

2007 Annual Bulletin

1 Introduction

On 9 January 2007, the NMa published its Agenda for 2007. This Agenda dealt in detail with a number of themes on which the NMa would focus in 2007. The Agenda also specified how the NMa wished to organise its monitoring activities and which specific areas of focus it would concentrate on in 2007. The NMa Agenda, the Annual Bulletin and later this year the 2007 Annual Report are essential building blocks for the cycle of accountability and for NMa's working method. The areas of focus in 2007 were the health sector, the media and communication markets, and the financial sector subject to general competition monitoring. The energy and transport sectors are being monitored by the sector-specific regulators – that is, the Office of Energy Regulation (DTe) and the Office of Transport Regulation. Needless to say, in 2007 the NMa also undertook a wide range of activities outside its areas of focus.

2 Energy

Consumer confidence growing

Consumer confidence in the energy market increased slightly in 2007 as opposed to 2006. That is demonstrated by the market monitoring report for consumers published every year by the NMa. Consumers are happier with the administrative services provided by the energy companies and the way complaints are handled. Consumers also believe that the reliability of information from energy companies is improving. Nevertheless, the NMa concludes that consumers are still reluctant to switch from one supplier to another. There are various reasons for this. Consumers say they are satisfied with the existing situation, are afraid that something will go wrong if they make the switch, are not interested in energy, or feel they do not have enough transparent information about the market.

In order to lower the threshold for switching, the NMa first focused on improving the supply of information and the level of transparency. Among other things, it formulated requirements for the price information published by the energy companies on their websites. Secondly, it is vital for consumer confidence that mistakes in bills and switches are avoided as much as possible. The NMa uses a 'scorecard' to monitor the performances of energy companies. This scorecard shows that performances improved in 2007. Lastly, consumer confidence is boosted when complaints are handled properly. The NMa again conducted a consumer survey in 2007 on the handling of complaints. This follow-up survey showed that the quality of the way complaints are handled is indeed getting better, though there is still plenty of room for improvement in this area.

Competition stagnating on the wholesale market

Although consumers have more confidence in the energy market, the wholesale markets for gas and electricity are developing slower than was hoped. The annual monitoring report shows that competition on the wholesale market for electricity is stagnating. As a result, Dutch consumers are paying tens of euros more for electricity than consumers in neighbouring countries. According to the NMa, more efficient use and expansion of cross-border interconnectors is required to stimulate competition in the Netherlands.

The same applies to the wholesale market for gas. The annual monitoring report on the wholesale market for gas has identified a number of serious bottlenecks that are obstructing competition on the Dutch market. For example, the potential for gas import, gas storage and quality conversion is not being utilised to the full, while market parties have stated that this is exactly what they are missing. Further integration of the gas

markets in North Western Europe is necessary to enable Dutch consumers to benefit more from the advantages of liberalisation. The NMa therefore remains active in diverse European platforms in order to promote the internal market.

Plenty of debate about independent network management

In 2007, there was considerable debate about 'public and independent network operations. In June, the Minister of Economic Affairs decided to definitively divide the vertically integrated energy companies along ownership lines. The NMa contributed to the 'unbundling' debate with the publication of two studies: a risk assessment for network operations in case of the acquisition of Indaver by energy company Delta, and a general risk assessment for independent network operations under current regulation.

In 2007, the NMa demonstrated the need for the monitoring and regulation of network management with its evaluation of the regulatory system. The magnitude, origin and spending of the profits of Delta, Eneco, Essent and Nuon for the period 2001-2007 were investigated. The main conclusion was that regulation by the NMa has generated total savings of EUR 1.9 billion on consumers' bills. However, the investigation also revealed that the regulation could have been even more effective. In 2004 and 2005, the energy companies made a total of EUR 393 million more profit than the NMa considered to be reasonable. That is why, in the summer of 2007, the NMa published strict new draft regulatory methods for the period 2008-2010.

Fines and other decisions

In 2007, the NMa imposed a fine of EUR 95,000 on NRE Network B.V. for three infringements of the 1998 Electricity Act. It was found that this company charged around 2500 business customers excessive transport prices in the course of 2004. NRE was also fined EUR 180,000 for charging consumers an excessively high recurrent connection fee. NRE has since adapted its prices and is refunding the amounts that it overcharged its customers.

Mergers and acquisitions in the energy sector

Merger Nuon-Essent falls through

In May 2007, the NMa decided that if a merger were to take place between Essent and Nuon there are sufficient reasons to assume that it would create or strengthen a dominant position in parts of the gas and electricity markets.¹ The merger application was withdrawn in early September because the parties concerned said that the conditions for successful completion of the merger were insufficient at that time.

¹ This involves the market for the production and wholesale trade in electricity, the market for the supply of electricity to small-scale consumers, the market for the supply of gas to small-scale consumers and the 'imbalance market'.

3 Transport

Schiphol Airport reduces aviation tariffs

In April, the NMa approved the system for allocating expenditure and income from aviation activities at Schiphol Airport after the airport authority had implemented a number of changes. This was the first decision that the NMa took on the basis of the new Aviation Act. Furthermore, the NMa adopted a decision in response to three requests for a review of the airport charges set by Schiphol Airport. After an investigation based on the request submitted by KLM, the NMa decided that Schiphol Airport had to reduce its charges because it wrongly did not on-charge a number of deductible cost items (bonuses and setbacks). This means that Schiphol Airport can charge the airlines 36.8 million euro less. Schiphol implemented this reduction less than one week after the decision was taken, but also lodged an objection to the NMa's decision.

Railway competition has increased

In early 2007, the NMa published the second Rail Monitor, which showed among other things that compliance with the Railways Act and railway competition have increased. The Monitor also showed that the processes related to the Network Statement ("Netverklaring"), charging fees and access agreements leave room for improvement. The NMa has therefore focused on these points in its monitoring activities.

Capacity distribution

In late 2007, six parties lodged a complaint with the Office of Transport Regulation about ProRail's distribution of capacity over the rail infrastructure. These parties claim that ProRail has allocated them too little rail capacity. The complaint made by passenger transporter Connexion was withdrawn after mediation by the NMa because Connexion and ProRail came to an agreement. The other complaints will be resolved in 2008.

The Betuwe Line was put into operation in 2007. Many of the management tasks on this line are being carried out by Keyrail. ProRail is responsible for the other management tasks. Under pressure from the NMa, clear agreements on the competencies of the two rail infrastructure operators were announced so market parties know exactly where they stand.

Charging fee

In early 2007, the NMa investigated the discount applied by ProRail to the 2007 charging fee that freight transporters must pay for access to the railways. The NMa has no objection to the discount, because it is not part of the user fee system. Furthermore, the NMa conducted an investigation into the agreed performance system between rail companies and the operator. This was found to be an improvement compared to the 2006 system. In 2007, an improved performance system for 2008 was also agreed. In 2008, the NMa will test the effectiveness of these systems.

Preparations for monitoring pilotage services

In 2007, the NMa advised the Minister of Transport, Public Works and Water Management on the monitoring of pilotage services. The Market Monitoring Registered Pilotage Services Act has been in force since 1 January of this year. In order to be well prepared for enforcement of this Act, last year the NMa, together with the sector, made preparations to monitor this enforcement.

4 Healthcare

The quality, accessibility and affordability of the healthcare service must continue to be safeguarded in the long term. The Government has therefore opted for partial liberalisation and introduction of competition. Sound competition should stimulate care providers and health insurers to gear their products and services more closely to the demands of customers and patients and to operate in a cost-conscious way. On the basis of the Competition Act, the NMa monitors those areas where market processes have been introduced into the healthcare sector. As part of its activities over 2007, the NMa also worked closely with NZa, the regulator for the healthcare sector that is currently in the process of developing into a free market.

Healthcare Guidelines provide clarity on cooperation in the healthcare sector

Parties can intentionally or unintentionally obstruct market processes or make it impossible for them to flourish by entering into mutual agreements or forming undesirable concentrations. To help the sector to comply with the law, in 2007 the NMa revised its 'Guidelines for the Healthcare Sector'. These guidelines clearly explain what is and is not permitted under the Competition Act – for example, the extent to which care providers may cooperate with each other. Using these guidelines – which include all kinds of practical examples – market parties can themselves test forms of cooperation and practices against the Competition Act. The Guidelines also give an insight into the criteria used by the NMa to assess concentrations in the healthcare sector.

Home care organisations suspected of market-sharing practices

In the past few years, the NMa has mainly used its capacity to provide the healthcare sector with information (*guidance*). At meetings of branch associations and conferences, the NMa explained how the Competition Act is enforced. However, the NMa has received information about possible violations of the Competition Act by home care institutions. The NMa has therefore carried out a number of 'dawn raids'. During these on-site visits, the NMa looked for evidence of possible infringements. At the end of 2007, this investigation led to the first two statements of objections, which have been sent to the parties concerned.

Mergers and acquisitions in the healthcare sector

Investigations into mergers between care institutions

Among other things, the NMa has conducted a detailed investigation into two mergers between mental health institutions. This involved the intended merger between Stichting Adhesie, Stichting Mediant, Stichting RIAGGz over de IJssel and Stichting Zwolse Poort in the regions of Overijssel and Gelderland. The NMa is also conducting a detailed investigation into the intended merger between Stichting AMC de Meren and Stichting JellinekMentrum in the health care administrative region of Amsterdam. The merger of these care institutions may obstruct competition on the markets for clinical and non-clinical mental health care for adults and senior citizens. For patients in the Amsterdam region, only one other provider with a comparable range of services would remain after the merger. In Overijssel and Gelderland, the most obvious alternative provider of clinical mental health care for patients would even disappear altogether. The follow-up investigation focuses on two questions. First, the question of how much competitive pressure is being exerted by mental health institutions in the surrounding areas. Second, the question whether patients will be left with sufficient choice. On 3 December 2007, the four institutions from Overijssel and Gelderland withdrew their permit application because one of the institutions has since dropped out.

5 Financial sector

Working towards a single European payments market

The Netherlands is about to become part of a large single European payments market in which there will no longer be a difference between domestic and foreign payments. Just as payments can now be made everywhere with the same coins and banknotes in fifteen euro countries, in the future that will also be the case for money transfers, direct debit payments and debit cards. Due to the scale advantages and the more efficient use of payment instruments, cross-border competition can lead to lower costs for payment traffic, which in turn will also benefit consumers. On the Dutch market, the NMa is making sure that the switch to a European payments market meets the legal stipulations for competition. Agreements between market parties involved in the introduction of the payments market are being investigated by the NMa. To chart the risks for competition on a national level, the NMa has drawn up the consultation document 'The route to the Single European Payments Area'. In this document, the NMa asks the various parties concerned to respond to the expected effect of the new payments market on competition in payment traffic. Based on the responses to this consultation document, the NMa will keep a record of the strategies that individual market parties are pursuing and the views of the parties in question about general market developments resulting from the European payments market.

Investigation into credit loans

In response to complaints and following its own market research in this field, the NMa has made a number of unannounced company visits. One of these investigations involved credit loans to small and medium-sized enterprises, including loans from the three major banks in the Netherlands: ABN AMRO, ING Bank and Rabobank. This investigation is still ongoing.

Real-estate agents formulate compliance programme

After a complaint made by the Association of Home Owners ("Vereniging Eigen Huis"), the NMa launched an investigation into possible anti-competitive practices by the Dutch Association of Real Estate Agents [*Nederlandse Vereniging voor Makelaars (NVM)*] and its members. Following the intervention of the NMa, the sector organisation and its members have undertaken to draw up a compliance programme. In brief, a compliance programme is a package of measures and procedures taken to ensure that the Competition Act is being complied with. Following this undertaking, the NMa halted its investigation but continued to keep close track of developments. In the third quarter, it was announced that the NVM had decided not to introduce a number of regulations, which, according to an initial investigation by the NMa, could be detrimental to competition. The branch organisation stated that it will work on an alternative plan to achieve the desired quality. The NMa welcomes every alternative plan that does not obstruct the development of competition on the real-estate market for homes.

Mergers and acquisitions in the financial sector

NMa clears merger between BinckBank and Alex

The NMa has approved the acquisition of online investment bank Alex by BinckBank. According to the regulator, the acquisition will not disrupt competition on the market for transaction mediation for private investors. In addition to the post-merger company, private investors can choose from a sufficient number of alternative providers. It is also relatively simple for providers to become active on this market.

6 Media and communication markets

Removal of obstacles to the purchase of advertising space

At the insistence of the NMa, the Regulatory and Supervisory Board for the Advertising Sector (“ROTA”) has scrapped the ‘stacking ban’. This ban meant that publishers were not allowed to sign advertising contracts with more than one advertiser at the same time. By abolishing the ban on ‘stacking’ advertising space, advertisers can now form purchasing consortiums more easily, which enables them to insist on higher discounts from the publishers. This leads to a reduction in the advertising costs for companies, which can in turn lead to lower prices for their products and services. Partly on the basis of the pledge made by the ROTA, the NMa has decided not to pursue its investigation into this organisation.

Publishers launch their own compliance programmes

Telegraaf Media Groep, PCM Publishers and Nationale Regiopers Dagbladen have each set up their own compliance programmes. This involves a package of measures and procedures the publishers will use to embed compliance with the Competition Act into their business operations. Among other things, each publisher will appoint its own ‘compliance officer’, who will operate independently of the sales departments and will play a proactive role in preventing, investigating and halting possible constraints to competition. The NMa welcomes this initiative because it reduces the chance of violations. Needless to say, compliance programmes are not intended to replace regular monitoring by the NMa.

Apple not guilty of tied selling

The NMa has rejected a complaint made by the Dutch Consumers’ Organisation (Consumentenbond) about computer company Apple. According to the NMa, Apple is not guilty of abusing its dominant position with the ‘tied selling’ of its iPod portable music and media player and its iTunes online music store. Consumers that purchase music through Apple’s Internet store can and may play that music on devices other than an iPod. Furthermore, consumers can transfer music purchased at other music stores to their iPod. There is therefore no abuse of a dominant position.

Cable companies not abusing their dominant position

In response to a complaint made by KPN, the NMa concluded that cable television companies UPC, Essent Kabelcom and Casema Multikabel have not abused an economically dominant position. Among other things, KPN claimed that these cable companies are infringing the Competition Act by selling analogue and digital packages of radio and television, by charging predatory prices and by providing an unlawful cross-subsidy between analogue and digital packages. The NMa concluded that the disputed practices do not constitute an infringement of the Competition Act and has rejected KPN’s complaint.

Mergers and acquisitions in media and communication markets

Mecom may acquire Wegener after divesting itself of free local papers

After Mecom had adapted its original acquisition plan, the NMa approved the acquisition of Wegener by UK media corporation Mecom. The modification in the reported concentration means that Mecom will divest itself of most of the free local papers published by its subsidiary De Trompetter. This modification will safeguard competition on the market for local and regional advertisements in the eastern region of Noord-Brabant and Limburg.

7 Other activities related to general competition enforcement

Large number of construction cases concluded

Decisions on objections were central to NMa efforts over 2007. In April and May, the NMa issued 13 decisions on objections as part of accelerated proceedings in the civil engineering and infrastructure sector [GWW]. In October, the NMa issued 28 decisions on objections in various sub-sectors. The first court case took place in November.

Million euro penalty for tree nurseries

In November 2007, the NMa imposed fines of more than EUR 1 million on seven tree nurseries for participating in prohibited cartel agreements from January 1998 up to the end of February 2004. The companies in question had met in different configurations before submitting tenders to local governments for tree nursery products such as trees and shrubs. The case was brought to light after a tip from FIOD/ECD. During its investigation, some of the evidence used by the NMa was provided by two companies as part of their application for leniency. In addition to imposing a fine on this cartel, following its investigation into the tree nurseries the NMa also reprimanded the Dutch Federation of Tree Nurseries [*Nederlandse Bond van Boomkwekers (BvB)*] for providing its members with price recommendations. The NMa demanded that the NBvB should immediately stop this practice. A recent follow-up inspection showed that the NBvB has complied. Consequently, the NMa has halted investigations.

Fine for suppliers of metal grids

The NMa has fined suppliers of metal grids a total amount of more than EUR 2.7 million for participating in a cartel. To 'protect' themselves from mutual competition, the companies regularly met to harmonise the prices for grilles by drawing up price lists. For major contracts, the companies jointly determined which of them would be awarded the contract and for which price. In addition, the companies made agreements every year on the distribution of their market shares. The NMa launched the investigation after one of the parties informed the NMa about the cartel in return for fine immunity. Two other parties later submitted applications for leniency.

Fines for the concrete sector

The NMa has imposed fines of more than EUR 5.5 million on 18 companies in the construction sector for participating in cartel agreements. The fines follow two statements of objections that the NMa drew up at the end of 2006. The case involved companies active in the field of ornamental paving products, broad-slab floors and ribbed cassette floors. The fact that the companies continued their cartel practices for a long time, even after the Parliamentary Committee of Inquiry into the Construction Industry had completed its investigation into the construction case at the end of 2002, was taken into account when determining the severity of the fines. A leniency discount was granted in all cases.

Mergers and acquisitions

Green light for flower auction merger

After an in-depth investigation, the NMa decided that the merger between Aalsmeer Flower Auction and FloraHolland would not have a negative effect on competition. The merger has not created or strengthened a dominant position. The NMa's investigation focused on the question of whether the sales and purchasing channels outside the auction are a realistic alternative for growers and buyers. To ascertain this, around 1500 growers and 500 buyers of ornamental plant products were interviewed. The buyers that use the auctions are largely wholesale companies and florists. The NMa also interviewed competing parties and experts, including

foreign auctions and Internet auctions. The investigation showed that sufficient numbers of growers and buyers of ornamental plant products view the alternative channels as realistic options. The post-merger combination will therefore not be able to raise its prices or reduce its services without the growers switching to alternative channels.

Sugar merger approved

The NMa also approved the purchase by Koninklijke Coöperatie Cosun of all the shares of CSM Sugar. Last year, the European Union began reforming the sugar sector. It was investigated whether this reform is causing the sugar market to internationalise and whether that in turn is causing an increase in foreign competition. The NMa decided that the concentration will not create a dominant position on the market for the sale of sugar. Foreign providers have access to the Dutch market and Dutch buyers have sufficient fall-back options for the purchase of sugar abroad. The transport costs are not a prohibitive factor for either industrial sugar or consumption sugar.

To conclude

The NMa aims to be transparent and to provide an insight into the results and effects of its activities. That is why this 2007 Annual Bulletin examines the most interesting cases and events in brief. The Annual Report contains a more detailed overview. The NMa hopes to publish its Annual Report in April 2008. If you would like to know more about the NMa and its activities and wish to keep informed about the latest developments, we recommend that you visit our website on a regular basis: www.nmanet.nl.

The Hague, January 2008

8 Preliminary key figures of the NMa in 2007

These figures are provisional. Due to administrative processes, the definitive figures may deviate somewhat from these figures.

Preliminary key figures NMa in 2007

		2005	2006	2007	Comments 2007
Statement of Objections and fines					
	Number of formal investigations under competition law	20	26	25	
	Number of formal investigations resulting in a Statement of Objections (establishing a reasonable suspicion that the Competition Act was infringed)	10	5	4	
	Number of investigations completed by means of an alternative instrument	2	7	10	
	Number of cases in which the formal investigation was terminated due to insufficient evidence	8	14	11	
	Number of cases in which a fine/ periodic penalty payment was imposed	8	13	6	7 sanction cases were completed, resulting in a fine in 6 instances.
	Total fines in competition cases (x EUR million)	141.2	114.1	9.5	
Complaints and informal opinions					
	Complaints settled in relation to infringements of the Competition Act	174	112	65	Decline in number of complaints is partly due to new complaints processing procedures.
	Informal opinions	46	22	0	Many parties request for a meeting with the NMa instead of an informal opinion.
Mergers					
	Notifications of mergers, acquisitions and joint ventures (mergers)	80	135	108	
	Notifications withdrawn	5	5	7	
	Exemption from the waiting period	2	0	1	
	Decisions on notifications of mergers	80	119	106	
	License required for the merger	5	8	4	
	License applications	5	5	5	
	License applications withdrawn	0	3	3	
	Decisions on applications for a license	7	2	3	In 2005 3 out of 7 decisions concerned an amendment to the license granted
Transport					

Railway Act	Number of investigations Office of Transport Regulation	-	32	10	Last year, within the framework of an investigation into the performance agreement, ProRail and 23 railway companies were confronted with their failure to draw up a protocol. This year only one investigation was carried out.
	Number of formal investigations resulting in a Statement of Objections	-	8	4	
	Number of investigations completed by means of an alternative instrument	-	22	3	
	Number of cases in which no infringement was established			3	
	Number of completed sanctions cases	-	5	1	
	Number of completed complaints relating to the Railway Act	-	3	2	
Aviation Act	Number of requests for tariff assessment resulting in a decision			3	
	Approval decision on cost allocation system			1	
Passenger Transport Act 2000	Completed cases involving local transport companies	5	1	12	
	Number of cases resulting in a court ruling	1	1	1	
Energy					
	Method decisions	19	24	25	Method decisions are not adopted on an annual basis. In 2007 tariff decisions were not adopted either. This accounts for a total of 52 decisions.
	Implementation decisions	81	156	74	Decline in number of enforcement decisions is paralleled by increase in number of dispute resolution cases.
	Enforcement decisions	46	27	10	
	Advisory notices to the Minister of Economic Affairs	10	6	12	
	Dispute resolution	18	45	64	
	Number of energy cases in which a fine/period penalty payment was imposed	12	1	2	
	Total fine amount in energy cases (x EUR million)	0.5	0.1	0.3	
Administrative appeals					
	Completed administrative appeals in competition cases	53	125	107	65 construction cases
	Completed administrative appeals in energy cases	41	34	44	

	Completed administrative appeals in transport cases	-	4	2	
Judicial appeals					
	Judicial appeals completed by the Court of Rotterdam against decisions in relation to competition	29	28	33	
	Judicial appeals completed by the Trade and Industry Appeals Tribunal against decisions in relation to competition	8	5	10	
	Judicial appeals completed by the Court of Rotterdam against decisions in relation to energy	-	1	-	
	Judicial appeals completed by the Trade and Industry Appeals Tribunal against decisions in relation to energy	29	20	31	
Budget and personnel					
	Total budget granted	EUR 39 million	EUR 40.6 million	EUR 45.7 million	Increase in tasks due to Independent Network Operation Act [wet Onafhankelijk Netbeheer (Splitsingswet)] and increase in number of merger notifications due to lowering of thresholds in healthcare.
	Number of employees on 31 December	367	380	392	
	Ratio male/ female	51%/ 49%	52%/ 48%	51%/ 49%	
	Average age of staff	37	37	37	