

MERGER CONTROL

INTERNATIONAL SERIES

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FOREWORD

Jean-François Bellis and Porter Elliott | Van Bael & Bellis

The past several years have seen an increase in M&A activity, with tens of thousands of deals in 2016 alone, collectively valued at well over \$3 trillion. Recent large transactions include Dow's acquisition of DuPont, Anheuser-Busch InBev's acquisition of SAB Miller and AT&T's acquisition of Time Warner, to name just a few. While not every deal is subject to merger control, more M&A activity inevitably means more merger control filings. Filings to the European Commission, for example, increased over 30% from 2013 to 2016, and 2016 marks the second highest number of EU filings ever in a single year.

Whether your company has been involved in a transaction that requires merger control approval or you are an outside counsel retained to assist in obtaining such approval, you are all too aware of the hurdles that stand in the way of closing the deal. Most merger control regimes worldwide require suspension of notifiable transactions until they have been approved, and as this can take months, obtaining merger control approval is typically the long pole in the tent. Buyers are eager to take control of what they have bought, sellers are eager to get paid, and nobody benefits from the uncertainty and turmoil of a long-drawn-out merger review. Aside from timing issues, it can be difficult to navigate the sometimes turbulent waters of obtaining required approvals in multiple jurisdictions, each of which has its own filing thresholds, its own procedure and, in some cases, even its own substantive test for determining whether the deal will be approved.

This book aims to help.

With contributions from leading law firms covering 52 of the most important jurisdictions worldwide, this third edition of *Merger Control* sets out to address the most common and critical questions of merging companies and their lawyers, including some which are less often addressed in other books of its kind, such as whether pre-notification consultations are customary in a given jurisdiction, whether "carve-out" arrangements may be implemented to allow for closing to take place in jurisdictions where approval is still pending, whether the jurisdiction at issue has a track record of fining foreign companies for failure to file and whether it has ever issued penalties for "gun-jumping" offences.

Adopting the reader-friendly Q&A format that has been used successfully in the first two editions of *Merger Control*, this book sets out to answer for each jurisdiction the key questions those on the front line are most likely to have, including:

- Is notification mandatory (as in most jurisdictions where the thresholds are met) or voluntary (as, for example, in Australia, New Zealand, Singapore and the UK)?
- If mandatory, is the requirement to file based purely on the parties' turnover (as in the EU and many other jurisdictions worldwide) or are there other factors that need to be considered, such as market share (for example, in Portugal, Spain and the UK), asset value (for example, in Russia and Ukraine) or the size of the transaction (for example, in the US)?
- Is there a filing deadline and/or a requirement to suspend implementation pending receipt of an approval decision? In most jurisdictions, there is no filing deadline so long as the deal is not closed until it has been approved, but there are exceptions.

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- How onerous is the filing? Most jurisdictions have detailed notification forms that must be completed (Germany being a notable exception), although some forms take far more time to complete than others. For example, although certainly not always the case, it is not unusual for notifications to the European Commission to exceed 100 pages (not counting annexes), and to include very detailed legal and economic analysis. By comparison, the US Hart–Scott–Rodino form is short and straightforward, and can usually be completed in a matter of days (although a second request in the US can be extremely burdensome).
- What factors are likely to be considered by the relevant authorities in assessing the legality of the transaction? While it must be assumed that every authority will focus first and foremost on whether the transaction would raise competition concerns in its territory, some authorities are more likely than others to consider theories of competitive harm that go beyond traditional concerns related to high combined market shares, such as the risks of vertical foreclosure. Similarly, non-competition issues, such as industrial policy or labour policy, may be more likely to be considered in some jurisdictions than in others.

Although by no means a substitute to seeking the advice of local counsel, this book aims to address these and other critical questions in a concise and practical way, and therefore to serve as a valuable resource to companies and their counsel as they negotiate their way through the twists and turns of obtaining the required merger control approvals worldwide.

As always, compiling the third edition of *Merger Control* has truly been a group effort. With this in mind, we would like to thank all the authors for their contributions, as well as the team at Sweet & Maxwell for their diligence in bringing this book to fruition. We also wish to express our gratitude to our colleagues at Van Bael & Bellis who assisted us on this project, in particular Veerle Roelens and Gwenda De Pril for their secretarial assistance.

Brussels, May 2017

FOREWORD

Carles Esteva Mosso | Deputy Director-General for Mergers, DG Competition, European Commission

Describing around 50 national and regional merger control regimes, this book provides an excellent illustration for the deep proliferation of merger control worldwide.

This proliferation of merger regimes and the related internationalisation of merger review is a positive development. It shows that a competition culture is expanding around the world and that a global level playing field is being established. On the downside, it increases administrative burden and costs for merging parties, as well as the risk of inconsistent merger review outcomes.

Convergence and effective inter-agency cooperation have to go hand in hand to tackle these issues. We have already made good progress in this regard within international forums, such as the International Competition Network, the OECD and UNCTAD. This does not, however, mean that no further efforts are needed.

Indeed, from a procedural point of view, divergence in merger control is still important and implies challenges for global transactions. Some of these divergences are linked to the differences in the institutional set-up of merger review systems (judicial/administrative systems). Other differences relate to the fundamental procedural characteristics of merger control systems (voluntary versus compulsory notification systems, ex ante and ex post review). Those differences obviously have a strong impact on the applicable timetables, which may be challenging to align in multi-jurisdictional transactions. Further differences may exist with regard to the procedural safeguards of due process and transparency.

However, from a substantive point of view, we have achieved broad agreement on how to assess mergers and what type of theories of harm should be in the focus of our investigations. Indeed, in its 2013 Report on Country Experiences with the 2005 OECD Recommendation on Merger Review, the OECD found a clear move away over the previous ten years from the dominance test. Many jurisdictions had changed and others were contemplating changing the legal standard for the review of mergers from a standard based on the creation or the strengthening of a dominant position to a “significant lessening of competition” (SLC) standard. It found that today the SLC test or hybrid tests are used in the vast majority of jurisdictions.

Moreover, the Recommended Practices for Merger Analysis by the International Competition Network (ICN) demonstrate common ground in the assessment of horizontal mergers. The ICN Recommended Practices set out very clearly that mergers that lead to high market shares for the merging firms and that result in significant increases to concentration levels are in general the mergers most likely to raise competition concerns. In other words, there is some international consensus that horizontal mergers tend to be the most likely to raise competition concerns under the mentioned conditions. Moreover, there is also consensus on the framework to assess the potential anti-competitive effects resulting from such mergers. The recommended practices state that the goal of competitive effects analysis in the review of horizontal mergers is to assess whether a merger is likely to harm competition significantly by creating or enhancing the merged firm’s ability or incentives to exercise market power, either unilaterally or in coordination with rivals. As far back as 2006, the ICN Merger Guidelines Workbook clearly set out how to assess unilateral and coordinated effects that may result from a horizontal merger. The European

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Commission's and the US Federal Trade Commission's horizontal merger guidelines are based on those economic considerations, and so too are the merger control guidelines and practice in many other jurisdictions.

We constantly strive to further convergence. In 2017, the ICN has not only revised some of its existing Recommended Practices in the field of merger control, including on notification thresholds and local nexus, as well as remedies, but also elaborated new Recommended Practices on the types of transactions to be subjected to merger control and efficiencies.

The main challenge is making this convergence work in practice in the assessment of the substance and remedies of individual cases. At the Commission's Directorate-General for Competition, this is not a theoretical or rare challenge, but one that concerns our daily work. In fact, over the period 2014–15, at DG Competition, we cooperated with other competition authorities (outside the EU) in half of the complex merger cases (50%). We define 'complex merger cases' as those which are cleared in the first phase subject to remedies and those that require a second phase investigation. Aggregated data shows that this is representative for recent years: during the 2010–15 time frame, international cooperation in complex merger cases amounted to 53%.

Our cooperation extends from cooperation with well-established authorities to cooperation with younger authorities. During the period 2014–15, DG Competition cooperated with 16 non-EU competition agencies on complex merger decisions.

This is why, as former co-chairs of the ICN merger working group, we have promoted the "ICN Practical Guide to International Enforcement Cooperation". This ICN work product provides guidance on multilateral merger enforcement cooperation for agencies, as well as for merging parties and third parties. It sets out the overarching principles for successful cooperation, namely: (i) the voluntary nature of cooperation and required flexibility; (ii) the need for and utility of cooperation in a given case; and (iii) the role of the merging parties. The guide then explains how best to put those cooperation principles into practice. It emphasises the importance that the merging parties facilitate initial contacts between agencies through related information at an early stage. The guide also explains how information sharing between agencies can be facilitated by the merging parties through waivers; and how timing alignment can be facilitated by merging parties by taking into account the different procedural frameworks applying to multi-jurisdictional transactions. This relatively short document is worth reading, not only for agencies, but also for practitioners dealing with multi-jurisdictional merger filings.

In fact, the merging parties play a crucial role for the success of inter-agency enforcement cooperation in merger control. Importantly, they can facilitate that cooperation through timing alignment. Obviously, this requires substantive knowledge of the various merger control regimes applying to a specific transaction. The present book provides a very useful contribution in this respect, and can be of great assistance to corporations and their counsel who have to manoeuvre multi-jurisdictional merger notification requirements.

THE NETHERLANDS

Gerrit Oosterhuis | Houthoff Buruma

LEGISLATION AND JURISDICTION

1. What is the relevant merger control legislation? Is there any pending legislation that would affect or amend the current merger control rules described below?

On 1 January 1998, the Dutch Parliament adopted the Dutch Competition Act (Mededingingswet; Mw). This is the primary basis for Dutch merger control. The Mw closely follows EU merger control as laid down in the EU Merger Regulation (EUMR). Moreover, the Explanatory Memorandum (Memorie van Toelichting) to the Mw provides that it should be applied in line with EU competition law. In practice, the ACM usually also follows relevant guidance from the European Commission pertinent to merger control, such as the Commission's Consolidated Jurisdictional Notice.

In addition to the Mw, the General Administrative Law Act (Algemene Wets Bestuursrecht,) and the Act establishing the ACM (Instellingswet ACM) set out rules, mainly of a procedural nature, of relevance to merger control.

The legal landscape for merger control in the Netherlands was changed substantially in 2013 and 2014. The old Dutch Competition Authority (Nederlandse Mededingingsautoriteit; NMa) was merged with the telecom operator OPTA and the Consumer Authority into the newly created Authority for Consumers & Markets (Autoriteit Consument en Markt; ACM) on 1 April 2013, through the Act establishing the ACM.

A legislative proposal is pending at the House of Representatives to transfer the power to perform the so-called healthcare-specific merger test of the Dutch Healthcare Authority (Nederlandse Zorgautoriteit; NZa) to the ACM. See *question 7* for an explanation of the healthcare-specific merger test. Unofficial translations of some key documents can be found on the website of the ACM.

2. What are the relevant enforcement authorities, and what are their contact details?

The implementation and enforcement of the merger control provisions of the Mw are entrusted to the ACM. It is the competent authority for the Netherlands with regard to Council Regulation 139/2004.

The ACM is an autonomous administrative authority, as its predecessor the NMa had been since 1 July 2005. This means that it operates with a great degree of autonomy from the Ministry of Economic Affairs, notably regarding its decision making and the priorities it sets in enforcement. Nevertheless, the Minister of Economic Affairs may decide to grant a licence for the implementation of a concentration after the ACM has refused such licence (*Article 47 Mw*); thus far, however, this power has not been used.

The ACM is authorised to issue general guidance. More formal documents, such as policy rules regarding fining, are issued by the Ministry of Economic Affairs after consultation with the ACM.

THE NETHERLANDS

The contact details of the ACM are:

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3. What types of transactions are potentially caught by the relevant legislation?

The Mw introduced a system of merger control that is closely based on the EU merger control regime. It applies to the same types of transactions that fall under the EU Merger Regulation – also called “concentrations” – namely: (i) mergers; (ii) acquisitions of joint or sole control; and (iii) the establishment of joint ventures that fulfil all the functions of an independent economic entity on a lasting basis, also called “full-function” joint ventures. A joint venture will be full function if:

- It disposes of sufficient resources to operate independently on the market.
- Its activities go beyond a specific function for its parents (such as R&D).
- It is not fully dependent upon its parent companies for its input and sales.
- It operates on a lasting basis.

So-called foreign-to-foreign concentrations are not excluded from the application of the Dutch merger control regime, if and to the extent that the (turnover) thresholds as laid down in the Mw are met.

4. Are joint ventures caught, and if so, in what circumstances?

The creation of a joint venture that performs all the functions of an autonomous economic entity on a lasting basis (a “full-function” joint venture) is caught by the Mw. The ACM follows the Commission’s Consolidated Jurisdictional Notice on the concept of full-function joint ventures. See *question 3* for a clarification of the concept of full-functionality.

5. What are the jurisdictional thresholds?

Pursuant to Article 29 Mw, notification is only required if, in the calendar year preceding the transaction:

- The combined worldwide turnover of the companies concerned was at least EUR 150 million.
- A turnover of at least EUR 30 million was realised in the Netherlands by each of at least two of the companies concerned.

The companies concerned are:

- In case of mergers: all merging companies.
- In case of the acquisition of joint or sole control: the target company and all companies that obtain control.
- In case of the creation of a new joint venture: only the parent companies that obtain control. The turnover of any assets that are contributed to the joint venture must be allocated to the contributing parent company.

These turnover thresholds concern the net turnover – or sales – realised during the last calendar year. The ACM follows the European Commission with regard to the calculation of the turnover of the companies concerned. This means that one must look at the aggregate turnover of the company concerned, including the turnover of the entire group to which the entity that is party to the transaction belongs. Turnover consists of the amounts derived by the companies from the sale of products and the provision of services falling within their ordinary activities. Internal group sales, sales rebates, VAT and other taxes directly related to turnover must be excluded from the turnover.

If a company has sold or acquired a business with turnover after the close of the relevant financial year, the turnover must be adjusted: the entire turnover of the acquired or sold business in that relevant year must be added (respectively deducted) retroactively from the turnover of the company concerned.

6. Are these thresholds subject to regular adjustment?

The thresholds have been adjusted only once since the Mw came into force. On 1 August 2014, the threshold for the combined worldwide turnover was raised to EUR 150 million to correct for inflation. When the Mw came into force in 1998, that figure was EUR 113,450,000 (or 250 million Dutch Guilders).

7. Are there any sector-specific thresholds?

There are a number of sector-specific thresholds, namely for healthcare companies, financial institutions and pension funds.

A concentration between two or more healthcare undertakings must be notified to the ACM if, in the calendar year preceding the concentration:

- The combined worldwide turnover of the companies concerned exceeded EUR 55 million in the calendar year preceding the concentration.
- At least two of the companies concerned each achieved at least EUR 10 million in the Netherlands.

A company qualifies as a healthcare undertaking if it achieved, in the calendar year preceding the concentration, a turnover of more than EUR 5.5 million through the provision of healthcare according to the General Law on Exceptional Medical Expenses (Algemene Wet Bijzondere Ziektekosten).

In addition, all transactions involving at least one healthcare company that employs or contracts more than 50 healthcare providers – being natural persons, not full-time equivalents – must also be notified to the NZa. This “healthcare-specific merger test” applies even if the other companies concerned are not active in the healthcare sector. Notably, the NZa evaluates whether healthcare will remain accessible, and whether the parties have a substantiated plan for integrating the relevant businesses and the necessary financial means to do so. If the NZa advises positively, the transaction must be notified to the ACM if it meets the thresholds mentioned above.

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(see question 5). A legislative proposal is pending at the House of Representatives to transfer the power to perform the healthcare-specific merger test from the NZa to the ACM.

In case of credit and financial institutions, whether the thresholds are met will not be calculated on the basis of turnover but on the basis of the following income items: interest income, income from securities, commissions receivable, net profit on financial operations and other operating income.

Pension funds will be regarded as companies for competition law purposes. The turnover of pension funds will be determined on the basis of gross premiums written in the previous calendar year.

8. In the event the relevant thresholds are met, is a filing mandatory or voluntary?

In general, every concentration falling within the thresholds of the Mw has to be notified to the ACM before it may be implemented. There are, however, a few exceptions.

First, the acquisition of a controlling interest by credit institutions, other financial institutions and insurance companies does not constitute a concentration in the sense of the Mw if they hold the controlling interest on a temporary basis with a view to reselling it, provided that they do not exercise the voting rights or they exercise them only with a view to preparing for the sale of the interest and that any such sale takes place within one year of the date of acquisition.

Secondly, the acquisition of control by receivers, as referred to in Article 68(1) of the Dutch Bankruptcy Act (Faillissementswet), managers (administrators) appointed by the courts, as referred to in Article 215(2) of the Dutch Bankruptcy Act, persons, as referred to in Article 1:76(1) of the Dutch Financial Supervision Act (Wet op het financieel toezicht), managers, as referred to in Article 3:162(4) of the Dutch Financial Supervision Act, or persons, as referred to in Article 3:175(9) of the Dutch Financial Supervision Act, does not constitute a concentration in the sense of the Mw.

Thirdly, participating interests in the capital, as referred to in Article 27(1)(b) Mw, including participating interests in joint undertakings as referred to in Article 27(2) Mw, acquired by venture capital undertakings do not constitute a concentration in the sense of the Mw, provided the voting rights pertaining to the participating interest are exercised only to maintain the full value of those investments. The exact scope of this last exception is not well defined in case law and does not seem to apply often.

9. Can a notification be avoided even where the thresholds are met, based on a “lack of effects” argument?

If the thresholds laid down in the Mw are met, notification cannot be avoided based on a “lack of effects” argument. Note that the requirement that at least two companies concerned obtain a EUR 30 million turnover within the Netherlands filters out most transactions that would have no effect in the Netherlands.

10. Are there special rules by which a notification of a “foreign-to-foreign” transaction can be avoided even where the thresholds are met?

No, if the thresholds as laid down in the Mw are met, foreign-to-foreign concentrations are not excluded from the application of the Dutch merger control regime. In other words, the duty to notify has an extraterritorial effect:

even a merger that would be implemented outside the Netherlands or that only involves companies that are not established in the Netherlands is subject to notification to the ACM if the Dutch turnover figures of the parties meet the thresholds.

11. Does the relevant authority have jurisdiction to initiate a review of transactions which do not meet the thresholds for a notification?

The ACM cannot initiate a review of transactions that do not meet the thresholds for a notification. It may, however, based on Article 22 EUMR, request the Commission to examine any concentration that does not have a Community dimension but affects trade between member states and threatens to significantly affect competition within the territory of the member state or states making the request. The Dutch government has used this possibility twice, in cases *M.553 – RTL/Veronica/Endemol* and *M.890 – Blokker/Toys “R” Us (II)*, but this was before the introduction of merger control in the Netherlands. To the best of my knowledge, the ACM and its predecessor NMa only made such a request once, and ultimately did not maintain it, in case *M.7980 – ABF/GBI assets*.

NOTIFICATION REQUIREMENTS, TIMING AND POTENTIAL PENALTIES

12. Is there a specified deadline by which a notification must be made?

There is no deadline by which a notification must be made. The only requirement is that a concentration must not come into effect until the ACM has given its consent (*see question 16*).

13. Can a notification be made prior to signing a definitive agreement?

A notification can be made prior to the conclusion of a definitive agreement. The ACM only requires that there is reasonable certainty that the concentration will take place and clarity as to the structure of control after the proposed transaction. Hence, a concentration can be notified, for example, on the basis of a letter of intent.

14. Who is responsible for notifying?

The parties intending to establish a concentration are responsible for notifying it, according to the Determination of Forms under the Competition Act 2007 (Besluit vaststelling formulieren Mededingingswet 2007). In case of a merger, this will be the merging parties. In case of the creation of a joint venture, this will be the founding parties. In case of the acquisition of shares or assets, this will be the acquiring parties.

Regarding the latter category, the ACM has in the past also fined sellers of shares or assets for not notifying. However, the Dutch Trade and Industry Appeals Tribunal (College van Beroep voor het bedrijfsleven; CBb), being the Netherlands' highest administrative court in competition matters, has held that a seller that loses control over the relevant company or assets due to the transaction bears no responsibility for notifying the concentration to the ACM. Arguably, this implies that a founder of a joint venture that does not obtain control has no duty to notify – but the CBb did not rule on this issue.

15. What are the filing fees, if any?

Undertakings are required to pay to the ACM a fee of EUR 17,450 for a Phase 1 decision and an additional EUR 34,900 for a Phase 2 decision. These filing fees have to be paid regardless of whether the notifying parties decide to withdraw their notification at a later time.

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16. Where a notification is necessary, is approval needed before the transaction is closed/ implemented (is there a waiting period or a suspension requirement)?

It is prohibited to complete a transaction before the ACM has given its consent. This is the so-called “standstill obligation”. There is one narrow exception to this rule: in case of a public acquisition or exchange bid aimed at the acquisition of a share in the capital of a company that is quoted on a public stock exchange, the transaction can be closed prior to approval from the ACM, provided that (i) the ACM is formally notified as soon as possible and (ii) the acquiring party does not exercise the voting rights attached to the relevant share in the capital prior to approval by the ACM. It is possible to request permission from the ACM to nevertheless exercise the voting rights prior to the ACM’s approval where that would be necessary to protect the value of the investment.

17. If there is a suspension requirement, is it possible to apply for a derogation in order to close before approval is granted? If so, under what circumstances?

The ACM may grant an exemption from the standstill obligation on “important grounds”, on the basis of Article 40 Mw. Although this article does not provide examples of what constitutes an “important ground”, an exemption is normally only granted when a bankruptcy threatens the survival of the target. Recently, a number of transactions involving healthcare undertakings benefited from an exemption based on Article 40 Mw even outside of bankruptcy, due to the concern that the continuity of care would be affected.

18. Are any other exceptions (for example, carve-outs) available to allow parties to close/ implement prior to approval?

There are no exceptions – other than the ones mentioned under *question 17* – available that allow parties to close/ implement a transaction prior to approval by the ACM. The standstill obligation has universal application: notably, it is not possible to close specific parts of a transaction outside the Netherlands until the ACM has issued a decision.

19. What are the possible sanctions for failing to notify a transaction?

A failure to notify is not a separate infringement, but the implementation of a transaction prior to receiving approval is. See *question 20*.

20. What are the possible sanctions for implementing a transaction prior to receiving approval (so-called “gun-jumping”)?

On the basis of the Mw, the ACM can impose on each of the parties concerned a fine for failure to notify a transaction with a theoretical maximum of EUR 900,000 or 10% of their turnover, whichever is greater. The Penalty Policy Code ACM 2014 (Boetebeleidsregel ACM 2014) has set a range for the fine for this infringement from EUR 400,000 at the minimum to EUR 700,000 or 5% of the turnover (whichever is greater) at the maximum. The transaction will have to be notified retroactively and if the ACM deems that it significantly impedes competition it can order it to be undone.

The ACM can also impose periodic penalty payments to force the parties to notify.

Finally, the natural persons who oversaw the “gun-jumping” can receive a fine of up to EUR 900,000, depending on the turnover of the companies involved.

21. What are the possible sanctions for implementing a transaction despite a prohibition decision or in breach of a condition/obligation imposed by a conditional clearance decision?

A transaction that has been put into effect despite a prohibition decision or in breach of a condition/obligation imposed by a conditional clearance decision is contrary to Article 34 Mw and as a consequence is null and void. The ACM can impose on each of the parties concerned a fine for such failure to notify of EUR 900,000 or 10% of their turnover, whichever is greater.

The ACM can also impose periodic penalty payments to force the parties to undo the transaction or to implement the conditions imposed by the ACM. Finally, the natural persons who oversaw the “gun-jumping” can receive a fine of up to EUR 900,000, depending on the turnover of the companies involved.

22. What are the different phases of a review? Is there any way to speed up the review process?

The decision period commences when the ACM receives the notification. The ACM has to give its initial decision (Phase 1) on whether the transaction forms a significant risk to competition within four weeks. If a decision is not given within this period, the transaction is deemed to be approved.

If the ACM decides that the transaction forms a risk to competition, a licence is required and a new notification, using a longer form, must be submitted. After receiving this licence application (Phase 2), the ACM has 13 weeks in which to approve the transaction and grant a licence. If the investigation period lapses without a decision having been taken, the proposed concentration is deemed to have been permitted. In very simple cases, the ACM will not use the full four-week period. However, in both Phase 1 and Phase 2, the ACM can ask formal written questions that will suspend the decision period (“stop the clock”). Even though the ACM is not allowed to abuse this possibility by asking for information that it does not need, it can nevertheless cause the decision period to be much longer than the basic periods in complex cases. Phase 1 in a complex case may typically take three to five months, with Phase 2 lasting at least six months. The duration of Phase 1 is sometimes lengthened because both the ACM and the parties want to avoid a Phase 2, but giving the ACM the necessary assurance that the transaction would not result in a significant impediment to effective competition in Phase 1 may require substantial investigations or remedies. Arguably, in such a scenario, at least part of what is in fact a Phase 2 investigation is carried out during Phase 1.

There are no formal means to speed up the review process. The parties may be able to influence the duration a little by providing detailed and complete information at the start of Phase 1.

23. Is there a possibility for a “simplified” procedure or shorter notification form and, if so, under what conditions would this apply?

The Mw does not provide for a formal “simplified” procedure, and shorter notification forms are thus not available. However, the Phase 1 form of the ACM requires much less information than, for example, the Long Form CO of the European Commission.

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24. What types of data and what level of detail is required for a notification?

There is a specific notification form (Formulier melding concentratie) that should be used in Phase 1. It requires information regarding the transaction, the companies concerned (name and address details, ownership, a structure chart, a description of business activities, turnover data), and information regarding the affected markets. Regarding affected markets, the notifying parties have to define the relevant markets, assess the effects of the transaction, and identify their five largest competitors and customers on these markets. In case of a joint venture, information must be provided regarding the possibilities and incentives for coordination between the parent companies. If the parties' activities overlap only insignificantly, the information about the markets can remain limited. The notifying parties should also indicate whether there are any agreements, decisions or concerted practices that fall under Article 6 Mw (the cartel prohibition) that are, according to the parties, directly linked to the concentration and necessary for its completion. Finally, the parties must advise whether they have notified the concentration with the competition authority of another EU member state.

Another form (Formulier aanvraag vergunning) should be used for a Phase 2 licence application. Compared to the Phase 1 form, this form requires more detailed information about the affected markets. The required information includes:

- Data on imports (such as an estimate of the total value of import) and exports.
- Information on actual and potential production capacity.
- A comparative analysis of prices in the Netherlands, Belgium, Germany, France and the United Kingdom.
- Information on the existence of vertical integration.
- Information on key customers and suppliers.
- Information on market development.
- Information on cooperation agreements with competitors.
- Information on the market position of the undertakings concerned outside the Netherlands

The Phase 2 form resembles the Long Form of the European Commission.

25. In which language(s) may notifications be submitted?

The Phase 1 and Phase 2 forms must be submitted in Dutch. If the notifying parties submit attachments in another language, the ACM may request them to provide a translation. The review periods are then suspended until such translation has been received by the ACM. In practice, the ACM accepts transaction documents and other annexes in English.

26. Which documents must be submitted along with a notification?

The following documents must be submitted along with a notification:

- The most recent annual accounts and annual reports of the companies concerned.

- Dated copies of the most recent documents on the basis of which the concentration will be completed.
- A written document showing the power of representation of the designated contact person(s).
- Market studies of the relevant market(s) that the parties used when preparing the transaction.

Contrary to some other countries, internal documents that, for example, were prepared for the parties' management and discuss the impact of the proposed transaction on competition do not normally need to be submitted in Phase 1.

27. What are the possible sanctions for providing incorrect, misleading or incomplete information in a notification?

The ACM can impose on each of the parties concerned a fine for failure to notify correctly and completely of EUR 900,000 or 1% of their turnover, whichever is greater. The Penalty Policy Code ACM 2014 has set a range for this infringement, from a minimum of EUR 400,000 to a maximum of EUR 700,000 or 5% of an undertaking's total annual turnover (whichever is greater). In addition, the ACM can revoke a licence that has been granted if accurate information would have led to a different decision.

28. To what extent is the relevant authority available for pre-notification discussions? Are pre-notification consultations customary?

The Mw does not provide for pre-notification discussions with the ACM. However, in a guidance document for merger control (Spelregels bij concentratiezaken ACM), parties are invited to request an informal written opinion or a pre-notification meeting if they face complicated questions, especially if parties are not familiar with the merger control procedure at the ACM. Apart from very big and complicated cases, pre-notification discussions are hardly used as they are seen to signal to the ACM that the parties think that there could be objections to the transaction.

29. Where pre-notification consultations are possible, what measures does the relevant authority take to ensure that such discussions are treated confidentially?

The ACM is subject to Article 17 EUMR. This means that information acquired by the ACM as part of a merger procedure may be used only for the purposes for which it was acquired. Information covered by these professional secrecy rules cannot be disclosed. In practice, the ACM never leaks information to the market.

30. At what point and in what forum does the relevant authority make public the fact that a notification has been made?

The receipt of the notification or the licence application is announced in the Government Gazette within three to five days. The submission of notifications or licence applications are also published on the website of the ACM, often within one or two days after receipt. These announcements only provide the names of the relevant parties and the fact that they intend to conclude a transaction.

31. Once the authority has issued its decision, what information about the transaction and the decision is made publicly available?

The ACM publishes all of its decisions in full on its website and in the Government Gazette. Most Phase 1 decisions are published as "short-form" decisions that contain only the names of the parties, the date of the notification, a

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short description of the transaction and the fact that the ACM does not object to the transaction. The remaining – reasoned – Phase 1 decisions are also published in full on the ACM's website, but with confidential information being removed prior to publication. Along with the publication, the ACM often issues a press release on its website. The ACM may also publish press releases. It will do so notably when significant (potential) competition concerns are discussed in its merger decisions, such as when the ACM determines that a licence is required, when a licence is granted or when conditions are imposed. In addition, the ACM may publish a press release if the transaction has received considerable attention in the media or represents a major economic interest.

SUBSTANTIVE ASSESSMENT OF THE MERGER, ROLE OF THIRD PARTIES AND REMEDIES

32. What is the substantive test for assessing the legality of a notified transaction?

The ACM investigates whether a proposed concentration would significantly impede effective competition on the Dutch market or on a part thereof, in particular as a result of the creation or strengthening of a dominant position. This so-called SIEC test is the same as is applied under the EU merger control regime.

In Phase 1, the ACM investigates whether the transaction would create the risk of a significant impediment to competition. If so, a licence is required, which the companies concerned can request by submitted a licence application. This opens Phase 2. In Phase 2, the burden of proof is higher for the ACM: it can only prohibit a transaction if it demonstrates that the transaction would actually result in a significant impediment to competition.

33. What theories of harm are considered by the authority in assessing the transaction? How concerned are the authorities with non-horizontal (for example, vertical or conglomerate) effects, and are any other theories of harm analysed (for example, coordination in the case of joint ventures)?

The ACM considers similar theories of harm in assessing transactions as the European Commission: it has explicitly said that it will apply the European Commission's approach to horizontal and non-horizontal mergers, as laid down in the Commission's guidelines.

In its decisions, the ACM has discussed various theories of harm other than dominance, such as the risk of foreclosure and the existence of buyer power.

The possibility of conglomerate effects has been investigated by the ACM in, for example, the food sector, but so far no transaction has been prohibited on this ground.

The ACM gives particular attention to the coordinative aspects of joint ventures. It will examine coordinative aspects not only in case of the creation of a joint venture, but also in case of the acquisition of joint control over a pre-existing company.

34. Are non-competition issues, such as industrial policy or labour policy, commonly taken into account in the assessment of the transaction?

The ACM limits its analysis strictly to competition law issues. The Minister of Economic Affairs may take non-competition issues into account should parties request the Minister to allow a transaction that the ACM has prohibited (*see questions 2 and 41*).

35. Are economic efficiencies considered as a mitigating factor in the substantive assessment?

Economic efficiencies are in theory considered a legitimate defence in the substantive assessment, but it is seldom accepted. The ACM has allowed the efficiency defence once in a hospital merger case (*case 6424/Ziekenhuis Walcheren-Oosterscheldeziekenhuizen*), although in a slightly unusual way. The ACM rejected all of the arguments that the parties had put forward to substantiate that the merger would improve the quality of healthcare. Instead, it took into account that the Healthcare Inspectorate (Inspectie Gezondheidszorg) had pronounced that without the merger at least one of the two hospitals would no longer meet some crucial standards and would have to be closed. As the merger would prevent such closure, the ACM accepted that it would improve the quality of healthcare. The ACM did, however, impose additional measures, including requirements as to quality and pricing, in order to make sure that the quality improvement would be passed on at a fair price and hence could indeed be considered efficiencies.

36. Does the relevant authority typically cooperate/share information with authorities in other jurisdictions?

The ACM cooperates with other authorities in the Netherlands and in other jurisdictions. Within the European Competition Network (ECN) and the European Competition Authorities (ECA) network, information may be shared by the ACM with other competition authorities (their members are the competition authorities of the European Economic Area, including the European Commission). In particular, the ACM may do so in multi-jurisdictional mergers that are also notified to other ECN or ECA members.

The ACM is also a member of the International Competition Network. The Netherlands is one of the member states of the Organization for Economic Cooperation and Development (OECD), and the ACM attends OECD meetings on competition on behalf of the Dutch government.

37. To what extent are third parties involved in the review process?

Notifications and requests for authorisation are published in the Official Gazette in order to alert third parties and allow them to make comments. If third parties file complaints against a transaction, these are taken very seriously by the ACM. In the more complex cases, the ACM will systematically contact customers, competitors and suppliers of the parties to the notified transaction, in order to verify the submissions of the parties and to get the necessary insight into the market.

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38. Is it possible for the parties to propose remedies for potential competition issues?

Parties can propose remedies to solve potential competition issues. Both Phase 1 and Phase 2 decisions of the ACM may be issued subject to limitations and instructions (remedies), such as the obligation to divest certain activities (a structural remedy) or to respect a price ceiling (a behavioural remedy).

39. What types of remedies are likely to be accepted by the authority (for example, divestment remedies, other structural remedies, behavioural remedies)?

Parties can propose various types of remedies. According to the ACM's Guidelines Remedies 2007 (Richtsnoeren Remedies 2007), the ACM generally prefers structural remedies over behavioural remedies. In 2016, binding commitments were required in two notified transactions in order to obtain clearance from the ACM, one of which was a Phase 1 decision and the other a Phase 2 decision. In both cases, the parties involved proposed divestment remedies. In Phase 1, the Mw requires parties to effectuate any divestment remedies prior to completing the concentration. Thus, a binding agreement regarding the divestments alone, which the Commission would accept, is insufficient under the Dutch merger control regime in Phase 1. It is possible to circumvent this "fix-it-first" obligation to some extent by withdrawing a notification in Phase 1, subsequently ring-fencing a to-be-divested company division for sale and resubmitting an adjusted notification as if the ring-fenced division were already sold. The ACM will only accept this where the to-be-divested unit is a stand-alone business that can be ring-fenced in a watertight way and can be sold easily.

40. What power does the relevant authority have to enforce a prohibition decision?

The ACM has regulatory instruments to enforce a prohibition decision. Notable examples of these instruments are fines and periodic penalty payments. See *questions 20 and 21* for the size of such fines.

JUDICIAL REVIEW

41. Is it possible to challenge decisions approving or prohibiting transactions? If so, before which court or tribunal?

Merger control decisions taken by the ACM can be judicially appealed directly to the Rotterdam District Court. Judgments of the Rotterdam District Court can be appealed to the CBB. In addition, the Minister of Economic Affairs may grant a licence for a concentration, despite a negative decision by the ACM, if the Minister believes that there is significant public interest that outweighs possible competition restrictions. Such request must be made within four weeks after the negative decision of the ACM has become binding. In this case, the Minister must take a decision within 12 weeks. However, the Minister has never given such a licence.

42. What is the typical duration of a review on appeal?

A review on appeal to the Rotterdam District Court takes at least a year. A further appeal to the CBB will typically take another two years.

Three recent examples illustrate this. In the *Geberit* case (*case 14.1154.22/Geberit-Sanitec*), the parties notified the transaction on 20 October 2014. The ACM decision of 18 December 2014 was appealed and led to a judgment of the Rotterdam District Court on 7 April 2016. In a merger case involving two hospitals, the parties notified on 30

December 2013 (*case 14.0982.24/Stichting Albert Schweitzer Ziekenhuis – Stichting Rivas Zorggroep*). After a Phase 1 decision of 18 March 2014, a Phase 2 decision was reached by the ACM on 15 July 2015. This ultimately led to a judgment of the Rotterdam District Court on 29 September 2016. In the *Bolletje* case (*case 7321/Continental Bakeries-A.A. ter Beek*), the parties notified the transaction on 13 December 2011. After a Phase 1 decision of 17 April 2012, a Phase 2 decision was reached by the ACM on 14 December 2012. This decision was appealed before the Rotterdam District Court, which held its judgment on 27 February 2014. This judgment was then appealed before the CBB, which issued its judgment on 11 February 2016.

43. Have there been any successful appeals?

There are few appeals against decisions of the ACM in merger cases, but a good proportion of the appeals that have taken place have been successful.

A seller that lost control but was fined by the ACM for gun-jumping won on appeal before the CBB in 2012 (*ECLI:NL:CBB:2010:BV6874/A v ACM*).

There have also been some successful appeals by parties against the prohibition of a transaction or against the imposition of conditions. In 2005, the Rotterdam District Court overturned the decision of the ACM to attach conditions to the acquisition of Reliant by Nuon (*03/3131 MEDED-WILD, 04/135 MEDED-WILD, 04/137 MEDED-WILD, 04/1571 MEDED-BRO1 and 04/2061 MEDED-VERW, LJN AT8794/Nuon – Reliant*), which decision was upheld by the CBB (*ECLI:NL:CBB:2006:AZ3274/Nuon – Reliant*). In 2016, the CBB reversed a prohibition decision of the ACM which involved an attempted acquisition of Bolletje by Continental Bakeries (*ECLI:NL:CBB:2016:23/Continental Bakeries c.s. v ACM*). In an earlier judgment, the Rotterdam District Court upheld the decision (*ECLI:NL:RBROT:2014:1323/A.A. ter Beek c.s. v ACM*).

Appeals by third parties claiming that clearance decisions by the ACM should be overturned and the relevant transactions be prohibited have so far not been successful. See, for example, the 2016 decision of the Rotterdam District Court in the *Geberit* case (*ECLI:NL:RBROT:2016:2292/Ucosan v ACM c.s.*).

STATISTICS

44. Approximately how many notifications does the authority receive per year?

The ACM receives on average between 80 and 100 notifications a year, depending on the general economic activity. As an illustration, in 2016, the ACM received 105 notifications, compared with 89 in 2015 and 75 in 2014.

45. Has the authority ever prohibited a transaction? How many prohibition decisions has the authority issued in the past five years?

The ACM has prohibited only two transactions within the past five years. In 2015, the ACM prohibited a merger between two hospitals for the first time (*case 14.0982.24/Stichting Albert Schweitzer Ziekenhuis – Stichting Rivas Zorggroep*). In 2012, the ACM prohibited the acquisition of Bolletje by Continental Bakeries. This decision was reversed by the CBB in 2016 (*case 7321/Continental Bakeries-A.A. ter Beek*). However, the impact of the ACM's review is bigger than this figure suggests, as parties may also withdraw their notifications or licence applications due to concerns expressed by the ACM before it can issue a formal prohibition decision. Over the past five years, 21

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notifications and one licence application have been withdrawn, due at least in part to concerns expressed by the ACM.

46. Over the past five years, in what percentage of cases have binding commitments been required in order to obtain clearance for a transaction?

Binding commitments have been required in order to obtain clearance from the ACM in less than 5% of the cases. By way of illustration, in 2016, binding commitments were required in two notified transactions, one of which was a Phase 1 decision (the divesture of two stores) and the other a Phase 2 decision (the divesture of a wholesaler and 89 stores).

However, in practice, parties often withdraw and modify their (Phase 1) notifications in order to address competition concerns. By doing so, parties avoid a Phase 2 decision. In essence, this leads to a similar outcome as offering remedies. By way of illustration, the ACM decided that Thuiszorg Service Nederland was allowed to complete an acquisition after divesting certain care activities to certain buyers in 2011 (*case 7147/Thuiszorg Service Nederland Holding B.V. – Stichting Thuiszorg Groningen and Stichting Continuering Uitvoering AWBZ en Wmo Groningen*).

47. How frequently has the authority imposed fines in the past five years?

In the past five years, the ACM has not imposed any fines relating to merger control. The ACM has, however, regularly imposed fines for breach of the standstill obligation in the past ten years.