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

-- 2004 --

This annual report is submitted by the Delegation of the Netherlands to the Competition Committee FOR DISCUSSION at its forthcoming meeting to be held on 19-20 October 2005.

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

I.1 Summary of new legal provisions of competition law and related legislation

Competition Rules

A. Competition Amendment Act: the NMa, an independent Administrative Authority

1. On 7 December 2004, Dutch Parliament approved the bill which transformed the NMa into an independent administrative authority. As of 1 July 2005, the NMa is not an agency of the Ministry of Economic Affairs anymore, acquiring a Board with the status of an independent administrative authority. The Board of the NMa consists of three members. The most important amendment to the Competition Act is that the Minister of Economic Affairs ceased to have the power to issue directives in individual competition cases. The Minister remains responsible, however, for competition policy and may issue the NMa with general directives. The Amendment Act (Independent Administrative Authority) [*Wet tot wijziging van de Mededingingswet in verband met het omvormen van het bestuursorgaan van de Nederlandse mededingingsautoriteit tot zelfstandig bestuursorgaan*] provides for the full integration of the Office for Energy Regulation (DTe) into the NMa. Acquiring the status of an independent administrative authority has no consequences for the legal position of the NMa's employees. They continue to be employed by the Ministry of Economic Affairs.

B. Competition Amendment Act: Implementation of Regulation 1/2003

2. In 2004 an Amendment was made to the Competition Act in order to implement the changes under European competition law, the so-called Modernisation (European Council Regulation 1/2003). Together with other competition authorities in Europe, the NMa combats infringements that affect trade between member states. With a view to this, national competition authorities and the Commission co-operate in the European Competition Network (ECN). On 1 May 2004 the possibility of applying to the European Commission (hereafter: Commission) for an exemption for agreements that restrict competition ceased to apply.

3. As in the European Council Regulation 1/2003, under the new national system, companies will have to make their own assessment of the extent to which their practices are in compliance with the law. It is not possible, but this is also not necessary, to notify agreements to the the NMa to obtain an exemption. Companies are themselves responsible for compliance and the NMa is responsible for enforcing the rules. The dispensations, which the NMa granted in the past, will continue to apply for a maximum of five years. Current applications for dispensations and administrative appeals will no longer be processed, as stipulated in the amendment to the Act.

4. In this amendment was also the maximum fine for refusing to co-operate with the NMa in an investigation increased from EUR 4,500 to EUR 450,000 per infringement. If 1% of the turnover of an undertaking is higher than EUR 450,000, this amount of 1% is the maximum fine for failing to co-operate. The fine has been increased to enhance the effectiveness of the NMa's investigations.

C. Direct Judicial Appeals Act [*Wet rechtstreeks beroep*]

5. Before it is possible to file a judicial appeal with a court against a decision taken by a public administrative authority, in accordance with the General Administrative Law Act [*Algemene wet bestuursrecht*] an administrative appeal must first be submitted to the administrative authority. As of 1 September 2004, the Act provides for the possibility of skipping the administrative appeal procedure and filing a judicial appeal directly with the court, provided the interested parties request this and the

administrative body gives its consent. A direct judicial appeal can reduce the time required for the proceedings by a number of months. In principle, the NMa will give its consent to applications for direct judicial appeals where this relates to decisions imposing sanctions pursuant to the Competition Act. Where this relates to other decisions, the NMa will assess whether the case is suitable for a direct judicial appeal on a case-by-case basis. A direct judicial appeal is not the most obvious course of action if the evidence or the standpoints of the parties are not clear or if opportunities still exist to resolve the dispute. In 2004 the NMa received one request for a direct judicial appeal and consented to this.

Energy Regulation

D. Implementation of the Intervention and Implementation Act

6. Within days of the liberalisation of the market for consumers on 1 July 2004, the Intervention and Implementation Act ([*I&I-wet*], amending the Electricity Act of 1998 and the Gas Act in relation to the implementation and tightening of supervision of the electricity grids and gas networks) resulted in a far-reaching amendment of the Electricity Act of 1998 and the Gas Act. The amendment, which came into force on 14 July 2004, was necessary to implement a number of European obligations and to tighten the supervision of electricity grid and gas network operators and electricity and gas suppliers. For instance, the NMa was given the power to impose fines and to monitor the marketing practices of energy suppliers. Furthermore the NMa has the power to resolve disputes between buyers of energy and electricity grid and gas network operators. To provide clarity with regard to the disputes procedure, the NMa adopted 'Policy Rules in relation to Dispute Procedures in the Energy Sector' [*Beleidsregels proceduregeschillen energie*] in 2004.

Transport regulation

E. Creation of the Office of Transport Regulation

7. The Office of Transport Regulation, which has functioned as a project of the NMa since 2001, was given the status of a fully-fledged office of the NMa. The reason for this was the assignment to the Office of Transport Regulation of the task to supervise compliance with two acts, the Passenger Transport Act 2000 and the Railways Act. At the end of 2004, it became clear that the Railways Act would come into force on 1 January 2005. Supervision under the Act focuses on compliance with statutory rules and obligations, and relates to the provision of services in the transport sector and the market behaviour of companies.

Other relevant measures, including new guidelines

- The NMa-agenda 2005

8. In the beginning of 2005 the NMa published its NMa Agenda 2005. The NMa Agenda sets out the NMa's plans for the coming year and its priorities in relation to these. The NMa-Agenda 2005 was formulated on the basis of broad consultation within Dutch society (ministries, undertakings, consumer organisations, etc.).

- Guidance on procurement power

9. In 2004 the NMa consulted the market on the topic of procurement power. Procurement power refers to situations where procurers have a strong position relative to suppliers. For the purposes of consultation, the NMa drew up a document. Interested parties were invited to respond to this. The results were published in Guidelines entitled 'Procurement Power' ['*Inkoopmacht*'].

- Compliance arrangement for insurance sector

10. The NMa was involved in drawing up the model 'Competition Compliance Programme' in cooperation with insurance companies and the branch association for the insurance sector, the Dutch Association of Insurers. The aim of the scheme is to create a sector which is visibly and verifiably free of restrictions on competition. During the first quarter of 2005, the programme was implemented by the 200 individual insurance companies affiliated to the Dutch Association of Insurers.

- Guidelines on cooperation between undertakings

11. The Guidelines were published in the Netherlands Government Gazette (Staatscourant) on 7 April 2005 (No. 67, pp. 20-24). These Guidelines provide an indication in general terms of how the NMa assesses a number of types of cooperation on the basis of the Competition Act, in particular with regard to the SME's in which trade organisations often play an important role. The Guidelines were drawn up on the basis of consultation with, amongst others, the employers' organisations VNO-NCW and MKB-Nederland.

- Cooperation Protocol the NMa and the Office of Health Regulation (currently being established)

12. To ensure clarity with regard to the division of tasks and roles between the NMa and the Healthcare Charges Board [*College Tarieven Gezondheidszorg*]/Office of Health Regulation [*Zorgautoriteit*], which is currently being established, a cooperation protocol has been drawn up and signed in 2005. This protocol contains agreements on cooperation and the division of work. These agreements provide clarity for market parties on the tasks of these regulators in the healthcare sector and clarify whom market parties should approach with their complaints. The cooperation with the Independent Post and Telecommunications Authority (OPTA) serves as an example for this. In this cooperative relationship, the NMa contributed to defining OPTA's new markets.

- Guidelines on Competition in the Hospital sector

13. In its Guidelines entitled 'Competition in the Hospital Sector', the NMa concluded that the Competition Act also applies to the provision of hospital care.

- Guidelines on "Markets for healthcare subject to the Exceptional Medical Expenses Act"

14. In January 2004 the NMa published its Guidelines entitled 'Markets for Healthcare Subject to the Exceptional Medical Expenses Act' [*'AWBZ-zorgmarkten'*]. The most important conclusions of these Guidelines were that, in principle healthcare providers in the healthcare sector subject to the Exceptional Medical Expenses Act fall within the scope of the Competition Act but that parties which procure healthcare subject to the Exceptional Medical Expenses Act (the healthcare agencies) are not undertakings in terms of the Competition Act.

- Policy rules Taxi Market

15. The Netherlands Competition Authority drew up policy rules with regard to the application of the Competition Act on the taxi market. The policy rules provide a framework for assessing the market, which is evolving due to liberalisation. The policy rules came into force in the spring of 2005.

16. The NMa assesses cooperation within taxi offices on the rules contained in the Competition Act. In accordance with this Act, companies may not enter into agreements which restrict competition. The competitive pressure that taxi offices experience from other control centres or companies is important in this assessment. In the policy rules, the NMa will provide guidance on the way in which the NMa twill assess agreements between individual taxi companies operating within taxi offices.

17. The NMa has withdrawn its earlier decision on the Rotterdam taxi office, Rotterdamse Taxi Centrale (RTC). The NMa dismissed an application for exemption from the prohibition on cartels for price agreements within RTC. The cooperation within RTC will also have to comply with the policy rules.

- Cooperation agreements

18. Directive 2001/14 EC stipulates that Member States must set up a regulatory body for the railway sector. The regulatory bodies of the various Member States, such as the Office of Transport Regulation in the Netherlands, are required to exchange information and cooperate in order to develop best practices for regulation. In 2004 this directive was implemented. During six meetings the implementation of the directive in the Member States was discussed. Attention was also given to the network declarations and problems obtaining access to the railways. The experiences of the UK and German regulators, in particular, were immediately applicable. The Office of Transport Regulation applied the newly acquired insights in its advice to ProRail and the Ministry of Transport, Public Works and Water Management.

19. In December 2004, the railway regulators of the Netherlands, Germany, Switzerland and Italy reached agreement on cooperation and activities to be developed jointly in relation to freight transport by rail on the route between Rotterdam and Milan. The agreements, which form the basis of this cooperation, are modelled on the agreements which the ministries of transport and the infrastructure operators in these countries have reached under the joint banner of the International Quality Improvement Corridor (IQC). The agreements are aimed at increasing the quality and quantity of freight transport by rail. The problems experienced by railway companies on this route can, in principle, be solved from the beginning of 2005 through cooperation between the regulators.

Government proposals for new legislation

- **A Bill amending the Dutch Competition Act as a result of it's evaluation** is pending in the Lower House. Depending on parliamentary procedures, the amendments will probably come into effect in 2006 and include:

(i) More powers for the NMa

20. Cartel enforcement would substantially be strengthened:

a) liability (maximum fines of € 450.000) of executives and factual instigators of breaches of Dutch Competition Act;

b) higher maximum fines: 1% (procedural breaches) or 10% (material breaches) of annual turnover for breaches of merger control rules;

c) the power to impose structural remedies, as mentioned in article 7 of EC Regulation 1/2003, on undertakings or associations of undertakings; and

d) the power to claim payment of fines with the members of an association of undertakings, in case the association does not pay the imposed fines.

(ii) Merger control rules in line with European Merger Regulation: new substantive test

21. The Dutch merger control rules will be brought in line with the European Merger Regulation, leading to a new substantive test. The "dominance" test in Regulation 4064/89 (forbidding concentrations creating or strengthening a dominant position as a result of which effective competition would be impeded in the common market or a substantial part of it) is substituted in the new Merger Regulation 139/2004 by the "SIEC" test (forbidding concentrations which would significantly impede

effective competition in the common market or a substantial part of it, in particular as a result of the creation or strengthening of a dominant position).

22. Although the Minister of Economic Affairs and the NMa are of the opinion that the SIEC test is not, in its content, different from the "dominance" test, but rather a clarification thereof, a similar change from the "dominance' test to the SIEC test is proposed. In the Explanatory Statement of the Proposal it is mentioned that the NMa will issue Guidelines in order to provide more certainty as to how the SIEC test will be applied in practice. These Guidelines will address horizontal and non-horizontal concentrations. It is not certain yet whether a mere referral to the existing EC Guidelines on horizontal concentrations and, in time, to the, not yet existing EC Guidelines on non-horizontal concentrations, will suffice, or whether explicit NMa Guidelines will be drawn up.

23. The Explanatory Statement, in referring to the new SIEC test, furthermore provides for an opening towards a so-called "efficiency defence", stating that the merger analysis will have to take into account, amongst other things, "the development of technical and economic progress provided that it is to the consumers' advantage and does not form an obstacle to competition" (based on art. 2.1.b of Merger Regulation 139/2004). Guidelines on the efficiency defence will also be issued in due time.

24. At the moment a written consultation amongst lawyers and economists has been set out in order to assess on which specific subjects practitioners feel that more guidance is needed, or whether a mere referral to the EC Guidelines will suffice.

- Introducing rules of conduct for market activities by the public sector

25. The Dutch government plans to put a Market and Government Bill to Parliament in the spring of 2006. It is intended that this Bill will incorporate rules of conduct for public bodies in the Dutch Competition Act. Four rules are being considered: i) a ban on cross-subsidies; ii) a ban on the exclusive use of data that the organisation has gathered in order to exercise its public mandate; iii) a ban on the intermingling of public and commercial responsibilities; and iv) a ban on preferential treatment for public enterprises.

II. Enforcement of competition laws and policies

II.1. Action against anticompetitive practices, including agreements and abuses of dominant positions

a) Summary of activities of:

Competition authorities

Statement of objections and fines	
Number of investigations in competition cases	22
Number of Statements of Objections based on a reasonable suspicion that the Competition Act had been contravened	41
Number of cases concluded by means of alternative enforcement instruments	3
Number of cases in which investigations were discontinued due to a lack of evidence	15
Number of cases in which fines and/or injunctions were imposed	12
Total fines in 1 million	78.7

Courts

Statistics 2004 and 2005 (up to September)
Administrative judgements concerning decisions of the Netherlands Competition Authority (the NMa):

	2004	**2005 (up to September)**
Appeal	17	18
District Court of Rotterdam		
Final appeal	9	-
Regulatory Industrial Organisation		
Appeals Court		
Cases won	Appeal: 12 Final appeal: 4	Appeal: 10 Final appeal: -
Cases lost	Appeal: 4 Final appeal: 3	Appeal: 7 Final appeal: -
Other (e.g. no competence of the Court to handle a case)	3	1

Three interesting judgements involving NMa decisions:

1. Judgement of the District Court of Rotterdam, December 2nd, 2004, Kingma
2. Judgement of the District Court of Rotterdam, May 31st , 2005, Nuon Reliant
3. Judgement of the District Court of Rotterdam, 23 June 23rd, 2005, Texaco versus Tango

1. Kingma

26. Kingma is the first judgement concerning the NMa's policy of prioritising cases. The Dutch Competition Act does not attribute an explicit power to the NMa to prioritise cases. However according to the parliamentary history of the Dutch Competition Act the NMa is not obliged to investigate every case. In Kingma the Court first of all acknowledged the power of the NMa to prioritise cases. This means that the The NMa is not obliged to investigate every complaint that is filed. Secondly the Court approved of the policy the NMa applies when it uses its power to prioritise cases. This policy is based on four criteria:

1. What is the economic importance of a case?
2. What is the consumer importance of a case?
3. How serious is the infringement?
4. Is the NMa action appropriate and effective?

27. In later judgements the District Court of Rotterdam recognised the possibility to prioritise a case when there's another (more appropriate) authority that can handle the complaint or when the complainant has already started a civil procedure concerning the same infringement.

2. Nuon/ Reliant

28. This case concerns the merger of two main electricity producers/ wholesalers on the Dutch market, Nuon and Reliant. The NMa approved of the merger under the condition (remedy) that Nuon would hold an auction for 900 Mw capacity in which Essent, Electrabel and Nuon as main electricity producers on the Dutch market, could not participate. In a provisional relief the District Court of Rotterdam suspended the condition (remedy) of the auction. Furthermore in the proceedings on the merits the Court annulled the NMa decision. In view of the particular structure of the whole sale market for electricity and the opportunities of strategic behaviour of the main electricity producers on this market, the The NMa decided that it could not rely on a traditional assessment of the market power on the basis of market shares and HHI. That's why the NMa carried out a qualitative analysis of

opportunities of strategic behaviour of Nuon and its effect on prices (comparable with the European Commission decision concerning Sydkraft) supported by two independent econometric analyses. The Court was not convinced by the NMa's arguments why the traditional assessment of market power could not suffice. In view of the fundamental character of this case the NMa decided to appeal.

3. Texaco versus Tango

29. In this case the NMa imposed fines on Texaco and three dealer owned, Texaco branded petrol stations for infringement of article 6 of the Competition Act. This article is the equivalent of article 81 EC. The infringement concerned a joint discount action to prevent a new unmanned self service petrol station, Tango, from entering the market. On the basis of statements and a joint advertisement, the NMa qualified this behaviour as a horizontal price fixing agreement/ concerted practice and imposed fines. The Court annulled the decision of the NMa because of lack of evidence of a horizontal agreement or concerted practices. The Court furthermore did not see a horizontal relationship between Texaco and the three other petrol stations, but a vertical relationship.

Civil judgement involving the NMa

30. In 2005 there was one civil judgement of the Court of The Hague involving the The NMa. Accell, a bicycle manufacturer, filed a claim for damages, because of - among other things - a press release of the The NMa in which it announced that it suspected Accell of an infringement of article 6 of the Dutch Competition Act (equivalent of article 81 EC). The Court of The Hague held the NMa liable for damages because - among other things - the press release violated Accell's rights ex article 6 ECHR (presumption of innocence). The Court of The Hague took into account that the NMa notified Accell of the press release only two hours before it was made public. Accell had no time to give a reaction to the NMa with regard to this press release. Furthermore the Court of The Hague stated that the press release did not clearly specify to the public that there was only a suspicion of an infringement of article 6 of the Dutch Competition Act and not yet a definitive infringement.

Description of significant cases, including those with international implications.

1. Construction sector

31. In the Autumn of 2001, the possibility of large-scale irregularities in the construction industry emerged. Partly on the basis of evidence in a 'parallel administration' of a 'big-seven' road construction company, the NMa started various investigations. The NMa set up a Construction Industry Taskforce to carry out intensive investigations into possible infringements of the Competition Act in the construction industry. Dutch Parliament also started a large scale inquiry into the irregularities.

32. The NMa's continuous, systematic approach to the construction industry resulted in a number of important developments in 2004. In January 2004, the Director General of the NMa called on the construction industry to voluntarily notify the NMa of practices which contravened the Competition Act. In February 2004, a whistleblower brought to light a new set of parallel accounts originating from the housing and utility construction sector. This again gave rise to discussion within society. The Minister of Economic Affairs repeated the call and set a deadline of 1 May 2004 to file leniency notifications with the NMa.

33. In total 481 companies in the construction sector heeded the call to come clean. All the large construction companies came forward, as did many companies in the small and medium enterprise sector. The notifications received originated from the road and infrastructure sector, the installation engineering sector, the housing and utility construction sector and various other subsectors of the construction and related industries.

34. Of the 481 notifications, 379 could be regarded as applications for leniency in accordance with The NMa's Leniency Guidelines. Together with information from the NMa's own investigation, these notifications provided a comprehensive overview of the construction industry and contributed to effective enforcement by the NMa.

Investigations in the construction industry in 2004

35. The investigation based on the applications for leniency proofs the existence of a culture in which there was little competition between construction companies, and in which bid rigging was common. Allowing each other to take on work and respecting each other's customers were the characteristics of this culture. Many companies indicated that the division of work and the mechanism of price formation, which was expressly prohibited by the European Commission in 1992, was tacitly continued. This resulted in agreements between the companies on the division of work and price formation in relation to individual tenders.

36. In the light of the large number of companies and projects involved within the construction industry, the NMa opted for an approach in which various subsectors were investigated consecutively. This involved the following subsectors:

- road and infrastructure;
- installation engineering;
- housing and utility construction; and
- other subsectors;

First cases: road and infrastructure

37. The first case relates to a system of bid rigging in the road and infrastructure sector. The system covered tenders throughout the Netherlands. Approximately 400 construction companies, including a number of foreign companies, were suspected of participating in the system. The system of prior consultation involved meetings of interested construction companies shortly before each tender in order to determine amongst them who would submit the lowest bid (the so-called 'claimant') and at what price. The other participants in the prior consultation then had a claim against the claimant, consisting of an entitlement to work or turnover from a subsequent project. The accumulated entitlements could be used in future prior consultations to claim a project. Such entitlements and obligations were recorded precisely by each company in their own secret claims administrations. The suspected system of prior consultation is qualified as an infringement of Article 81 of the EC Treaty and article 6 of the Competition Act.

38. The NMa fined most of the companies involved in the Spring of 2005. At the same time the NMa fined in total 7 companies that participated in two specific cartels. The first cartel coordinated their market behaviour on a structural basis in a group with a fixed composition and for a long period (1997 to 2001) in relation to large future road construction projects. The other cartel coordinated their market behaviour in relation to large future concrete hydraulic engineering projects. The agreements included parts of the high-speed railway line (HSL) and the so-called Betuwe freight railway line.

39. The agreements were qualified as an infringement of Article 81 of the EC Treaty and article 6 of the Competition Act. The fines totalled around EUR 100 million.

Other cases

40. End of April 2005 the NMa concluded her investigation into a system of bid rigging in the installation engineering sector. The NMa is expected to fine the 180 companies involved in the Fall of 2005.

41. The NMa's investigation into the housing and utility construction sector is the NMa's largest case ever. Around 700 companies received a statement of objections. In September 2005, the NMa concluded the investigation and started the sanctioning procedure.

42. In the Fall of 2005, more investigations will lead to statements of objections and sanctioning procedures.

Special fining procedure

43. How does the NMa handle these large cases? The NMa has to be efficient. There is political pressure for swift results and the NMa wants to prevent long procedures that keep the NMa and construction industry hostage for years. Moreover, the NMa has to obtain the right effect: to stimulate construction companies to clear themselves and shift to sound competition.

44. To reach these goals, the NMa introduced a shortened sanctioning procedure ("fast lane procedure"). This procedure is open to confessors to the cartel behaviour. There will be no individual hearing and all companies agree to authorise the same representative to conduct the procedures. Only the notification of certain individual circumstances are allowed (such as financial position). The individual, standard administrative procedure is open to non-confessors and the legal protection is preserved.

45. The NMa also introduced a special method to set fines. The idea is that fining sector behaviour should have a preventive effect. Setting fines in single cases would lead to maximum fines, which might cause bankruptcy of large parts of the construction industry. The NMa had to allow extension of payment to several companies so as to prevent them from being forced to file for bankruptcy. The NMa announced a special method of fining to stimulate companies to participate in the shortened sanctioning procedure. It was made clear that cooperation with this procedure leads to a 15% reduction of the fine.

Facts & figures

- road and infrastructure: 90% of 380 companies chose fast lane procedure;
- installation engineering: 88% of 180 companies chose fast lane procedure;
- fines in road and infrastructure case vary from EUR 1,363 to EUR 19 million per company - total EUR 100 million;
- current estimation of the total fines for the installation engineering companies: EUR 35-45 million.

2. Healthcare sector

Pharmacies

46. In 2003 the NMa drew up a report on two cases where access to networks was restricted (pharmacies in the regions of Assen and Breda). Since the purpose of doing so was mainly to remove restrictions for the future, the NMa did not consider it opportune in these cases to impose fines, but rather took measures aimed at the immediate restoration of normal competition, such as consultation with the parties involved or an injunction. Following consultation, the pharmacies in the Breda region liberalised access to the network. With regard to the pharmacies in the Assen region, it proved necessary to impose an order subject to a penalty. In terms of the order, it had to be possible for all pharmacies to consult up-to-date information 24 hours a day. For every day that the pharmacies did not comply with the order, they would forfeit a penalty of 4 1,000. The pharmacies complied with the order.

3. Financial Sector

Interpay

47. The NMa has imposed a fine of EUR 30 million on Interpay for charging excessive rates for the provision of network services for debit-card transactions. These are the rates which retail traders pay Interpay per transaction.

48. In addition, the NMa has fined the eight banks which created Interpay. The banks created Interpay in such a way that Interpay is the only provider of network services for debit-card transactions. With regard to the sale of these services, the banks have eliminated competition amongst themselves. The following banks have been imposed for this infringement: ABN AMRO Bank N.V. Rabobank Nederland, ING Bank N.V., Fortis Bank Nederland N.V., SNS Bank N.V., F. van Lanschot Bankiers N.V., Friesland Bank N.V., N.V. Bank Nederlandse Gemeenten.

49. The NMa has determined that Interpay has a dominant position on the market for network services for debit-card transactions in the Netherlands. In the NMa's opinion, Interpay has abused its dominant position by charging excessive rates. A fine has been imposed for this infringement for the period from 1 January 1998 up to and including 31 December 2001. Although Interpay has reduced its rates in recent years, in the NMa's opinion the rates are still excessive relative to the cost of these network services.

50. In its assessment, the NMa has acknowledged that Interpay has incurred considerable expense in setting up the network necessary to provide retailers with network services. This network has made it possible for widespread use to be made of debit-card transactions through a fast and secure network. In its assessment of the rates, the NMa has taken into account the costs incurred by Interpay in doing so. Despite this, Interpay's rates are so high that since the introduction of the Competition Act they have generated a return which is five to seven times higher than the benchmark set by the the NMa. The NMa has therefore concluded that this constitutes abuse of a dominant position. The retailers, and ultimately consumers, have suffered a loss as a result.

51. The NMa has also imposed fines on eight banks which cooperate within Interpay. They were fined because they broadened their cooperation within Interpay to include the sale of network services for debit-card transactions. By limiting the sale of network services to Interpay, in the period from 1 January 1998 to 1 March 2004, the banks excluded the possibility of providing these services in competition with each other.

52. The NMa is of the opinion that the banks are able to provide retailers with network services individually in competition with each other. The banks have also since decided in future to act as customers of Interpay and will supply retailers with these services in competition with each other. The NMa expects this to result in new rates which are not excessive. In the future The NMa will continue to monitor these developments closely. In 2004 the NMa will keep giving priority to the financial sector.

53. Parties have appealed against this decision. A decision on this appeal is expected in 2005.

Currence

54. The NMa gave an informal guidance (Comfort Letter) on May 17th 2005 stating that the establishment of the Brands & Licences Payment Systems Netherlands B.V. (B&L) and the activities which she will perform, are in accordance with Dutch Competition Law.

55. B&L will shortly be the only instance in the Netherlands which can bestow the right to become active in the market for the Netherlands monetary transfers regarding the collective payment products PIN and Chipknip, by granting licences or certificates to market-parties or (new) entrants.

Until then (17/5) Interpay was the sole owner of the brands PIN and Chipknip. To increase transparency and improve functioning of the market with the Netherlands Monetary Transfers, Interpay has, mainly on the recommendation of the Wellink Commission, transferred these brands to B&L. Based on the information supplied by B&L, the NMa has stated in the informal guidance (Comfort Letter) that the procedure for admittance which B&L will employ, seems to be sufficiently independent and transparent. The demands with which the players in the market ought to comply to qualify for a license or certificate, presented to the NMa, seem to be objective and go no further than necessary for a proper functioning of Monetary Transfers. The NMa informs B&L in the informal guidance (Comfort Letter) of several points of consideration. The NMa emphasises that B&L should operate completely independently whilst performing her certifying activities, so that no single player in the market can influence the decision as to whether (potential) competitors will be admitted to the market.

Financial Sector Monitor

56. FSM carries out economic research into competition in the various market segments of the financial sector. In doing so, the characteristics of these markets are analysed and an assessment is made of the extent to which risks to competition exist in certain market segments.

57. In the first full year of its existence, FSM has placed considerable emphasis on conducting research into the structure of the financial sector and monitoring current developments. This is a good way of acquiring an overview of aspects relating to competition in the market segment being researched. Desk research and interviews are the most important methods for this type of research. In the future, FSM will gradually place greater emphasis on research into the behaviour of market parties and the outcomes of market processes. In this regard, it is expected that increasing emphasis will be placed on quantitative research methods. In addition, continuous attention will be paid to current developments in the financial sector.

58. In addition to the banking and insurance sectors, for the first time the securities sector received FSM’s

59. attention. For instance, developments resulting from the entry of the London Stock Exchange (LSE) to the market for trading facilities for Dutch shares will be followed closely. Broad-scoped research was also carried out into risk segments in the stock market from the perspective of competition.

4. Energy Sector

Essent

60. The NMa started an investigation following a complaint from a wind energy producer who was of the opinion Essent that Essent charged a settlement rate for transformer losses which was too high. As a result, the wind energy producer suffered a loss of turnover. In its investigation, the NMa concluded that the settlement rate was high and could possibly be deemed to be an abuse of a dominant position in terms of section 24 of the Competition Act. In response to the NMa’s investigation, Essent reduced the settlement rates for transformer losses from 2% to 1.3% as of 1 January 2005 and devised a compensation scheme for all similar connected customers with retrospective effect for the three years preceding this. Essent reserved an amount of 1 2.5 million for this. In the light of these developments, The NMa ceased its investigation in relation to Essent.

61. After intervention of the NMa four network managers committed to reducing the settlement rates for transformator losses. Two network managers issue an arrangement for compensation of affected clients. This was the result of a follow-up investigation into regional network managers.

Fair tariffs in a liberalised supply market

62. Since the full liberalisation of the market for the supply of electricity and gas on 1 July 2004, energy tariffs are no longer determined by the NMa/DTe (the Office for Energy Regulation). In the new situation, consumers may choose their own supplier and tariffs are determined on this liberalised market. DTe undertook two activities to offer consumers the best possible protection in this liberalised market against unfair pricing due to possible imperfect competition:

- DTe periodically checked the tariffs charged to consumers. This meant that a large number of suppliers were invited to meetings with DTe to explain their tariffs. A number of suppliers subsequently amended their tarifs.

- DTe took action following a complaint about unreasonably high cancellation fees. Consumers may be charged cancellation fees if they cancel their contracts prematurely. DTe started a consultation round on this topic taking as its point of the departure a maximum cancellation fee for consumers of 4 50 per contract. At the beginning of 2005, this resulted in a binding directive in relation to cancellation fees. As a result, DTe was able to ensure that consumers are not charged a cancellation fee which is too high.

Approval of the NorNed cable

63. DTe has approved the construction of a 580 km long electricity cable between the Netherlands and Norway by TenneT, the manager of the national high-voltage grid, subject to certain conditions. For instance, the cable must be economically profitable and must be available to market parties for a sufficient number of hours per year. A so-called bonus-malus scheme applies to the cost, the delivery date and the capacity of the cable. If TenneT exceeds the deadline for delivery of the cable and the construction cost, TenneT will be required to pay compensation up to a reasonable maximum amount. On the other hand, TenneT will be rewarded if it delivers up the cable earlier. For DTe it is of primary importance that Dutch buyers should benefit from the cable. The link is only justified if the benefits outweigh the costs and if the risks are manageable. An important improvement is the guarantee that the capacity of the cable will amount to 700 Megawatts (MW) without incurring additional costs, rather than the 600 MW stated by TenneT in the application. TenneT may offset the costs against the proceeds of the auction of electricity transmission on connections to foreign grids.

Quality regulation

64. Power failures incur considerable social cost. For this reason, DTe introduced a system of quality regulation in 2004 through which regional grid managers are held to account financially for the reliability of supply of electricity which they offer. Through this form of regulation, DTe strives to guarantee the interests of buyers with regard to the reliable supply of energy. The new system ensures that consumers can continue to enjoy an optimal price/quality ratio. DTe introduced quality regulation with retrospective effect from 1 January 2004. The system of regulation is a ‘symmetrical system’: grid managers who have more outages than the stipulated norm must charge their buyers lower tariffs. If a grid manager outperforms the norm, the grid manager may increase its tariffs. The extent to which tari¤s are adjusted is based on the losses which consumers experience due to the outage. This enables grid managers to finance additional investment, provided it results in better quality. The quality regulation of the electricity grids followed extensive consultation between grid managers and organisations representing buyers. DTe is the first energy regulator in Europe to introduce this form of economic regulation.

Administrative problems at energy companies

65. In 2005 DTe started a large-scale investigation into the nature and extent of the administrative problems at energy companies which, for instance, regulate the switch to a different

energy supplier. In addition to requesting energy companies to supply data on the way in which administrative processes take place, DTe also visited various energy companies to check and critically assess the data.

66. The investigation, which was carried out on the instructions of Minister Brinkhorst of Economic Affairs also included a survey of consumers. Consumers were asked to give their experience of the administrative processes. The outcomes of this investigation also served as a means of verifying the data provided by the companies. DTe analysed the data collected for possible short and long-term solutions and structural measures. The conclusion was that in general improvement was shown, although the degree of improvement differs between companies.

Market Surveillance Committee

67. The NMa and DTe have set up a joint monitoring system ('Market Surveillance Committee') to monitor developments on the electricity market in the Netherlands. In order to determine whether competition on this market develops properly after liberalisation, The NMa/DTe will collect information on the market and analyse these data, paying attention to price trends and the behaviour of companies active on this market. The point of departure in this regard is monitoring compliance with both the Competition Act and the Electricity Act of 1998. In addition, DTe will use the outcomes to evaluate the rules for import allocation and the balancing market. The NMa/DTe will collect information on matters such as (import) prices and volume, the auctioning of available import capacity, listings on the APX, developments on the balancing market etc.

68. These activities will be supported by a committee of independent experts from the Netherlands and other countries set up especially for this purpose. At present, the members of the Committee are Professor David Newbery (Chairman, Cambridge University), Professor Eric van Damme (Tilburg University) and Professor Nils-Henrik von der Fehr (Oslo University).

5. Telecommunication

Mobile Termination Tariffs

69. The price of calls from a telephone on a fixed network to a mobile telephone will fall sharply from 1 January onwards. This fall is the direct result of a reduction in the termination tariffs of mobile telephone companies. The high termination tariffs were the reason that OPTA and the NMa started proceedings earlier. The NMa has now abandoned its current investigation into possible excessive tariffs. OPTA will adjust its policy with regard to the settlement of disputes between market players. In 2004 callers from a fixed network to a mobile network will benefit by at least EUR 200 million.

70. The current termination tariffs will have been almost halved by 1 December 2005. The reduction will occur in three stages. The first fall in tariffs took effect on 1 January 2004 and amounts to almost 20%. As soon as the new Telecommunications Act takes effect, OPTA intends to carry out further research into the mobile market.

71. By passing judgement in disputes between market players, OPTA earlier tried to bring about a reduction in termination tariffs. This met with objections from the Court. The NMa then took over the baton from OPTA and continued its investigation into possible excessively high termination tariffs. In the light of the sharp fall in prices, the NMa will now abandon this investigation. The Netherlands is amongst the countries with the highest termination tariffs in Europe. A termination tariff is the amount that telephone operators charge for delivering telephone calls on their own network.

6. Transport

Port of Rotterdam

In the report "Port of Rotterdam' the NMa concluded that the Port of Rotterdam has a dominant position in a number of relevant markets. Furthermore the NMa concluded that a reasonable chance exists that the Port of Rotterdam might abuse this dominant position in the future. The NMa advised the ministry of Economic Affairs and the Ministry of Transport, Public Works and Water Management to develop a new policy for port tariffs and take measures that will ensure implementation of this new policy.

II.2 Mergers and acquisitions

a) Statistics on number, size and type of mergers notified and/or controlled under competition laws;

Concentrations

- Notifications of mergers, acquisitions and joint ventures (concentrations) 83
- Withdrawn notifications 4
- Exemptions from waiting period 3
- Decisions in response to notifications of concentrations 71
- Licence required for concentrations 1
- Decisions on licence applications 0

b) Summary of significant cases.

- Case 4140

72. Both parties are active, for instance, as publishers of (youth) magazine. **Sanoma** (the parent company Werner Söderström – Malmberg of Werner Söderström) is the market leader in the Netherlands in the area of the publication of publicly distributed magazines (including Donald Duck and Libelle). **Malmberg** is a publisher of educational youth magazines, such as Okki. By applying economic analysis, the notifying parties examine the extent to which the various magazines of the parties were each other's closest competitors. By means of price/ volume correlations, the extent to which the sales of Okki depend on changes in the price of Donald Duck was determined and *vice versa*. Such analyses were also carried out for other magazines of the parties to the merger. It appeared from the analyses and further research by the NMa that the magazines of Werner Söderström and Malmberg are not each other's closest competitors. The NMa concluded that a licence was not required.

- Case 4308

73. The activities of the parties overlap in the area of the sale of hardware and software to end users and **Getronics – PinkRoccade** in the area of IT services. Most assignments in these sectors are obtained through tenders. The NMa carried out a bidding study which involved writing to approximately 170 buyers/organisations which issued tenders. It appeared from this study that the parties are not each other's closest competitors and that other market players exercise sufficient competitive pressure and must continue to do so, even after the proposed merger.

- Case 4100

74. The publisher **Sdu** intended acquiring another company in the same branch, Ten **Hagen & Stam**, from Sdu – Ten Hagen & Stam Wolters Kluwer. In 2002 the parties had already notified the proposed acquisition, following which the NMa had given its approval in 2002. However, this

transaction was not effected. In 2002 the parties again notified the NMa, but this time the notification included a number of differences compared to the transaction approved in 2002. The most important difference was that to finance the transaction Wolters Kluwer would obtain a minority shareholding of 25% in Sdu. The activities of Wolters Kluwer and Sdu overlap, particularly on the market for legal publications, on which they are the largest and the second-largest players respectively. On assessing the notification, the NMa considered (i) the effects on the incentive to compete with each other; (ii) the opportunities created to exchange information; and (iii) the possibilities for entering the market for legal publications. After the parties had given guarantees that the minority shareholding was of a temporary nature, the NMa concluded that this merger did not require further investigation.

- Case 4295

75. In the case of the merger of **Stichting Icare**, **Stichting Sensire** and **Stichting Thuiszorg** Groningen, the area Stichting Icare – Sensire – served by Icare and Thuiszorg Groningen consisted of the regions of Drenthe and Groningen respectively. Thuiszorg Groningen Due to the merger of these two parties a significant competition factor would have disappeared and the merger of Icare and Thuiszorg could have resulted in the emergence or strengthening of a dominant position. In the case of the merger of Sensire and Thuiszorg Groningen, this would not have occurred. The parties amended their notification in such a way that it only involved a merger of Sensire and Thuiszorg Groningen. The NMa was able to give the green light to this intended merger without a further investigation.

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

IV. Resources of competition authorities[1]

IV.1 Resources overall (current numbers and change over previous year):

a) Annual budget (in your currency and USD):

€ 35 million
$ 42 million

Number of employees (person-years):

⇒ economists; 60
⇒ lawyers; 90
⇒ other professionals; 34
⇒ support staff; 161
⇒ all staff combined; 345
⇒

IV.2 Human resources (person-years) applied to:

a) Enforcement against anticompetitive practices[2]; 166
b) Merger review and enforcement; 24
c) Advocacy efforts; Not available

IV.3 Period covered by the above information:

2004

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

NOTES

1. If there is more than one authority, please give details for each. However, only Central Government competition authorities should be included, not State or provincial bodies. Local offices should be included where these are part of the central authority.

2. Excluding unfair or misleading practices which fall under consumer protection provisions of the law, where these exist.