THE MERGER CONTROL REVIEW

Tenth Edition

Editor
Ilene Knable Gotts

THE LAWREVIEWS

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TENTH EDITION

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PREFACE

Pre-merger competition review has advanced significantly since its creation in 1976 in the United States. As this book evidences, today almost all competition authorities have a notification process in place – with most requiring pre-merger notification for transactions that meet certain prescribed minimum thresholds. Additional jurisdictions, most recently in South America, have added pre-merger notification regimes. In our endeavour to keep our readers well informed, we have expanded the jurisdictions covered by this book to include the newer regimes as well. Also, the book now includes chapters devoted to such 'hot' M&A sectors as pharmaceuticals, and high technology and media, in key jurisdictions to provide a more in-depth discussion of recent developments.

Given the ability of most competition agencies with pre-merger notification laws to delay, and even block, a transaction, it is imperative to take each jurisdiction – small or large, new or mature – seriously. For instance, in 2009, China blocked the Coca-Cola Company's proposed acquisition of China Huiyuan Juice Group Limited and imposed conditions on four mergers involving non-China-domiciled firms. In *Phonak/ReSound* (a merger between a Swiss undertaking and a Danish undertaking, each with a German subsidiary), the German Federal Cartel Office blocked the entire merger, even though less than 10 per cent of each of the undertakings was attributable to Germany. It is, therefore, imperative that counsel for such a transaction develops a comprehensive plan before, or immediately upon, execution of an agreement concerning where and when to file notification with competition authorities regarding such a transaction. To this end, this book provides an overview of the process in 32 jurisdictions, as well as a discussion of recent decisions, strategic considerations and likely upcoming developments. Given the number of recent significant M&A transactions involving media, pharma and high-technology companies, we have included chapters that focus on the enforcement trends in these important sectors. In addition, as merger review increasingly includes economic analysis in most, if not all, jurisdictions, we have added a chapter that discusses the various economic tools used to analyse transactions. The intended readership of this book comprises both in-house and outside counsel who may be involved in the competition review of cross-border transactions.

Some common threads in institutional design underlie most of the merger review mandates, although there are some outliers as well as nuances that necessitate careful consideration when advising a client on a particular transaction. Almost all jurisdictions vest exclusive authority to review transactions in one agency. The United States is now the major exception in this regard since China consolidated its three antitrust agencies into one agency this year. Most jurisdictions provide for objective monetary size thresholds (e.g., the turnover of the parties, the size of the transaction) to determine whether a filing is required. Germany has recently amended its law to ensure that it has the opportunity to review transactions

in which the parties' turnover do not reach the threshold, but the value of the transaction is significant (e.g., social media, new economy, internet transactions). Please note that the actual monetary threshold levels can vary in specific jurisdictions over time. There are some jurisdictions that still use 'market share' indicia (e.g., Bosnia and Herzegovina, Colombia, Lithuania, Portugal, Spain, Ukraine and the United Kingdom). Most jurisdictions require that both parties have some turnover or nexus to their jurisdiction. However, there are some jurisdictions that take a more expansive view. For instance, in Poland, a notification may be required even though only one of the parties is present and, therefore, there may not be an impact on competition in Poland. Turkey recently issued a decision finding that a joint venture (JV) that produced no effect on Turkish markets was reportable because the JV's products 'could be' imported into Turkey. In Serbia, there similarly is no 'local' effects required. Germany also takes an expansive view by adopting as one of its thresholds a transaction of 'competitively significant influence'. Although a few merger notification jurisdictions remain 'voluntary' (e.g., Australia, Singapore, the United Kingdom and Venezuela), the vast majority impose mandatory notification requirements. Moreover, in Singapore, the transaction parties are to undertake a 'self-assessment' of whether the transaction will meet certain levels, and, if so, should notify the agency to avoid potential challenge by the agency.

Although in most jurisdictions the focus of the competition agency is on competition issues, some jurisdictions have a broader mandate. For instance, the 'public interest' approach in South Africa expressly provides for consideration of employment matters, local enterprises and procurement, and for economic empowerment of the black population and its participation in the company. Many of the remedies imposed in South Africa this year have been in connection with these considerations. Although a number of jurisdictions have separate regulations and processes for addressing foreign entity acquisitions when national security or specific industrial sectors are involved, in Romania, for example, competition law provides that the government can prohibit a merger if it determines that such merger could have a potential impact on national security.

The potential consequences for failing to file in jurisdictions with mandatory requirements vary. Almost all jurisdictions require that the notification process be concluded before completion (e.g., pre-merger, suspensory regimes), rather than permitting the transaction to close as long as notification is made before closing. Many of these jurisdictions can impose a significant fine for failure to notify before closing, even where the transaction raises no competition concerns (e.g., Austria, Cyprus, India, the Netherlands, Romania, Spain and Turkey). In France, for instance, the competition authority imposed a €4 million fine on Castel Frères for failure to notify its acquisition of part of the Patriache group. In Ukraine and Romania, the competition authorities have focused their efforts on discovering consummated transactions that had not been notified, and imposing fines on the parties. Chile's antitrust enforcer recommended a fine of US$3.8 million against two meat-packing companies, even though the parties had carved the Chilean business out of the closing.

Some jurisdictions impose strict time frames within which the parties must file their notification. For instance, Cyprus requires filing within one week of signing of the relevant documents and agreements; Serbia provides for 15 days after signing of the agreement; and Hungary, Ireland and Romania have a 30-calendar-day time limit for filing the notification that commences with entering into the agreement. Some jurisdictions that mandate filings within specified periods after execution of the agreement also have the authority to impose fines for 'late' notifications (e.g., Bosnia and Herzegovina, Indonesia, and Serbia). Most jurisdictions also have the ability to impose significant fines for failure to notify or for

closing before the end of the waiting period, or both (e.g., Austria, Canada, China, Greece, Portugal, Ukraine and the United States). In Macedonia, the failure to file can result in a misdemeanour and a monetary fine of up to 10 per cent of the worldwide turnover. In Belgium, the competition authority fined a party for late submission of information.

The United States and the European Commission both have a long history of focusing on interim conduct of the transaction parties, which is commonly referred to as 'gun-jumping', even fining companies who are found to be in violation. For example, the European Commission (EC) imposed the largest gun-jumping fine ever of €124.5 million against Altice. Other jurisdictions have more recently been aggressive. Brazil, for instance, issued its first gun-jumping fine in 2014 and recently issued guidelines on gun-jumping violations. Since then, Brazil has continued to be very active in investigating and imposing fines for gun-jumping activities. In addition, the sharing of competitively sensitive information before approval appears to be considered an element of gun-jumping. The Korea Fair Trade Commission (KFTC) has imposed fines on over 50 transactions in the past two years that it deemed were not reported, were reported late, or were properly reported but implemented before the end of the waiting period. Also, for the first time, France imposed a fine of €20 million on the notifying party for failure to implement commitments fully within the time frame imposed by the authority.

In most jurisdictions, a transaction that does not meet the pre-merger notification thresholds is not subject to review or challenge by the competition authority. In Canada – like the United States – however, the Canadian Competition Bureau can challenge mergers that were not required to be notified under the pre-merger statute. In Korea, Microsoft initially filed a notification with the KFTC, but when it faced difficulties and delays in Korea, the parties restructured the acquisition to render the transaction non-reportable in Korea and consummated the transaction. The KFTC, however, continued its investigation as a post-consummation merger investigation and eventually obtained a consent order. In addition, the European Commission has fined companies on the basis that the information provided at the outset was misleading (for instance, the EC fined Facebook €110 million for providing incorrect or misleading information during the *Facebook/WhatsApp* acquisition).

In almost all jurisdictions, very few transactions undergo a full investigation, although some require that the notification provide detailed information regarding the markets, competitors, competition, suppliers, customers and entry conditions. Most jurisdictions that have filing fees specify a flat fee or state in advance a schedule of fees based upon the size of the transaction; some jurisdictions, however, determine the fee after filing or provide different fees based on the complexity of the transaction. For instance, Cyprus is now considering charging a higher fee for acquisitions that are subjected to a full Phase II investigation.

Most jurisdictions more closely resemble the EC model than the United States model. In these jurisdictions, pre-filing consultations are more common (and even encouraged); parties can offer undertakings during the initial stage to resolve competitive concerns; and there is a set period during the second phase for providing additional information and for the agency to reach a decision. In Japan, however, the Japan Federal Trade Commission (JFTC) announced in June 2011 that it would abolish the prior consultation procedure option. When combined with the inability to 'stop the clock' on the review periods, counsel may find it more challenging in transactions involving multiple filings to avoid the potential for the entry of conflicting remedies or even a prohibition decision at the end of a JFTC review. Some jurisdictions, such as Croatia, are still aligning their threshold criteria and processes with the EC model. Some jurisdictions even within the EC remain that differ procedurally

from the EC model. For instance, in Austria, the obligation to file can be triggered if only one of the involved undertakings has sales in Austria, as long as both parties satisfy a minimum global turnover and have a sizeable combined turnover in Austria.

The role of third parties also varies across jurisdictions. In some jurisdictions (e.g., Japan), there is no explicit right of intervention by third parties, but the authorities can choose to allow it on a case-by-case basis. In contrast, in South Africa, registered trade unions or representatives of employees must be provided with a redacted copy of the merger notification from the outset and have the right to participate in merger hearings before the Competition Tribunal: the Tribunal will typically also permit other third parties to participate. Bulgaria has announced a process by which transaction parties even consent to disclosure of their confidential information to third parties. In some jurisdictions (e.g., Australia, the EC and Germany), third parties may file an objection to a clearance decision. In some jurisdictions (including Canada, the EC and the United States), third parties (e.g., competitors) are required to provide information and data if requested by the antitrust authority. In Israel, a third party that did not comply with such a request was recently fined by the antitrust authority.

In almost all jurisdictions, once the authority approves the transaction, it cannot later challenge the transaction's legality. The United States is one significant outlier with no bar for subsequent challenge, even decades following the closing, if the transaction is later believed to have substantially lessened competition. Canada, in contrast, provides a more limited time period of one year for challenging a notified transaction (see the recent CSC/Complete transaction). Norway is a bit unusual, where the authority has the ability to mandate notification of a transaction for a period of up to three months following the transaction's consummation. In 'voluntary' jurisdictions, such as Australia and Singapore, the competition agency can investigate and challenge unnotified transactions.

It is becoming the norm, in large cross-border transactions raising competition concerns, for the US, Canadian, Mexican and EC authorities to work closely together during the investigative stages, and even in determining remedies, minimising the potential of arriving at diverging outcomes. The KFTC has stated that it will engage in even greater cooperation with foreign competition authorities, particularly those of China and Japan, which are similar to Korea in their industrial structure. Regional cooperation among some of the newer agencies has also become more common; for example, the Argentinian authority has worked with Brazil's CADE, which in turn has worked with the Chilean authority. Competition authorities in Bosnia and Herzegovina, Bulgaria, Croatia, Macedonia, Montenegro, Serbia, Slovenia, and Turkey similarly maintain close ties and cooperate on transactions. Taiwan is part of the Asia-Pacific Economic Cooperation Forum, which shares a database. In transactions not requiring filings in multiple European jurisdictions, Member States often keep each other informed during the course of an investigation. In addition, transactions not meeting the EC threshold can nevertheless be referred to the European Commission in appropriate circumstances. The United States has signed cooperation agreements with a number of jurisdictions, including most recently Peru and India. China has 'consulted' with the United States and the EC on some mergers and entered into a cooperation agreement with the United States authorities in 2011.

The impact of such multi-jurisdictional cooperation is very evident. For instance, the transaction parties in *Applied Materials/Tokyo Electron* ultimately abandoned the transaction following the combined objections of several jurisdictions, including the United States, Europe and Korea. In *Office Depot/Staples*, the FTC and the Canadian Competition Bureau

cooperated and both jurisdictions brought suits to block the transaction (although the EC had also cooperated on this transaction, it ultimately accepted the undertakings offered by the parties). In the *GE/Alstom* transaction, the United States and the EC coordinated throughout, including at the remedies stage. Additionally, in the *Halliburton/Baker Hughes* transaction, the United States and the EC coordinated their investigations, with the United States suing to block the transaction while the EC's investigation continued. Also, in *Holcim/Lafarge*, the cooperation between the United States and Canada continued at the remedies stage, where both consents included assets in the other jurisdiction's territory. The United States, Canada and Mexico coordinated closely in the review of the *Continental/Veyance* transaction. This past year, for instance, many jurisdictions coordinated on the *Linde/Praxair* and the *Bayer/Monsanto* transactions. In fact, coordination among the jurisdictions in multinational transactions that raise competition issues is becoming the norm.

Although some jurisdictions have recently raised the size threshold at which filings are mandated, others have broadened the scope of their legislation to include, for instance, partial ownership interests. Some jurisdictions continue to have as their threshold test for pre-merger notification whether there is an 'acquisition of control'. Many of these jurisdictions, however, will include, as a reportable situation, the creation of 'joint control', 'negative (e.g., veto) control' rights to the extent that they may give rise to *de jure* or *de facto* control (e.g., Turkey), or a change from 'joint control' to 'sole control' (e.g., the EC and Lithuania). Minority holdings and concerns over 'creeping acquisitions', in which an industry may consolidate before the agencies become fully aware, have become the focus of many jurisdictions. Some jurisdictions will consider as reviewable acquisitions in which only a 10 per cent or less interest is being acquired (e.g., Serbia for certain financial and insurance mergers), although most jurisdictions have somewhat higher thresholds (e.g., Korea sets the threshold at 15 per cent of a public company and otherwise at 20 per cent of a target; and Japan and Russia at any amount exceeding 20 per cent of the target). Others use, as the benchmark, the impact that the partial shareholding has on competition; Norway, for instance, can challenge a minority shareholding that creates or strengthens a significant restriction on competition. The United Kingdom also focuses on whether the minority shareholder has 'material influence' (i.e., the ability to make or influence commercial policy) over the entity. Several agencies during the past few years have analysed partial ownership acquisitions on a stand-alone basis as well as in connection with JVs (e.g., Canada, China, Cyprus, Finland and Switzerland). Vertical mergers were also a subject of review (and even resulted in some enforcement actions) in a number of jurisdictions (e.g., Belgium, Canada, China, Sweden and Taiwan). Portugal even viewed as an 'acquisition' subject to notification the non-binding transfer of a customer base.

For transactions that raise competition issues, the need to plan and to coordinate among counsel has become particularly acute. Multi-jurisdictional cooperation facilitates the development of cross-border remedies packages that effectively address competitive concerns while permitting the transaction to proceed. The consents adopted by the United States and Canada in the *Holcim/Lafarge* merger exemplify such a cross-border package. As discussed in the 'International Merger Remedies' chapter, it is no longer prudent to focus merely on the larger mature authorities, with the expectation that other jurisdictions will follow their lead or defer to their review. In the current enforcement environment, obtaining the approval of jurisdictions such as Brazil and China can be as important as the approval of the EC or the United States. Moreover, the need to coordinate is particularly acute, to the extent that multiple agencies decide to impose conditions on the transaction. Although most jurisdictions indicate that 'structural' remedies are preferable to 'behavioural' conditions, a

number of jurisdictions in the past few years have imposed a variety of such behavioural remedies (e.g., China, the EC, France, the Netherlands, Norway, South Africa, Ukraine and the United States). For instance, some recent decisions have included as behavioural remedies pricing, sales tariffs and terms of sale conditions (e.g., Korea, Ukraine and Serbia), employee retrenchment (South Africa) and restrictions on bringing anti-dumping suits (e.g., Mexico). Many recent decisions have imposed behavioural remedies to strengthen the effectiveness of divestitures (e.g., Canada's decision in the *Loblaw/Shoppers* transaction, China's MOFCOM remedy in *Glencore/Xstrata* and France's decision in the *Numericable/SFR* transaction). This book should provide a useful starting point in navigating cross-border transactions in the current enforcement environment.

Ilene Knable Gotts
Wachtell, Lipton, Rosen & Katz
New York
July 2019

Part II

Jurisdictions

Chapter 26

NETHERLANDS

Gerrit Oosterhuis and Weyer VerLoren van Themaat[1]

I INTRODUCTION

Dutch merger control is similar to European merger control, certainly as regards the substantive rules. Thus, the Dutch concept of a concentration is similar to the definition of a concentration as laid down in the EU Merger Regulation (EUMR). It includes the acquisition of control and the possibility to influence strategic decisions of the target. Furthermore, the concept of undertakings concerned and the methodology of allocating turnover to the undertakings concerned are identical. Moreover, the European Commission's decision practice and the Commission's Consolidated Jurisdictional Notice are closely followed by the Dutch Authority for Consumers and Markets[2] (ACM) when it comes to, for example, the full functionality of a joint venture[3] or the geographical allocation of turnover.[4]

Mergers meeting the jurisdictional thresholds as laid down in the Dutch Competition Act (DCA) must be notified to the ACM. In general, a concentration must be notified to the ACM if the combined worldwide turnover of all undertakings concerned is more than €150 million in the calendar year preceding the concentration, and at least two of the undertakings concerned each achieved at least a €30 million turnover in the Netherlands. Various sector-specific thresholds are discussed in Section III, infra.

Concentrations meeting the thresholds must be notified prior to completion and may not be implemented during the review period. Failure to notify may result in large fines.

II YEAR IN REVIEW

i Workload

The ACM received 107 notifications and reached 93 decisions in Phase I in 2018, which is comparable to the workload in 2017 (102 notifications and 103 decisions).[5] The majority of notifications resulted in one-page short decisions. Only seven Phase I decisions were

1 Gerrit Oosterhuis is an associate partner and Weyer VerLoren van Themaat is a partner at Houthoff.

2 The ACM is the result of the merger between the Dutch Competition Authority (NMa), the Dutch Consumer Authority and the telecoms authority OPTA. The merger was effectuated as per 1 April 2013. Some of the case names – prior to 1 April 2013 – still refer to the NMa.

3 Decision NMa 7 September 2010 (*Transdev/Veolia*) Case 6957.

4 Decision NMa 3 May 2010 (*Amlin/Dutch State*) Case 6843. For a discussion of the EUMR, the Consolidated Jurisdictional Notice and the decision practice of the European Commission, please refer to the European Union chapter.

5 Statistics from the Annual Report 2018 of the ACM (Dutch version) at page 28. Please refer to www.acm.nl/sites/default/files/documents/2019-04/jaarverslag-2018.pdf.

substantiated (with reasons, down from 14 in 2017 and nine in 2016). In addition, the ACM received one request for a decision in Phase II and issued one decision in Phase II, which is the same score as in 2017.[6]

Of the eight decisions in Phase I and Phase II, four concerned the healthcare (home care, elderly care, rehabilitation care and specialised clinics)[7] and pharmacy sectors.

Two of the decisions concerned the food sector, with one merger concerning producers of spices and cold sauces[8] and one involving flour mills.[9] Of the two remaining cases, there was one merger of ship chandlers[10] and one acquisition in the supermarket sector.[11]

The ACM granted one request to adapt a remedy that was agreed upon in a Phase II decision from 2016.[12]

An exemption from the mandatory waiting period has been granted three times.[13]

The ACM did not impose any fines for a failure to notify a concentration in 2018.

ii Infringements of formal obligations and legal proceedings

Two merger decisions were appealed in 2018. In both cases, the Rotterdam District Court (the Court) and the Trade and Industry Appeals Tribunal (CBb) respectively ruled in favour of ACM.

In 2017, the ACM had cleared the acquisition of a part of Heineken's non-alcoholic wholesale activities by the wholesale food supplier Sligro.[14] The ACM had concluded that the acquisition would not give rise to competition problems, as a sufficient number of wholesalers for food products and related non-food products would continue to exert competitive pressure. A number of competitors of Sligro appealed this decision to the Court, claiming that the ACM should have assessed the acquisition on the narrower market for the supply of food products to the hotel and catering industry. The Court held that the ACM was right to decide that the market for the supply of food and food-related products does not need to be divided into several sub-markets depending on the type of customers, referring to recent case law of the EC, as well as the outcome of the market investigation of the ACM.

Sligro and Heineken had, in the context of the transaction, also agreed that Sligro would provide all logistical services for the distribution of Heineken's beers and ciders –

6 Decision ACM 17 December 2017 (*Bergman Clinics/NL Healthcare Clinics*) Case ACM/18/033727.

7 The decisions in Phase I concern the following: Decision ACM 21 June 2018 (*Stichting ZorgSaam Zorggroep Zeeuws-Vlaanderen/Stichting Warmande*) Case ACM/18/032520, Decision ACM 4 July 2018 (*Stichting Centrum voor Reuma en Revalidatie Rotterdam/Stichting Aafje Thuiszorg Huizen Zorghotels*) Case ACM/18/033184 and Decision ACM 21 December 2018 (*Aurobinde/Apotex*) Case ACM/18/033946. The Phase II Decision concerns Decision ACM 17 December 2017 (*Bergman Clinics/NL Healthcare Clinics*) Case ACM/18/033727.

8 Decision ACM 22 January 2018 (*Euroma Holding BV/Clearwood Investment BV*) Case ACM/17/024889.

9 Decision ACM 14 February 2018 (*Dossche Mills Nederland BV/Meneba Holding BV*) Case ACM/17/019799.

10 Decision ACM 10 July 2018 (*Wrist Holding NL BV/Klevenberg Shipping Center BV*) Case ACM/18/033205.

11 Decision ACM 26 June 2018 (*Jumbo/Emté*) Case ACM/18/032654.

12 Decision ACM 30 July 2018 (*Brocacef/Mediq*) Case ACM/16/029865.

13 Decision ACM 18 May 2018 (*Ledeboer Investments BV/Stichting Bestuur Vérian*) Case ACM/18/033021; Decision ACM 20 July 2018 (*Blueprint/ECR*) Case ACM/18/033613; and Decision ACM 31 December 2018 (*Stichting OLVG/Slotervaartziekenhuis BV*), Case ACM/18/034722.

14 Decision ACM 12 September 2017 (*Sligro/Heineken*) Case 17.0611.22.

which it could combine with the delivery of its own products. The appellants submitted that this allowed Sligro to offer a one-stop-shop solution that would be irresistible to customers in the hotel and catering industry and that the ACM had not sufficiently investigated this aspect. The ACM had notably relied on the internal upsell model of Sligro, which predicted that the effects of the logistical agreement on sales by Sligro would be limited, owing to the nature of Sligro's customers and the fact that Heineken (because of commitments to the ACM) is prohibited from entering into exclusive supply agreements for beer. The Court held that the ACM's investigation had been sufficiently thorough and upheld the clearance decision.

The other litigated case can be traced back to 2008, when the ACM had allowed a joint venture for laying fibre cables between Reggefiber and telecom incumbent KPN, while imposing conditions such as non-discriminatory access and a prohibition of tariffs that could lead to a price squeeze. When KPN acquired sole control over the joint venture, the ACM did not re-impose these conditions, on the basis that new sector regulation regarding maximum prices would impose the same restraints on KPN. The District Court agreed in 2016.[15] Vodafone appealed. It pointed out that Reggefiber's previous prices were around 10 per cent below the regulated maximum prices and that it would have an incentive to raise its prices to the new regulatory maximum. This price raise would in itself constitute a significant impediment to competition, according to Vodafone. The CBb held that the regulatory maximum prices were intended to prevent excessive prices and margin squeezes. Hence, the ACM had been correct to refer to the sector regulation and to conclude that a price hike up to the regulatory ceiling would not constitute a significant impediment to competition.

iii Phase I decisions

Two providers of geriatric revalidation care with a joint market share of 30 to 40 per cent in the city of Rotterdam were allowed to merge their activities. The ACM relied notably on the opinion of health insurers that they would continue to have access to a sufficient number of alternative suppliers on the local market.[16]

The acquisition by ZorgSaam of Warande would result in combined market shares of above 70 per cent on several local healthcare markets, but it was allowed on the basis of the failing firm defence. Warande was expected to soon go bankrupt, meaning that its assets would end up with ZorgSaam anyway.[17] Finally, the market investigation showed that there were no other buyers for Warande, to the effect that all criteria of the failing firm defence, as defined in the EC's Guidelines for Horizontal Mergers, were fulfilled. The ACM attached great importance to the opinion of stakeholders that they did not want to contract with Warande anymore and that ZorgSaam was the only viable buyer of Warande.[18]

The ACM allowed the acquisition by food retailer Jumbo of 79 shops of competing retail chain EMTÉ, but required the divestment of three shops to remedy market shares above 50 per cent on local markets for the sales of daily consumer goods through supermarkets.

15 Rotterdam District Court 12 May 2016 (*Vodafone Libertal/ACM*), ECLI:NL:RBROT:2016:3476.

16 Decision ACM 4 July 2018 (*Stichting Centrum voor Reuma en Revalidatie Rotterdam/Stichting Aafje Thuiszorg Huizen Zorghotels*) Case ACM/18/033184.

17 The ACM equals this to the situation that the assets would leave the market, as the demand for care would remain and the health insurers are legally obliged to continue to serve this demand for care.

18 Decision ACM 21 June 2018 (*Stichting ZorgSaam Zorggroep Zeeuws-Vlaanderen/Stichting Warmande*).

Interestingly, the ACM aligned itself with the Belgian Competition Authority by defining the size of the local market as smaller than it had previously done, relying on a radius of 10 minutes of travelling time by car around a shop rather than the 15-minute radius used in earlier cases.[19]

Flour mill Dossche was allowed to acquire its competitor Meneba without remedies, despite a joint market share of 40 to 50 per cent on the Dutch market. As imports from Germany and Belgium were increasing, the ACM expected that mills from those countries would provide sufficient competitive pressure.[20]

The acquisition of Clearwood by Euroma concerned the markets for cold sauces, spices and seasonings. The markets were considered competitive owing to the availability of spare production capacity and the use of short-term contracts. [21] Likewise, the ACM considered the market for ship chandlers in the Port of Rotterdam and the ARA region[22] – which it had not discussed earlier – to be competitive owing to, inter alia, the absence of long-term contracts.[23]

The ACM issued a detailed decision regarding the acquisition of pharmaceutical wholesaler Apotex by its competitor Aurobindo, discussing various product market definitions (molecular level versus Anatomical Therapeutic Chemical Classification; prescription versus over the counter) as well as related markets such as pipeline products and contract manufacturing. The acquisition was allowed under the condition that Apotex's diazepam enema business was divested, as the parties would have a 100 per cent share of this market.[24]

iv Phase II cases

The only Phase II decision of 2018 concerned a merger of two operators of specialised commercial clinics (also called independent treatment centres) for dermatology, eye care and orthopaedics.[25] In Phase I, the ACM had expressed a concern regarding the market for the supply of care[26] in a vaguely defined area around the town of Amersfoort where the parties would have 30 to 40 per cent market share. In Phase II, the ACM accepted that the parties were no (close) competitors in this area based on diversion ratios. On the national market for the purchase of care,[27] the ACM investigated whether the parties would have significant bargaining power – despite their moderate market share of less than 20 per cent – owing to the preference of some patients for specialised clinics over hospitals. The market investigation did not show any such leverage, as, for example, very few people would switch between health insurers depending on whether or not the insurers had contracted care from specialised treatment centres. The ACM allowed the transaction without remedies.

In 2016, the ACM granted a Phase II licence under conditions for the acquisition of Mediq by its competitor Brocacef.[28] Both parties operate a chain of pharmacies in the

19 Decision ACM 26 June 2018 (*Jumbo/Emté*) Case ACM/18/032654.

20 Decision ACM 14 February 2018 (*Dossche Mills Nederland BV/Meneba Holding BV*) Case ACM/17/019799.

21 Decision ACM 22 January 2018 (*Euroma Holding BV/Clearwood Investment BV*) Case ACM/17/024889.

22 The ports along the North Sea cost between Antwerp, Rotterdam and Amsterdam.

23 Decision ACM 10 July 2018 (*Wrist Holding NL BV/Klevenberg Shipping Center BV*) Case ACM/18/033205.

24 Decision ACM 21 December 2018 (*Aurobinde/Apotex*) Case ACM/18/033946.

25 Decision ACM 17 December 2017 (*Bergman Clinics/NL Healthcare Clinics*) Case ACM/18/033727.

26 Meaning the market on which patients demand care.

27 Being the market on which health insurers purchase care from suppliers on behalf of their insured.

28 Decision ACM 13 June 2016 (*Brocacef/Mediq*), Case 15.0849.24.

Netherlands, and are active in the field of wholesale in the pharmaceutical sector. Brocacef was obliged to sell 89 local pharmacies, including one called De Witte Pauw in the town of Ermelo to remove overlap with the three other local pharmacies that were originally Mediq franchisees. In January 2018, those three pharmacies terminated their relationship with Brocacef. As this removed the original overlap in Ermelo, the ACM changed the conditions imposed on Brocacef, allowing it to re-contract De Witte Pauw. The prohibition to have a wholesale relationship during a cooling off period was switched from De Witte Pauw to the three pharmacies that left the Brocacef franchise.[29]

v Exemptions from the standstill period

The ACM granted three exemptions from the standstill period in 2018, all in the healthcare sector and all resulting from the target being bankrupt or running an immediate risk of going bankrupt.[30] In all cases, the ACM seems to have acted quickly and in a rather pragmatic way.

vi Reports and position papers

In 2017, the ACM published an arguably biased report that suggested that hospital mergers lead to price increases but not to better care.[31] The ACM refers to this conclusion in a new position paper regarding hospital mergers and in which it also argues that it may be necessary to implement a care-specific merger test that includes non-competition parameters such as size and complexity of the resulting hospitals.[32]

The ACM published its new best practices regarding the analysis of product markets in healthcare sectors.[33] In this document, the ACM announces a new product market definition for basic care, being 'diagnosis treatment combinations carried out in at least 20 general hospitals'. Importantly, the ACM will no longer start its analysis from a supply-side perspective (i.e., which hospitals offer a certain treatment) but from the demand perspective (i.e., what alternatives exist for specific patient groups). This will lead to hugely more detailed and more complicated reviews.

29 Decision ACM 30 July 2018 (*Brocacef/Mediq*) Case ACM/16/029865 to change the decision of 13 June 2016 in Case 15.0849.24. As discussed in the 9th edition of this publication, the original licence was challenged by competitors and insurance companies but upheld in first instance (Rotterdam District Court 7 September 2017 (*Mosadex ea/ACM*) ECLI:NL:RBROT:2017:6833). Appeal is pending.

30 Decision ACM 18 May 2018 (*Ledeboer Investments BV/Stichting Bestuur Vérian*) Case ACM/18/033021; Decision ACM 20 July 2018 (*Blueprint/ECR*) Case ACM/18/033613; and Decision ACM 31 December 2018 (*Stichting OLVG/Slotervaartziekenhuis BV*), Case ACM/18/034722.

31 See: www.acm.nl/sites/default/files/documents/2017-12/rapport-effecten-van-ziekenhuisfusies-prijs-en-volume-aangepaste-versie-2017-12-07.pdf.

32 ACM, Effects of hospital mergers (Effecten van ziekenhuisfusies), position paper for a round table discussion with the Ministry of Health, Welfare and Sport of 29 January 2018 (see: www.acm.nl/sites/default/files/documents/2018-01/position-paper-voor-rondetafelgesprek-inzake-zorgfusies-2018-01-30.pdf).

33 ACM, Merger filings in specialised medical care (Fusiemeldingen in de medisch-specialistische zorg), Best Practices of 28 December 2018 (see: www.acm.nl/sites/default/files/documents/werkwijze-analyse-productmarkten-msz.pdf).

III THE MERGER CONTROL REGIME

i Merger control thresholds

Article 29 DCA provides that a concentration must be notified if:

a the combined turnover of all undertakings concerned exceeds €150 million in the calendar year preceding the concentration; and

b of this turnover, at least two concerned undertakings each achieved at least €30 million in the Netherlands.

Alternative jurisdictional thresholds exist for the following undertakings.[34]

Healthcare undertakings

All concentrations involving at least one healthcare undertaking must be notified to the Dutch Healthcare Authority (NZa). For the purpose of the healthcare-specific test carried out by the NZa, a healthcare undertaking is defined as an undertaking employing or contracting more than 50 healthcare providers (persons).[35] The NZa evaluates, inter alia, the accessibility and quality of services and their integration plans. If the NZa advises positively, the transaction must be notified to the ACM if it meets the thresholds explained below.

For the purpose of the control by the ACM, a healthcare undertaking is an undertaking that achieves at least €5.5 million turnover through healthcare services. A concentration between two or more healthcare undertakings must be notified to the ACM if:

a the combined turnover of all undertakings concerned exceeds €55 million in the calendar year preceding the concentration; and

b of this turnover, at least two of the undertakings concerned each achieved at least €10 million in the Netherlands.[36]

Credit and financial institutions

For credit and financial institutions within the meaning of the Act on Financial Supervision, Article 31(1) of the DCA states that instead of turnover, income items must be used (analogous to those defined in Article 5(3)(a) of the EUMR).

Pension funds

Any type of pension fund will be regarded as an undertaking for competition law purposes. New thresholds apply from 1 July 2016: concentrations involving pension funds are subject to prior notification if the joint worldwide premiums written by the parties concerned in the preceding calendar year amounted to €500 million and at least two parties achieved €100 million premiums written by Dutch citizens.[37]

34 Since the Act for the streamlining of market surveillance by the ACM of 24 June 2014 entered into force on 1 August 2014, concentrations between insurance companies are subject to the regular thresholds. Previously, a complicated lower threshold applied.

35 The relevant amendment to the Health Care (Market Regulation) Act was voted on 26 November 2013 and is applicable as of 1 January 2014.

36 These thresholds will continue to apply until at least 1 January 2023.

37 Law of 23 December 2015 changed a number of laws in the Ministry of Economic Affairs domain, including raising the maximum fines applicable to the ACM (proposal 34,190).

ii Investigation phases

Notification phase

The Dutch procedure consists of two phases. In Phase I, the ACM will investigate upon notification whether there are reasons to assume that the concentration may impede effective competition in certain markets (notification phase). If there are no such reasons, the ACM will clear the concentration, after which the concentration may be completed. Once the decision on the notification is issued, a filing fee of €17,450 is imposed, regardless of the outcome of the decision.

Licence phase

If the ACM has reason to assume that competition may be impeded, it decides that the concentration requires a licence, which will be granted only after a further investigation in Phase II (licence phase).

In contrast with the European procedure, in the Netherlands, Phase II only starts if and when the parties involved request a licence. Such request requires a new notification in which more detailed information is provided to the authority about the parties and the relevant markets. Upon this request, the ACM will conduct an additional investigation and either clear or prohibit the relevant concentration. Before prohibiting a concentration, the authority will provide the parties (and sometimes third parties) with an overview of the relevant competition concerns (points of consideration) and will provide the parties (and sometimes third parties) with the opportunity to give their reactions on these points. Once the decision on the licence request is issued, a filing fee of €34,900 is payable, regardless of the outcome of the decision.

Both the notification for Phase I and the request for a licence must be submitted in Dutch. Annexes, such as letters of intent or share purchase agreements, or annual reports, may be submitted in English.

Clearance by the Minister of Economic Affairs, Agriculture and Innovation

If a concentration is prohibited, there is a possibility of requesting the Minister of Economic Affairs, Agriculture and Innovation to grant a licence for serious reasons of general interest. This possibility will probably be tested in the near future in *PostNL/Sandd*. In this case, the intended acquisition by postal incumbent PostNL of its largest competitor, Sandd, would create a near monopoly, but it is claimed to be necessary, at least in the medium term, to maintain a postal system with national coverage.

iii Duration procedure and waiting period (standstill obligation)

Phase I is a 28-day review period, whereas Phase II has a maximum duration of 13 weeks. However, these periods may be suspended if the ACM asks formal questions requiring additional information on the concentration. Because of this possibility of suspension, the review period can be very lengthy. As an extreme example, the 28-day period (Phase I) was suspended for 261 days in the case of *Cooperatie Vlietland/Vlietland Ziekenhuis*.[38] There are no requirements for pre-notification.

38 Decision NMa 18 February 2010 (*Coöperatie Vlietland/Vlietland Ziekenhuis*), Case No. 6669.

Exemption waiting period

As previously indicated, the concentration may not be completed during the review period. Some exceptions apply, which are similar to those under the EUMR. In the event of a public bid, the prohibition does not apply, provided that the bid is immediately notified to the ACM and the acquirer does not exercise the voting rights attached to the relevant share capital (the latter condition may be waived).

The ACM can also grant an exemption from the standstill obligation if quick clearance by the authority is not possible and suspension of completion of the concentration would seriously jeopardise the concentration. Such exemption can be granted within several working days. Once the exemption is granted, the concentration may be completed before the authority clears it. If the intended concentration does not pose any problems, the ACM may prefer to take a final clearance decision within a couple of days instead of granting an exemption.

In case of exemptions, the concentration must be unwound if it is subsequently prohibited by the authority.

iv Other procedural aspects

Third parties

The notification of a transaction is always published in the Government Gazette. In this communication, third parties are invited to comment on the contemplated concentration. Although third parties are requested to respond within seven days, information provided later may also be used in the procedure. The ACM also actively gathers information by sending out questionnaires or by interviewing third parties. The ACM is aware that competitors may have strategic reasons to be critical of a contemplated concentration, but it attaches more weight to the comments of customers – especially the comments of health insurers in cases concerning healthcare suppliers.

Information received from third parties will generally be communicated to the parties concerned to provide them with the opportunity to respond. Generally, the authority will reveal the third party's identity.[39]

Remedies

Under the Dutch merger control rules, parties can propose remedies in both the notification phase and the licence phase. The conditions and type of remedies are in principle similar in both instances and are laid down in guidelines.[40] The general preconditions are that the parties to the concentration must take the initiative and the remedies proposed must be suitable and effective for eliminating the relevant competition concerns. The authority generally prefers structural remedies, but behavioural or quasi-structural remedies (not structural but nevertheless on a permanent basis, such as an exclusive licence agreement) are also possible. The authority does not have a specific form,[41] but does require, inter alia:

a the proposal to be in writing;

b a detailed description of the nature and size of the remedy;

39 The ACM has published 'rules of the game for merger control procedures' providing detailed information on its approach in merger control cases, available at www.acm.nl/nl/download/publicatie/?id=11348 (in Dutch).

40 Remedies guidelines 2007. This section is based on these guidelines.

41 In its guidelines, the authority does refer to model texts from the European Commission.

c a note on how all indicated competition concerns will be eliminated;
d if applicable, the steps required to divest a part of the undertaking and the timeline for such;
e a non-confidential version of the proposal; and
f a timely filing of the proposal.

Nevertheless, there are some differences between the procedures in the two phases. First, in the notification phase the remedy proposal should be handed in a week before the deadline of the ACM decision, whereas this is three weeks in the licence phase. In addition, whereas a concentration cleared under conditions in the notification phase may not be completed until the remedy is effectuated – effectively creating a 'fix it first' obligation. This limitation does not apply to remedies accepted in the licence phase. In both cases, however, effectuation of the remedies must be within the time frame stipulated in the proposal. If the parties fail to meet this deadline, the concentration will require a licence (remedies in the notification phase) or the concentration will be deemed to have been completed without a licence (remedies in the licence phase). In general, any failure to comply with remedies once the concentration has been completed is punishable by heavy fines.[42]

Fines for late notification

As previously indicated, failure to notify a concentration (in a timely manner) will usually lead to a fine upon discovery by the authority. Fines for late notification may run up to 10 per cent of the worldwide turnover in the year preceding the year of the fine, but this ceiling can be doubled in a case of recidivism. On the basis of Articles 2.5 and 2.6 of the 2014 ACM Fining Policy Rule,[43] the ACM sets the fine at €400,000 to €700,000 or 5 per cent of the total Dutch turnover in the preceding financial year for the buyer – whichever is higher. However, the ACM has substantial leeway to increase the resulting amount of the fine if it deems it to be too low. This fine may be doubled in case of recidivism.

v Appeals and judicial review

Merger control decisions

Each phase ends with a decision, which can be appealed before the District Court of Rotterdam by any party directly affected by the decision, including the parties involved in the concentration, and usually also competitors, customers and possibly suppliers. Further appeal against a judgment of the Rotterdam District Court can be lodged with the Regulatory Industrial Organisation Appeals Court (CBb).

Third parties directly affected by the decision do not have access to the authority's file, but they can request information from the authority on the basis of the Government Information (Public Access) Act when the merger control procedure has been completed. Information that is generally not provided to third parties under this Act includes confidential business information and internal memos of the authority.

42 For example, the €2 million fine imposed on Wegener; for more information, see the Netherlands chapter in the 2013 edition of this publication.

43 Policy rule of the Minister of Economic Affairs of 4 July 2014, No. WJZ/14112617, on the imposition of administrative fines by the Netherlands Authority for Consumers and Markets (www.acm.nl/en/download/attachment/?id=12098).

Sanction decisions

Before imposing a fine, the ACM draws up a statement of objections on which parties may comment (in writing or orally). After this, the ACM will take a decision against which a notice of objection can be filed with the ACM. An appeal can be lodged against the ACM's decision (on administrative appeal) to the District Court of Rotterdam. An appeal can be lodged with the CBb against the District Court's decision.

IV OTHER STRATEGIC CONSIDERATIONS

As previously indicated, the ACM is stringent in its interpretation of its jurisdiction, gun-jumping issues, late notifications and failure to comply with remedies, and has a track record of imposing heavy fines in cases of non-compliance. If it is unclear whether a concentration must be notified, the parties can seek informal guidance from the ACM. The ACM is required to react to such queries, and does so within two weeks (often within days).

The ACM imposed remedies in only a limited number of cases. However, in the case *Borgesius/Bakkersland*,[44] no formal remedies were imposed, but the case was only allowed after the buyer changed the concentration through a modified notification. In the case *Sonova/AudioNova*,[45] the remedies were very limited, but it is understood that the seller may have selected the buyer – through a controlled auction – in part because of the limited overlap to avoid a lengthy procedure at the ACM. Such cases are not uncommon. Hence, the impact of the control exercised by the ACM is bigger than it seems at first sight.

V OUTLOOK AND CONCLUSIONS

In recent years, the ACM has placed more priority on consumer protection than on the competitive structure of the market. This may change with the appointment of the new chairman of the ACM, Martijn Snoep, who has announced that the ACM will be more aggressively enforcing competition law through cartel investigations. This is, so far, of small consequence in the field of merger control, where the ACM generally remains quite realistic in its analyses.

However, the continuing policy of the ACM to issue only a limited number of reasoned decisions results in a lack of guidance on market definitions, jurisdictional issues, economic analyses and theories of harm. This can render the notification process unpredictable. The ACM only partially makes up for the 'guidance deficit' by publishing informal guidance letters addressed to parties seeking guidance on the interpretation of the merger rules. It did not issue any informal opinions in 2018.

A major challenge is the healthcare-specific merger test of the NZa.[46] The Minister had proposed to transfer this test to the ACM as per 1 January 2017,[47] which may bring some procedural efficiency. The transfer would not affect the essence of the test and hence

44 Decision ACM of 31 October 2016 (*Borgesius/Bakkersland*) Case 16.0592.22.

45 Decision ACM of 7 September 2016 (*Sonova/Audionova*) Case 16.0721.22.

46 Article 49 of the Health Care (Market Regulation) Act of 1 October 2006.

47 Proposal of law of 8 April 2016, 34445.

will continue to pose a heavy administrative burden on the parties involved. At the time of finalising this chapter in 2019 the legislative proposal had not been adopted by the Dutch parliament.[48]

An even bigger challenge, at least for hospital mergers, may be posed by the new best practices discussed in Section II.iv regarding hospital mergers, as they will greatly increase the burden on the parties to a concentration. Moreover, the ACM has suggested to the Ministry of Health, Welfare and Sport that all acquisitions by care institutions with significant market power as well as concentrations above a certain scale be prohibited unless the concentration would result in significant efficiencies.[49] It is a matter of concern that the ACM may be swayed by a certain populist sentiment against healthcare mergers. The Phase II decision regarding specialised commercial clinics discussed in Section II.iv does not bode well, as the ACM seemed to display a certain eagerness to find objections to the concentration.

In line with the general trend in the EU to be more cautious about foreign direct investment, the Minister has submitted a legislative proposal that would enable the Dutch cabinet to block or reverse acquisitions in the telecommunications sector. The proposal aims to prevent any 'undesirable' mergers by foreign companies that can be linked to criminal activities, are financially vulnerable or have a non-transparent corporate structure.[50] The Minister is also considering additional legal mechanisms to protect companies from hostile takeovers, such as the introduction of a mandatory period of reflection for the board. These legislative debates had, at the time of writing, only been conducted in an informal manner. Therefore, it is still unclear whether and which mechanisms may be introduced.[51]

The trend for third parties to challenge mergers that are approved by the ACM continues, but this concerns only a few very sensitive cases.[52]

48 See here: www.tweedekamer.nl/kamerstukken/wetsvoorstellen/detail?id=2016Z07311&dossier=34445.

49 ACM, Letter to the Minister for Health, Welfare and Sport, 19 July 2018, regarding Reaction ACM to requests by the Minister for suggestions to intensify merger control (Reactie ACM op verzoeken Minister om suggesties voor verscherping fusietoezicht), see: www.rijksoverheid.nl/documenten/brieven/2018/10/22/reactie-autoriteit-consument-markt-op-verzoeken-minister-om-suggesties-voor-verscherping-fusietoezicht.

50 See: www.internetconsultatie.nl/telecommunicatie.

51 See: https://fd.nl/Print/krant/Pagina/Voorpagina/1199825/kamp-dreigt-metzwaardere-wapens-tegen-overnames.

52 See the *NPCF* and *Reggefiber* cases discussed in Section II.ii.

Appendix 1

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Gerrit Oosterhuis is an associate partner at Houthoff and heads the Brussels office of the firm. He focuses on merger control work, cartel defence litigation and abuse of dominance procedures. In the field of merger control, he regularly acts for private equity funds as well as strategic buyers, acting in recent joint ventures such as *Varo/Argos DSE/Vitol/Carlyle/Reggeborgh*, *DEME/Oceanflore* and *Parcom/Pon/Imtech Marine*, concentrations in the food sectors such as *FrieslandCampina/Zijerveld* and major Dutch cases such as *Euretco/Intres* and *Shanks/Van Gansewinkel*. Mr Oosterhuis has been involved in defence work in major Dutch cartel cases. He has a substantial behavioural practice, advising clients such as *SHV Energy*, *Hasbro Europe* and *Royal Bunge*.

Mr Oosterhuis joined Houthoff in 1999. He works from Houthoff's Brussels and Amsterdam offices. He was recommend in *Chambers Europe 2019*: clients highlight his 'technical knowledge and commercial awareness' and describe him as 'client-orientated, effective and pragmatic'.

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Weyer VerLoren van Themaat has been assisting international clients for over 25 years in the most challenging and complex cases related to merger control and cartel defence litigation, and leads Houthoff's competition practice group. In the field of merger control, he has acted, inter alia, in European cases such as *TomTom/TeleAtlas*. He has a substantial healthcare practice. He was involved in almost all Dutch Phase II hospital mergers and received assignments for litigating merger fines from, inter alia, Singapore Airlines.

He was resident partner at Houthoff's Brussels office from 1997 to 2005, after which he returned to Amsterdam. He is chair emeritus of Lex Mundi's Antitrust Competition and Trade Group and a non-governmental adviser to the Dutch Authority for Consumers and Markets (ACM). He publishes and speaks regularly on competition law-related subjects. Mr VerLoren van Themaat is recommended in, inter alia, *Chambers Europe* (2019 edition), *The Legal 500* (2015 edition), *Who's Who Legal* (2014 edition) and *Best Lawyers* (2014 edition). He is described as 'smart and strategic' (*The Legal 500*, 2017 edition: EU and Competition). Interviewees highlight his strengths, saying: 'He is practical and has so much experience he is on top of the subject. He always approaches difficult topics in a positive manner and we have very open communication with each other.' (*Chambers Europe*, 2019 edition.)

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