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**ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN THE NETHERLANDS**

-- 2010 --

*This report is submitted by the Netherlands to the Competition Committee FOR DISCUSSION at its forthcoming meeting to be held on 19-20 October 2011.*

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## **Executive Summary**

1. 2010 was a top year for the Netherlands Competition Authority (NMa) in terms of competition enforcement. In 2010 the NMa focused its competition enforcement efforts on healthcare; the financial and business services industry; and the processing industry. The NMa imposed EUR 137 million in fines in 12 cases on 33 undertakings (both Dutch and foreign). In 2010, the NMa used its newly acquired powers (2009) to impose fines on five individuals for their role in providing incorrect information in a merger case. In 2010 the NMa meted out the highest level of fines in the last five years. The NMa participated in, and led, various cross-border cartel investigations in 2010 with great success. The two largest cartel investigations to be completed in 2010 were in the flour and insulated glass cartels. The mergers of Van Drie / Alpuro in the veal sector and Veolia / Transdev in the transport sector were also high-profile cases. The 3-year moving average of the NMa's outcome for 2010 has been estimated at EUR 284 million. This is more than six times the NMa's annual budget. The NMa's success was acknowledged in the 4 star rating which it received from the GCR for its 2010 performance.

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

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

2. On February 19, 2010, the Dutch Act on the Implementation of Legal Protection Guidelines concerning Procurement Processes (WIRA) came into effect. This is the implementation of EU Directive 2007/66/EC (the so-called Remedies Directive). The objective of this Directive is to increase the effectiveness of legal protection in procurement processes. The Directive builds on and improves the provisions in the existing legal-protection guidelines for both the pre-contractual and the post-contractual phases. The Act offers undertakings the opportunity to submit a civil law claim, even after the contract has been signed. If the court reverses, either completely or partially, the unlawfully signed contract because of compelling reasons of public interest, the Act then appoints the NMa as the independent authority authorized to impose an administrative fine on the tendering agency.

#### ***1.2 Other relevant measures, including new guidelines***

3. In 2010, the NMa revised its Guidelines for the healthcare sector after extensive consultations with healthcare providers, health insurers, trade associations and other experts. The guidelines were revised to further incorporate specific sectoral characteristics and to address notable current developments in the sector and questions among providers.

4. In addition, in 2010, the NMa released a vision document on individual and collective negotiations between health insurers and independent healthcare professionals, such as general practitioners and physical therapists. Although it may be useful for these parties to hold discussions with health insurers in order to promote efficiency and quality, at the same time, it should be clear that collective negotiations over prices, output and market-sharing are strictly prohibited because they damage competition and may result in higher prices or lower quality healthcare to the detriment of the consumer. The NMa worked closely together with the Dutch Healthcare Authority (NZa) in the creation of this vision document.

5. The NMa and the Dutch Healthcare Authority (NZa) have also drawn up Guidelines for healthcare groups. These Guidelines provide the framework within which healthcare providers within a healthcare group are allowed to cooperate. A healthcare group plays a coordinating role in the treatment of one or more chronic diseases, and determines in what way different providers work together in a chain. Cooperation can thus improve the quality of healthcare offered to patients. If this vertical chain hardens, which occurs when more and more healthcare providers within the same discipline join the cooperative

agreement, anticompetitive concerns may arise. The NMa has made it clear that in such circumstances it will step in and strictly enforce competition law.

## **2. Enforcement of competition laws and policies**

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

#### *2.1.1 Cartel cases*

6. The NMa issued 11 statements of objections in 2010 and 12 cartel decisions. The NMa meted out EUR 137.1 million in fines, with an average of EUR 11.4 million per cartel. The NMa carried out dawn raids in 13 cases at 80 different locations in 2010.

7. The NMa received 11 leniency applications between 1 January and 31 December 2010. As explained in the 2009 Annual Report, the NMa sharpened the criteria for successful leniency applications. The NMa generally offers parties who intend to file a leniency application the opportunity to take part in pre-application interviews. In these meetings, the NMa's Leniency Office offers parties a (non-binding) indication of the likelihood of their applications succeeding. Although the sharpening of the criteria for successful leniency applications may result in a decline in the number of formal leniency applications, the quality of the evidence received in the applications which are submitted has risen dramatically.

#### *2.1.2 Legal track record*

8. In 2010 the NMa won 90% of its 35 appeal cases. (This percentage reflects the number of cases where the NMa's decision was upheld, and includes cases where the fine was reduced by the court).

9. If we split these cases into construction cases and other (regular) competition cases we can see that the NMa was successful in 96% of the construction cases and 80% of (regular) competition cases. It may therefore be concluded that the NMa's track record remains strong.

10. NMa decisions may be appealed at first instance to the Rotterdam District Court, and at second (and last) instance to the Trade and Industry Appeals Tribunal. In a decision concerning the NMa's strategy on priority setting, the Trade and Industry Appeals Tribunal imposed tighter requirements on the NMa's rejection of certain complaints based on decisions related to priority setting.

11. In an important case in July 2010, the Trade and Industry Appeals Tribunal ruled that the so-called fast-lane procedure which the NMa had set up for its construction cartel cases did not violate the principles of due process.

12. In one of the NMa's unsuccessful appeal cases, CR Delta, the Trade and Industry Appeals Tribunal struck down the NMa's decision in an article 24 case (abuse of dominance). The court found that the NMa had not shown sufficiently that the anti-competitive effects of the loyalty discount in that case were probable.

### ***2.2 Significant cartel cases and other enforcement decisions, including those with international implications***

#### *2.2.1 Heavy fine for flour cartellists*

13. Flour producers in the Netherlands, Belgium and Germany were fined more than EUR 80 million. During the investigation, the NMa closely cooperated with other European competition authorities. Fifteen firms shared the market, or concluded agreements in order to restrict competition. These 15 firms

hold the lion's share of the Dutch market. Flour markets tend to be static because consumers have not increased their consumption by consuming more bread or other flour related products. In order for the cartelists to remain assured of a certain market share, they shared the market between 2001 and 2007. They agreed amongst themselves not to sell to each other's customers, making it harder for those customers to negotiate better prices. In addition, a competitor that did not take part in the cartel agreements was bought by the other parties and effectively removed from the market. Furthermore, a complete flour mill in the south of the Netherlands was bought by a straw-man, and was subsequently dismantled in order to prevent any new competitor from opening a new flour business there. The NMa imposed heavy fines on the cartelists, particularly with regard to the breadth of the infringements. Most of the firms involved have filed objections with the NMa.

### 2.2.2 *Fine on insulated-glass manufacturers*

14. Four manufacturers of insulated glass were fined almost EUR 18 million for having concluded price-fixing agreements. As one cartel participant filed a leniency application with the NMa, it avoided fines. Three of the four other manufacturers involved have filed objections with the NMa. Between May 18, 2004, and September 15, 2005, the cartel participants concluded illegal price-fixing agreements concerning the sale of insulated glass to buyers, which include contractors, painters, glaziers and wholesalers in glass products. The cartelists had a market share of more than 50 per cent. One of the cartel's objectives was to raise insulated-glass prices by 10 to 12 per cent, a move that they supported by the introduction of minimum prices. These minimum prices were put in place to deal particularly with the larger clients, who would otherwise potentially not accept individual price increases. The minimum prices had effectively eliminated mutual competition. Such coordination and fixing of prices is detrimental to consumer welfare as it leads to higher prices and less innovation.

### 2.2.3 *Cartels in the Home care Sector*

15. In the 2010-2011 NMa Agenda, the NMa said it expected the home care sector to take significant steps towards compliance with antitrust rules. In 2010, the NMa made an effort to come to a voluntary sector-wide approach to finish unresolved issues and increase compliance, yet the sector ultimately rejected the suggested approach. As a result, the NMa resumed the penalty cases that had been temporarily put on hold. The NMa subsequently fined four home care organizations in 2010. In 2008, the NMa had already imposed fines on five other home care organizations. The fines on these nine home care organizations vary between EUR 314,000 and EUR 4 million. These cases concerned price-fixing agreements and market sharing, and not cooperation in care chains aimed at quality improvement, as was originally claimed by the organizations in question. In 2011, various objections and appeals were filed in some of these cases. These will be discussed further in the 2011 Annual Report.

16. Home care organizations say they have trouble finding a balance between competing and seeking cooperation within a care chain. It should be noted that cooperation in the care chain in itself is possible without violating the Dutch Competition Act. In order to ensure that the line between acceptable and prohibited cooperation is not crossed, the NMa is encouraging every home care provider to implement a compliance policy.

### 2.2.4 *Fines on southern Dutch construction companies and their executives*

17. In October 2010, the NMa imposed fines on two road construction companies in the southern Dutch province of Limburg: EUR 3 million on Janssen de Jong Infra B.V. (Janssen de Jong) and EUR 100,000 on Aannemings- en Wegenbouwbedrijf "Limburg" B.V. (WBL).

18. In 11 tender proceedings, Janssen de Jong and WBL held pre-tender meetings in order to discuss bid price and bidding behavior. Both companies have deliberately misled clients by way of cover pricing. Cover pricing occurs when a potential bidder obtains a price from a competitor in the tender process, which is not designed to win the contract but is intended to give the appearance of competition, in order to explicitly remain on the client's radar. The NMa discovered these violations following a tip from the Dutch Public Prosecution Service.

19. The NMa additionally imposed individual fines on three executives of these companies, varying between EUR 10,000 and EUR 250,000, as these executives either gave instructions or carried out certain conduct constituting a violation of the Dutch Competition Act.

### **2.3 Mergers and acquisitions**

#### *2.3.1 Merger Notifications*

20. The NMa received 83 merger notifications between 1 Jan. and 31 Dec. 2010.

Approved in the notification phase	68
Approved due to imposed remedies	3
Withdrawn in the notification phase	4
Decision of non-applicability	1
Request to merge prior to decision	0

#### *2.3.2 Challenges to mergers*

21. The NMa challenged 14 merger cases in 2010. Of these 14 cases, the NMa refused to authorize seven and ordered parties to apply for licence (phase II investigation) should they wish to pursue the proposed mergers. Four cases applied for a licence which led to in-depth review in 2010; 2 of these cases were granted a licence; 1 one was granted a licence with remedies; while one merger case was withdrawn by the parties one day prior to the publication of the decision to block the merger.

22. In order to resolve competition concerns, remedies were imposed in three other cases in phase I. A further three merger filings were withdrawn by the parties, often following intense discussion with the NMa over competition concerns in phase I. Finally, two other cases led to fines where parties had failed to file a notification with the NMa. A summary of the most interesting of these cases follows.

### **3. Summary of significant merger cases and advocacy efforts.**

#### **3.1 Merger review**

##### *3.1.1 Acquisition of veal producer Alpuro by rival Van Drie*

23. The NMa approved the acquisition of Dutch veal producer Alpuro Holding by rival producer Van Drie Holding. The NMa came to the conclusion that it was unlikely that Van Drie's acquisition of Alpuro would adversely affect retail veal prices or veal quality. Both Van Drie and Alpuro were active players at various levels on the veal production chain, ie buying and fattening newborn calves; buying fattened calves and young cattle for slaughtering; and selling veal and young beef. It is important to note that while the buyers market remains national the NMa has determined that the sales market is geographically larger than national. Most of the veal slaughtered in the Netherlands is exported, and Dutch buyers can buy veal from foreign suppliers. The combined market share of Van Drie and Alpuro on this market was 17 per cent. Apart from Van Drie and Alpuro, several big Belgian, French and Italian players were also active on this market. However, the NMa established that the planned acquisition would create a major Dutch calf-

slaughtering player which, to a certain degree, could have resulted in a concentration of buyer power. However, after careful analysis, the NMa concluded that it was unlikely that the proposed merger would adversely affect retail veal prices. Both parties had only a modest market share on the European sales market, and foreign slaughterhouses only rely on Dutch fattened calves to a small degree. This case has now been appealed as two interested parties have raised objections against the merger.

### *3.1.2 Acquisition on the market for powered wheelchairs*

24. In late December, the NMa conditionally approved the acquisition of mobility products manufacturer Handicare by private equity firm Nordic Capital (owner of Swedish-based powered wheelchair manufacturer Permobil). Handicare is a major player on the Dutch market. Should Nordic Capital have acquired Handicare, the combination of the two biggest players on the market for powered wheelchairs in the Netherlands would have created to an entity with too large a market share, leaving too little competition. In order to allay the NMa's competition concerns, Handicare offered to sell production, distribution and development activities of a number of its powered wheelchairs models to an independent third party. These selected models represent a combined market share of 20-30 per cent of the Dutch market. The NMa accepted the conditions and cleared the merger.

### *3.1.3 Mergers in the mental healthcare sector*

25. The NMa determined that the merger between mental healthcare provider GGZ Delfland and social-services center group PerspeKtief may impede competition on the market for supportive housing for people with mental disabilities in the province of South-Holland. These services include supported independent living and community residential care centers. If the merger goes through as originally planned, clients could be internally referred from GGZ Delfland to PerspeKtief, making it harder or even impossible for PerspeKtief's competitors to enter the market. The Dutch Healthcare Authority (NZA) has voiced similar concerns. The NMa has therefore launched a more in-depth investigation following the filing of a (2nd phase) license application. The parties offered remedies in the hope that these would solve the competition issues in the market for housing services in Delft, however these were deemed insufficient to alleviate the NMa's competition concerns. The parties withdrew their license application in 2011 following news that the NMa was to publish a decision to block the proposed merger.

26. In a similar situation, two mental healthcare institutions in the southern province of Brabant, Stichting Geestelijke Gezondheidszorg Oost Brabant (GGZ Oost Brabant) and Stichting Reinier van Arkel, are planning to merge. This planned merger could impede competition on the markets of clinical and non-clinical mental healthcare for adults and seniors, and on the market of non-clinical mental healthcare for children and young people. In two adjacent regions, at least one of the merger parties is active in each of them. The merger would thus result in the elimination of the most obvious alternative institution with regard to mental healthcare for adults and seniors. The NMa investigated whether this would be a problem in the follow-up licensing phase conducted in 2011, Although the parties offered remedies, these were deemed insufficient to remove the NMa's concerns, The parties withdrew their licence application the week the NMa was to publish its decision to block the merger

### *3.1.4 Merger of two health care providers threatened to be blocked*

27. In yet another healthcare case, two health care providers in the Dutch city of Arnhem, Pleyade Foundation and Catharina Foundation, withdrew their merger license application following news that the NMa was on the brink of publishing its decision to block the proposed merger. Pleyade and Catharina are active players on the markets of nursing home care, psychogeriatric and somatic home care in the greater Arnhem area. The NMa was not convinced that the proposed remedies put forward by the two health care

providers would eliminate its competition concerns. The Dutch Healthcare Authority's opinion was in line with the NMa's assessment.

28. Since 2004, the NMa has published more than 100 decisions concerning proposed mergers in the healthcare sector. During this time, and in conjunction with NMa indications regarding competition concerns, 10 merger filings have been withdrawn.

### *3.1.5 Fines associated with merger procedures*

29. The NMa imposed fines on British insurance company Amlin and on the State of the Netherlands for failing to notify a concentration on time. Amlin was imposed a fine of EUR 1,4 million and the State EUR 800,000. In July 2009, the State transferred its shares in Fortis Corporate Insurance to Amlin, which thus acquired control over Fortis Corporate Insurance. This constituted a concentration. The NMa was informed of this concentration in the summer of 2009 - Amlin notified the NMa of the concentration in December 2009 - well after the original date of the acquisition. The NMa eventually approved the acquisition in January 2010. Under the Dutch Competition Act, it is prohibited to carry out concentrations of a certain size without obtaining clearance. In this instance, the NMa imposed a fine, especially because failure to notify on time undermines merger control.

### *3.1.6 Article 9 referral request to the European Commission*

30. Transdev and Veolia, two French public transport companies, active on the Dutch market through their Dutch subsidiaries Connexxion and Veolia Transport, wished to merge. Both companies offered bus and train services, as well as a variety of taxi services. Due to the turnover of the companies concerned, companies first filed with the European Commission. However, since the merger could have a major impact on the Dutch and French markets, both the NMa and the Autorité de la Concurrence requested that the Commission pass on the assessment of the effects on the respective national markets, to the national authorities. This request was granted.

31. In order to assess this merger, the NMa created a team of competition control and regulation experts. The NMa established that the newly merged company would acquire a large share of the Dutch market. After an extensive investigation, the NMa gave the green light to the merger. It turned out that the merger would not lead to significant changes in prices and quality levels. Tenders for bus and train services will continue to be competitive, as enough competition will remain in the market. The NMa based this conclusion on, among other aspects, the public transport companies' historical bidding patterns, and how they took their competitors into account when making those bids. The NMa also came to the conclusion that sufficient competition will remain in the market for taxi services.

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

### *3.2.1 Preventative measures: Advocacy and Guidance*

32. In order to fulfil its mission of 'making markets work', the NMa optimises the synergies between 'pure' competition enforcement and the other tasks it carries out. Advocacy and guidance are important tools in achieving long-term competition enforcement goals. This work includes advising policy makers on draft legislation (for example by looking at the competition impact in sector specific legislation and at the enforceability of legislation which will affect the tasks of the NMa). We also consider how best to improve compliance among Dutch firms. One example of the NMa's efforts in the fields of advocacy and guidance in 2010 was its vision document on the future of the financial industry. There, the NMa provides advice on exit strategies for the Dutch government following state aid interventions for financial institutions. At the NMa's behest, in December 2010, an important commitment decision was also adopted in the insurance

sector. This decision aims to put an end to anti-competitive risk pooling sales practices. This also involved adoption by the sector of a protocol offering guidance to insurance companies on how to work within the limits of competition law.

33. Besides competition law enforcement, the NMa, through the Office of Energy and Transport (DREV), is also entrusted with specific regulatory powers in the fields of Energy and Transport.

34. In the energy sector consumers should have access to clear information that is easy to understand. Many consumers use energy price comparison sites to help them compare energy offers. Together with the Dutch Consumer Authority, the NMa in 2010 carried out a study into the quality of several price comparison sites. The study revealed that, although these sites appear to be reliable, the information they provide should be clearer. In consultation with the NMa, the energy suppliers and the comparison sites agreed to improve their provision of information. Many improvements have since been implemented. In 2010, the NMa also explored other ways to improve the provision of information and make it more accessible. By adopting the Guidelines on the Provision of Information, the NMa has made sure that the energy suppliers' websites become clearer. In addition, the NMa has also provided for more consumer-friendly energy bills as a result of a series of non-mandatory agreements with energy suppliers.

### 3.2.2 *Reasonable tariffs for consumers*

35. The NMa checks whether all supply tariffs are reasonable. On numerous occasions in 2010, the NMa encouraged energy suppliers to adjust their tariffs voluntarily. This meant that the NMa did not need to issue any tariff decisions.

## 4. Resources of competition authorities

### 4.1 *Resources overall*

#### 4.1.1 *Annual budget 2010*

36. In 2010, the NMa's competition budget fell by EUR 2,6 million to EUR 46,8 million.

#### 4.1.2 *Number of employees: Lawyers, Economists, Other*

	<b>Legal</b>	<b>Economic</b>	<b>L &amp; E</b>	<b>Other</b>	<b>Total</b>
Competition Department	58	38	1	39	136
Office of the Chief Economist		3		1	4
Legal Department	18		1	1	20
(Office of) Board of Directors	4	1			5
Strategy & Communication	5	1	1	6	13
<b>Total</b>	<b>85</b>	<b>43</b>	<b>3</b>	<b>47</b>	<b>178</b>

Other includes: Business accountancy, Political science, Mathematics, Library science, International Business, Business economics, MBA, Political science, Communication studies, Business administration and economics, Socio-cultural sciences, Health sciences, Chinese language and culture, Engineering physics, Culture and science studies.

#### 4.1.3 *All staff combined*

37. 432 people are employed by the NMa (including temporary staff). This figure includes staff who work at the Office of Energy and Transport Regulation (DREV).

## **4.2 Human Resources**

38. 214 people (including secretarial assistance and paralegals) are actively involved in competition enforcement. 178 non administrative staff are involved in competition enforcement. Of these, 163 work in the Competition Department, 25 in the Legal Department, 4 in the Office of the Chief Economist, 13 in the Strategy and Communication Department; and 3 with the Board of Directors.

39. These figures exclude the support staff associated with competition enforcement (such as library, archive, human resources and mailroom), staff of the Offices of Energy Regulation and Transport Regulation and the part of the Legal Department which is dedicated to those Offices.

### **4.2.1 Enforcement against anticompetitive practices**

- Anti-Cartel: 93.5 FTE
- Dominance-related issues: 8 FTE

### **4.2.2 Merger review and enforcement**

- Mergers 23 FTE

### **4.2.3 Advocacy efforts**

- 18.3 FTE (This includes, for example, Monitor Financial Sector; drafting of/providing information regarding regulations; issuing informal guidelines; sector specific and general public targeted education regarding the NMa's leniency program; publishing articles, holding bilateral meetings with other competition authorities; and giving speeches and holding seminars on both national and international competition related issue.

## **4.3 Period covered by the above information**

- 1 January 2010 to 31 December 2010.

## **5. New reports and studies on competition policy issues**

### **5.1 Papers available in English**

- Kalbfleisch P., 'How to structure a Modern Competition Authority (Revision of the Swiss Competition Act)', in Baudenbacher C. (ed) Current developments in European and International Competition Law (2010).
- Kalbfleisch P., 'Antitrust Oversight: More an Art than a Craft', in Competition Policy International, volume 6, nr 2, 2010
- Kemp, R.G.M., Mulder, M., 'Outcome of NMa activities. A description of the calculation method', NMa Working Papers, No. 1, October 2010.
- Kemp, R.G.M., Severijnen, A., 'Price effects of Dutch hospital mergers', NMa Working Papers, No. 2, October 2010
- Lutz, C.H.M. Kemp R.G.M. and Dijkstra S.G 'Perceptions regarding strategic and structural entry' Small Business Economics, 2010
- Mulder, M., 'Tariff regulation and profitability of energy networks' , NMa Working Papers, No. 3, December 2010

5.2 *Papers only available in Dutch*

- Dijk, E.J. van en Heyningen, M.J. van, "postscript: The working methods of the NMa, analogue and digital research: the end of the search", in *Markt & Mededinging*, nr. 6, 2010.
- Leliefeld D., Nobel I. en Goudsmit-Hopstaken P., 'Reaction to: Spatial monopolies in Dutch supermarket sector' ESB 95(4594) 2010. p 605.
- Sinderen, J., Janssen M.C.W., 'Competition Enforcement and the Economic Crises', ESB 19-2-2010.
- Van den Broek C.M., Kemp R.G.M., Verschoor W.F.C. and De Vries A.C. 'Damage to reputation as enforcement tool' ESB, February 2010.