. Staats RA
Senior auditor

Was getekend

P.H.M. Verschoore RA
Audit manager

Auditors' Certificate II

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Status jaarrekening

De verkorte jaarrekening van het ZBO NMa over 2009 zoals opgenomen in dit jaarverslag, is gebaseerd op het departementale jaarverslag 2009 van het ministerie van Economische Zaken en de interne jaarrekening van het ZBO NMa over 2009. 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 het ZBO 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 2009 in hoofdstuk Financiën opgenomen verkorte jaarrekening, die deel uitmaakt van de interne jaarrekening van het ZBO NMa over 2009, gecontroleerd. De verkorte jaarrekening bestaat uit:

- de staten van verplichtingen en uitgaven met de financiële toelichtingen daarbij;
- de in dit Jaarverslag NMa 2009 in de bedrijfsvoeringparagraaf over de comptabele rechtmatigheid en de getrouwe weergave van de uitkomsten van de begrotingsuitvoering over 2009.

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 het ZBO 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 het ZBO 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 het ZBO 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 15 maart 2010 verstrekte goedkeurende accountantsverklaring.

Den Haag, 22 april 2010

Auditdienst van het ministerie van Economische Zaken

Was getekend

Drs. P.H. Staats RA
Senior auditor

Was getekend

P.H.M. Verschoore RA
Audit manager

Appendix

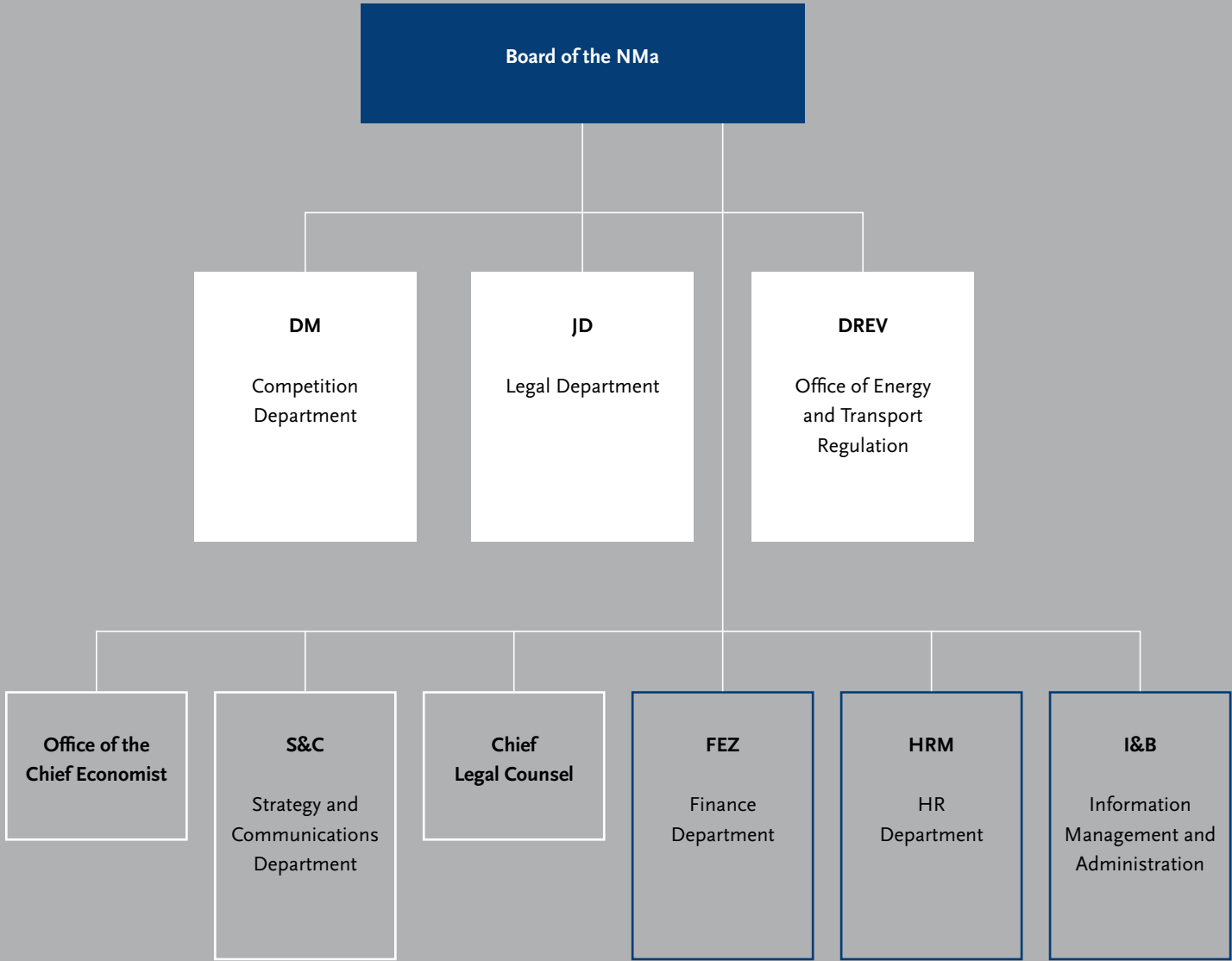
72

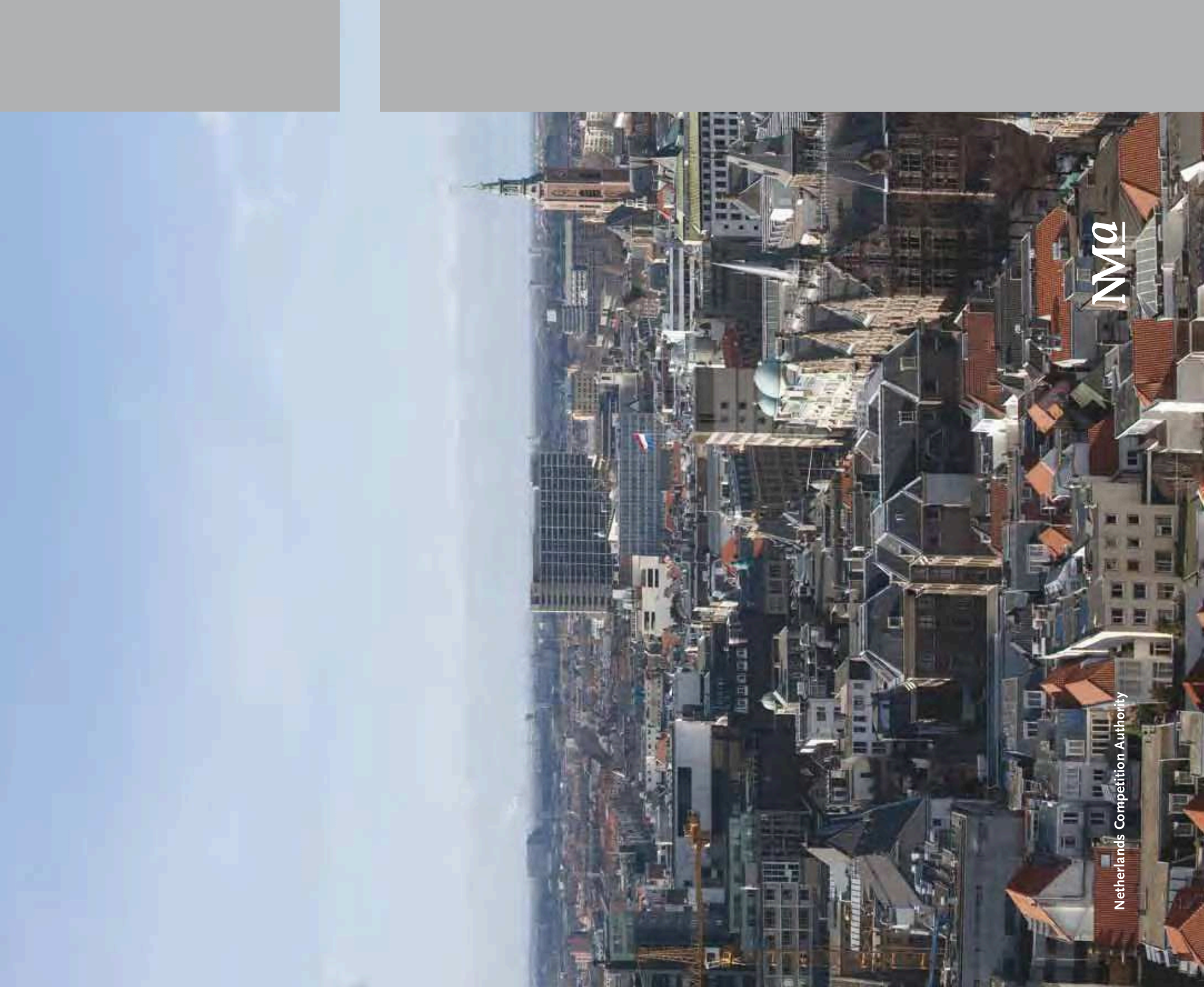
Core processes	Norm (days)	Norm (percentage)	Realization 2006	Realization 2007	Realization 2008	Realization 2009	Trend	Rating
Cartel and abuse cases (from investigation till sanction) ²	588	90 %	31 %	0 % ³	25 %	86 %	↑	(+)
Antitrust investigation with enforcement product*	336 (365) ¹	90 %	50 %	64 %	60 %	38 % ⁴	↓	(-)
Investigation with enforcement product ⁵	175 (180)	90 %	76 %	79 %	81 %	71 %	↓	(-)
Notification of concentration	28	100 %	100 %	100 %	100 %	100 %	↔	(++)
Request for exemption of waiting period (Section 40)	15	100 %		100 %	100 %	100 %	↔	(++)
Concentration License	91	100 %	100 %	100 %	100 %	100 %	↔	(++)
Complaint under Section 71 Railway Act	61	100 %	0 %	100 %	86 %		N.v.t.	N.v.t.
Dispute settlement (Electricity Act, Gas Act)	91	75 % (90 %)	71 %	66 %	72 %	63 % ⁶	↓	(-)
Sanction under Competition Act (Section 6 and 24)*	252	75 %	16 %	40 %	71 %	88 %	↑	(+)
Sanction under Electricity Act or Gas Act	91 (84)	75 %	100 %	67 %	100 %	100 %	↔	(++)
Sanction for non-cooperation/non-notification	91 (84)	100 % (75 %)		100 %	100 %	100 %	↔	(++)
Objection Competition (without objection advisory committee)	210	90 %	67 %	49 %	64 %	93 %	↑	(+)
Objection Competition (with objection advisory committee)	252	75 %	42 %	40 %	50 %	56 %	↑	(+)
Objection in connection with Electricity Act or Gas Act	140	75 %	53 %	25 %	50 %	43 % ⁷	↓	(-)
Sanction under any of the transport acts	91	75 %		0 %	75 %		N.v.t. ⁸	N.v.t.
Objection under any of the transport acts	140	75 %			100 %	100 %	↔	(++)
Request under Public Access to Government Information Act	56	75 %		49 %	58 %	43 %	↓	(-)

Empty cells mean that this type of product has not been completed (yet) or that the instrument has not been deployed.

- ¹ The norms in brackets are old, internally used norms, which have been changed as of 2008. The number of days is in calendar days. Realization is calculated by dividing the number of cases that were completed within the time limit by the number of cases in a given category.
- ² The category 'cartel and abuse cases' has been added for reasons of international comparison, but does not represent an actual, separate core process of the NMa. Lead time is comprised of lead time of some of the investigations with enforcement products (those with a fine) and the category 'Sanction under Competition Act' (see *).
- ³ The 2006 and 2007 realization figures include relatively complex, mutually related (and thus lengthy) investigations in the construction industry.
- ⁴ This percentage is influenced by a single long-term investigation in the energy industry that was completed in 2009. This category also includes several lengthy reports that are currently in the sanction phase. Alternative enforcement,

- which is also included in this category, is an often a relatively lengthy process.
- ⁵ These are investigations that are suspended. This also includes complaints that have been withdrawn or rejected (the latter usually happening within 56 days).
- ⁶ It turned out in 2009 that many disputes, despite them being individual disputes, can be traced back to underlying, more complex problems. Solving these problems is therefore preferable to settling the disputes, which will affect lead times.
- ⁷ Based on its Method decision (valid for three years), and for each network operator, the NMa issues a so-called x-factor decision, as well as three annual tariff decisions. Any objections can in effect only be addressed once the Method decision's validity has been established. Lead times are thus extended, but shortening the objection procedures is not efficient in most cases.
- ⁸ As already mentioned earlier in this annual report, no sanction has been imposed under any of the transport acts, though alternative instruments have been deployed.





NMa

Netherlands Competition Authority