The Merger Control Review

Sixth Edition

Editor
Ilene Knable Gotts

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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, particularly in Asia, are poised to add pre-merger notification regimes in the next year or so. The 10 Member States of the Association of Southeast Asian Nations, for example, have agreed to introduce national competition policies and laws by year-end 2015. We have expanded the jurisdictions covered by this book to include the newer regimes as well in our endeavour to keep our readers well informed.

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. China, for instance, in 2009 blocked the Coca-Cola Company’s proposed acquisition of China Huiyuan Juice Group Limited and imposed conditions on four mergers involving non-Chinese 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 a transaction develops a comprehensive plan prior to, or immediately upon, execution of the agreement concerning where and when to file notification with competition authorities regarding the transaction. In this regard, this book provides an overview of the process in 43 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 pharma and high-technology companies, we have added to this year’s edition chapters focusing on the US and EU 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 discussing 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 clients on a particular transaction. Almost all jurisdictions vest exclusive authority to review transactions in one agency. The US and China may end up being the exceptions in this regard. 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, for instance, provides for a de minimis exception for transactions occurring in markets with sales of less than €15 million. There are some jurisdictions, however, that still use ‘market share’ indicia (e.g., Bosnia and Herzegovina, Colombia, Lithuania, Portugal, Spain, Ukraine and the UK). 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, Turkey recently issued a decision finding that a joint venture (JV) that produced no effect in Turkish markets was reportable because the JV’s products ‘could be’ imported into Turkey. 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 UK and Venezuela), the vast majority impose mandatory notification requirements.

The potential consequences for failing to file in jurisdictions with mandatory requirements varies. Almost all jurisdictions require that the notification process be concluded prior to completion (e.g., pre-merger, suspensory regimes), rather than permitting the transaction to close as long as notification is made prior to 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 Authority imposed a €4 million fine on Castel Frères for failure to notify its acquisition of part of Patriache group. 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 and India provide for 15 days after signing the agreement; and Hungary, Ireland and Romania have a 30-calendar-day time limit commencing with the entering into the agreement for filing the notification. 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, India 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., Greece, Portugal, Ukraine and the US). 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 addition, other jurisdictions have joined the EU and US in focusing on interim conduct of the transaction parties. Brazil, for instance, issued its first ‘gun jumping’ fine last year and recently issued guidelines on gun jumping violations. In most jurisdictions, a transaction that does not meet the pre-merger notification thresholds is not subject to review and challenge by the competition authority. In Canada – like the US – however, the agency can challenge mergers that were not required to be notified under the
pre-merger statute. In 2014 alone, the Canadian Competition Bureau took enforcement action in three non-notifiable mergers.

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 EU model than the US 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 Japanese 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 process with the EU model. There remain some jurisdictions even within the EU that differ procedurally from the EU 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 are to 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 EU and Germany), third parties may file an objection to a clearance decision. In some jurisdictions (including Canada, the EU and the US), 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 Authority.

In almost all jurisdictions, once the authority approves the transaction, it cannot later challenge the transaction’s legality. The US 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, in that the Authority has the ability to
mandate notification of a transaction for a period of up to three months following the transaction's consummation.

It is becoming the norm in large cross-border transactions raising competition concerns for the US, Canadian, Mexican and EU authorities to work closely together during the investigative stages, and even in determining remedies, minimising the potential of arriving at diverging outcomes. The Korean Fair Trade Commission 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 EU jurisdictions, Member States often keep each other informed during the course of an investigation. In addition, transactions not meeting the EU threshold can nevertheless be referred to the Commission in appropriate circumstances. In 2009, the US signed a memorandum of understanding with the Russian Competition Authority to facilitate cooperation; China has 'consulted' with the US and the EU on some mergers and entered into a cooperation agreement with the US authorities in 2011. The US also has recently entered into a cooperation agreement with India.

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 EU 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 UK 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 standalone 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. Multijurisdictional 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 US 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 environment, obtaining the approval of jurisdictions such as Brazil and China can be as important as the approval of the EU or the US. 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 EU, France, the Netherlands, Norway, South Africa, Ukraine and the US). For instance, some recent decisions have included as behavioural remedies pricing, sales tariffs and terms of sale conditions (e.g., Ukraine and Serbia), employee retrenchment (South Africa) and restrictions on bringing antidumping 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, 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.

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Chapter 25

NETHERLANDS

Gerrit Oosterhuis and Weijer VerLoren van Themaat

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 & Markets (ACM, formerly the Dutch competition authority, NMa) when it comes to, for example, the full functionality of a joint venture or the geographical allocation of turnover.

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

### Workload

The ACM received 75 notifications and reached 72 decisions in 2014, slightly less than in 2013 (91 notifications and 85 decisions).\(^5\) The majority of notifications resulted in one-page short decisions. Only eight Phase I decisions were substantiated (with reasons, down from 15 in 2013). The overwhelming majority of these involved the health-care sector (six),\(^6\) with the remaining two concerning production\(^7\) and distribution.\(^8\)

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 preparation of notifications burdensome and the notification process unpredictable. The ACM partially makes up for the ‘guidance deficit’ by publishing informal guidance letters addressed to parties seeking guidance on the interpretation of the merger rules, but it published only two in 2014, down from four in 2013 and 10 in 2012.

Three notifications required a Phase II investigation,\(^9\) of which one was cleared without remedies in Phase II,\(^10\) one required remedies\(^11\) and one still awaits a final decision.\(^12\)

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9 Compared with two notifications that required a Phase II investigation in 2013.


An exemption from the mandatory waiting period has been granted three times, two of which concerned the health-care sector.\(^{13}\)

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

### ii Infringements of formal obligations and legal proceedings

The District Court of Rotterdam upheld the decision of the ACM in the *Dutch Rusk* case. In this case, the ACM refused to grant a licence for the concentration of two parties that produced, *inter alia*, rusks for sale to the retail channel. The ACM had defined a very narrow product market of rusks only. Contrary to certain Commission decisions, it held that the upstream product market included both branded and private label products. On this market, the parties had a share of 70 to 80 per cent. The parties had offered to divest a rusk production line, which remedy was refused by the ACM.\(^{14}\) The District Court confirmed that the ACM had been entitled to do so, as it had sufficiently demonstrated the risk that a buyer of this line would not remain active on the market in the medium term because the investment would be recuperated very quickly.\(^{15}\)

The ACM also won in the *NS* case. It had allowed Dutch incumbent railway undertaking NS to acquire the business unit for travel information from the rail infrastructure operator ProRail.\(^{16}\) This made NS responsible for all travel information on the Dutch rail network. Rival railway undertakings feared discrimination by NS and appealed. The District Court held that the ACM was right to conclude that sufficient guarantees were provided for competitors even without a structural remedy. Procedurally, the NS had restructured the transaction during the notification process and submitted an amended notification form to the ACM, as is customary in the Netherlands. The District Court held that this practice is legitimate.\(^{17}\)

### iii Phase I decisions

The ACM carefully investigated whether the acquisition of sanitary ceramics producer Sanitec Oyi by Geberit, a large producer of plastic sanitary products such as flush systems, would allow the parties to bundle their complementary products. It held that there was indeed an incentive to bundling, but that foreclosure was unlikely as several multinational competitors were also capable of bundling and remained (potential) competitors.\(^{18}\)

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\(^{14}\) Decision NMa 14 December 2012 (*Continental Bakeries–AA ter Beek*), Case 7321.


\(^{16}\) Decision NMa 3 October 2012 (*NS Reizigers–Reisinformatie ProRail*), Case 7436.


In the merger between the Noorderboog and Isala hospitals, the ACM found hardly any overlap between the areas where the patients of these respective hospitals came from. They were each other’s closest competitors in only five out of 22 municipalities. The health-care insurers did not expect any difficulties in keeping the merged entities’ behaviour in check, and the ACM allowed the concentration.19

In the merger between the Rijnland and Diaconessenhuis Leiden hospitals, the ACM found considerably more overlap than in the Noorderboog/Isala case, as 60 to 70 per cent of the patients of Rijnland and Diaconessenhuis Leiden came from municipalities where the hospitals were each other’s closest competitors. Nevertheless, the ACM found that the competitive pressure from the peripheral working areas would suffice to keep the merged entity in check throughout its entire working area and allowed the concentration.20

The ACM examined the home-care market when Tzorg wanted to acquire the home-care activities of Careyn and Zuwe Zorg. The ACM analysed the effects on separate markets for home care per municipality. The parties had relatively high market shares of 30 to 90 per cent in the relevant municipalities. However, the ACM found that there was at least one credible alternative home-care supplier active in each municipality, and that this was sufficient to discipline the merged entity taking into account the fact that contracts for home care are awarded through tendering.21

iv Phase II cases
Reggefiber Holding and Dutch telecoms incumbent KPN had joint control over fibre-optic cable company Reggefiber Group. At the creation of this joint venture, the NMa had imposed a number of conditions, including access and non-discrimination obligations, which would lapse if KPN would acquire sole control. The ACM wanted to investigate in depth whether this would allow KPN to foreclose its competitors from access to fibre-optic cables.22 In Phase II, the ACM considered that KNP would be subject to regulatory telecoms obligations, including pricing ceilings and non-discrimination obligations. Consequently, it held that KPN would have an incentive to foreclose its competitors, but would not be able to do so thanks to regulatory obligations.23

The Persgroep, a publisher of mainly national newspapers, notified its intention to acquire Mecom, a publisher of mainly regional newspapers, in 2014. The ACM found that to readers, national and regional newspapers are hardly competing products. However, the ACM found it necessary to investigate in depth any consequences on the

20 Decision ACM 19 February 2014 (Stichting Zorggroep Rijnland–Stichting Diaconessenhuis Leiden), Case 13.1462.22.
21 Decision ACM 22 May 2014 (Tzorg–Careyn HZ BV–Zuwe Zorg BV), Case 14.0504.22.
22 Decision ACM 6 May 2014 (KPN–Reggefiber), Case 14.0217.22.
markets for advertising space and for the printing and distribution of newspapers, and sent the case into Phase II. 24

In the last case that went into Phase II in 2014, the intended hospital merger between Albert Schweitzer Ziekenhuis and Rivas, the ACM found that the parties were each other’s closest competitors. 25 In addition, the health-care insurers were concerned of a worsening of their bargaining position. This was an important reason for the ACM to require a licence for the transaction, in line with its guidance document regarding the assessment of health-care mergers. 26

v Exemptions from the standstill period
The ACM granted an exemption of the mandatory standstill period before closing of a concentration is permitted on three occasions. One case, exceptionally, did not concern a bankruptcy. The ACM granted an exemption because the target hospital had an acute liquidity problem and the ACM was convinced that the hospital’s business would be irreparably damaged during the waiting period. 27

In two cases where the ACM granted an exemption of the standstill period, it did so with limitations. 28 The ACM found that the financial power of the buyer was necessary to save the business of the target, but also that it was likely that the ACM would want to perform a Phase II investigation due to the risks for effective competition posed by the proposed concentrations. Hence, the parties were prohibited from integrating their organisations in any way before the ACM would have taken a final decision. Both cases concerned the health-care sector.

vi Lifting of remedies
In 2009, the ACM allowed two regional hospitals in the province of Zeeland to merge to near monopoly, but imposed a pricing ceiling. 29 In 2012, the merged hospital, Admiraal de Ruyter Ziekenhuis (ADRZ), requested the ACM to lift this remedy based on changed market circumstances. The ACM found that the market share of ADRZ had declined.


25 Decision ACM 18 March 2014 (Stichting Albert Schweitzer Ziekenhuis/Stichting Rivas Zorggroep), Case 13.1464.22. The parties submitted a request for a licence in Phase II on 9 September 2014. At the time of writing, the ACM had not yet issued a decision.

26 In this document, the ACM sets out that it will gave much weight to the opinion of patient organisations and health-care insurers when assessing mergers. It is not published in English. See ‘Beoordeling fusies en samenwerkingen ziektenhuiszorg’ at www.acm.nl/nl/download/publicatie/?id=12037 for the Dutch language version.


29 Decision NMa 25 March 2009 (Ziekenhuis Walcheren/Oosterscheldeziekenhuizen), Case 6424.
only slightly, that the health-care insurers felt they still lacked the power to discipline the ADRZ and that the pricing ceiling formed only a minor administrative burden. ADRZ’s request was denied.\(^{30}\)

When Nordic Capital Fund VII acquired wheelchair manufacturer Handicare in 2010, Nordic Capital Fund V already owned rival wheelchair manufacturer Permobil. For the concentration to take place, Handicare had to divest a substantial part of its business and was prohibited from buying back the divested business for a period of 10 years.\(^{31}\) After Nordic Capital Fund V sold Permobil to a third party in 2013, Nordic Capital requested that the ACM lift the buy-back prohibition under the remedies. In the absence of precedents, the ACM decided on the basis of the facts and the Commission’s Revised Remedies Notice that the buy-back prohibition could indeed be lifted. Handicare proceeded to reacquire the business that it had divested in 2010.\(^{32}\)

III THE MERGER CONTROL REGIME

i Merger control thresholds

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

- the combined turnover of all undertakings concerned exceeds €150 million in the calendar year preceding the concentration;\(^{33}\)
- 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.

Health-care undertakings

All concentrations involving at least one health-care undertaking must be notified to the Dutch Healthcare Authority (NZa). For the purpose of the health-care specific test carried out by the NZa, a health-care undertaking is defined as an undertaking employing or contracting more than 50 health-care providers (persons).\(^{34}\) The NZa evaluates, inter

\(^{30}\) Decision ACM 23 October 2014, Case 12.0264.24.

\(^{31}\) Decision NMa 10 December 2010 (Nordic Capital–Handicare), Case 6900.

\(^{32}\) Decision ACM 10 June 2014 (Nordic Capital), Case 14.0243.30.

\(^{33}\) This amount was €113.45 million until the Act for the streamlining of market surveillance by the ACM, which includes this change, entered into force on 1 August 2014. The new threshold corrects the amount of €113.45 million introduced in 1998 for inflation purposes and should (slightly) lower the administrative burden for businesses.

\(^{34}\) The relevant amendment to the Health Care (Market Regulation) Act was voted on 26 November 2013 and is applicable as of 1 January 2014. Decree dated 17 December 2013, establishing the effective date of the Act of 27 November 2013, consisting of amendments to the Health Care (Market Regulation) Act, the Patients’ Rights (Care Sector) Act and several other Acts related to the timely identification of risks regarding the continuity of care as well as the tightening of procedures to ensure the quality and accessibility of health care; Government Gazette 2013, 522.
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 health-care undertaking is an undertaking that achieves at least €5.5 million turnover through health-care services. A concentration between two or more health-care 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.35

**Insurance companies**

In the case of insurance companies within the meaning of the Act on Financial Supervision, Article 31(2) DCA now stipulates that the general thresholds of Article 29(1) apply. Turnover will be calculated on the basis of gross premiums written.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 (including industry-wide pension funds, occupational pension funds and company pension funds) will be regarded as an undertaking for competition law purposes. The turnover of pension funds will be determined on the basis of the gross premiums written in the previous calendar year.

**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 authority 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.

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35 These thresholds will continue to apply until at least 1 January 2018. Decision of 19 October 2012, amending the decision of 6 December 2007 regarding the temporary lowering of the thresholds for health care mergers, Government Gazette 2012, 515.

36 The Act for the streamlining of market surveillance by the ACM, which includes this change, was adopted on 24 June 2014 and most provisions entered into force on 1 August 2014. Previously, a complicated lower threshold applied.
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 authority 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 (theoretical) possibility – which has never been undertaken to date – of requesting the Minister of Economic Affairs, Agriculture and Innovation to grant a licence due to serious reasons of general interest.

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 authority asks formal questions requiring additional information on the concentration. Due to 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.37

There are no requirements for pre-notification.

Exemption waiting period

As previously indicated, the concentration may not be completed during the review period. However, there are some exceptions to the prohibition on implementing a concentration prior to clearance, 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

37 Decision NMa 18 February 2010 (Cooperatie Vlietland/Vlietland Ziekenhuis), Case No. 6669.
granted within several working days. Once the exemption is granted, the concentration may be completed before the authority clears it.

In both of the above-mentioned cases, 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 authority also actively gathers information by sending out questionnaires or by interviewing third parties.

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.\textsuperscript{38}

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.\textsuperscript{39} 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,\textsuperscript{40} but does require, \textit{inter alia}:

\begin{itemize}
  \item[a] the proposal to be in writing;
  \item[b] a detailed description of the nature and size of the remedy;
  \item[c] a note on how all indicated competition concerns will be eliminated;
  \item[d] if applicable, the steps required to divest a part of the undertaking and the timeline for such;
  \item[e] a non-confidential version of the proposal to be attached; and
  \item[f] a timely filing of the proposal.
\end{itemize}

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 prior to 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

\textsuperscript{38} 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).

\textsuperscript{39} Remedies guidelines 2007. This section is based on these guidelines.

\textsuperscript{40} In its guidelines, the authority does refer to model texts from the European Commission.
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.  

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. On the basis of Articles 2.5 and 2.6 of the 2014 ACM Fining Policy Rule, the ACM generally calculates its fines on the basis of 1.25 per cent or 3.75 per cent of the total Dutch turnover in the preceding financial year for the buyer; however, the ACM has substantial leeway to increase the resulting amount of the fine if it deems it to be too low.

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.

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.

41 For example, the £2 million fine imposed on Wegener; for more information, see the Netherlands chapter in the 2013 edition of this publication.
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. Consequently, it is better to err on the side of caution. In cases of unprecedented situations, it is possible to seek informal guidance from the authority through its ‘informal observations’. Although not binding, these informal observations provide relative certainty that the authority will not act otherwise in the specific case, provided that the information provided in the informal procedure was correct and complete.

V OUTLOOK AND CONCLUSIONS

The merger of the NMa with the telecom regulator OPTA and the Consumer Authority was effectuated per 1 April 2013. Some changes to the powers of the authority, such as the increase in merger thresholds and the possibility to exchange information with other government agencies, entered into force on 1 August 2014.43

Since the merger, the ACM is clearly placing more priority on consumer protection than on the competitive structure of the market. This is, so far, of small consequence in the field of merger control, where the ACM generally remains quite realistic in its analyses.

The main challenge for private parties remains how to deal with the tendency of the ACM to refuse to conduct more substantial investigations during Phase I, obliging parties to offer radical remedies to prevent a time-consuming Phase II investigation.

Another major challenge is the health-care specific merger test of the NZa, which proves to be a heavy administrative burden. It, for example, requires parties to have detailed integration plans ready even before the ACM has approved the transaction, which defies transactional logic – especially in cases with significant overlap. There is hope for more efficiency going forward, as the performance of the health-care specific test will be transferred to the ACM.44

The trend for third parties to challenge mergers that are approved by the ACM continues, but this concerns only a few very sensitive cases.45

A legislative proposal is pending to raise the fining ceilings of the ACM considerably. The absolute maximum would be raised from €450,000 to €900,000. The relative maximum amount for cartel infringements would become 10 per cent of the turnover of the infringing group, multiplied by the number of years that the cartel lasted up to a maximum of four years. All maximum fines would double in cases of recidivism. Notably, the last change would affect fines for late filing.46

43 See footnote 33.
44 Letter of the Minister Health, Welfare and Sport of 6 February 2015, 723296-1333115-Z.
45 See the NS case discussed in Section II.ii infra.
46 Legislative proposal of 14 April 2015 to change a number of laws in the working space of the Ministry of Economic Affairs, concerning a raise of the maximum fines applicable to the ACM, TK 2014/15, 34190. It is not certain that the proposal will be adopted, as the European Commission reacted sceptically and the Council of State advised in the negative.
Appendix 1

ABOUT THE AUTHORS

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Gerrit Oosterhuis is a counsel at the office of Houthoff Buruma in Brussels. 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 North Sea Group/Argos Group, IHC/DEME/Oceanflore and Reggeboorh/Boskalis/VSMC, as well as concentrations in the food and retail sectors such as Euretco/Intres and FrieslandCampina/Zijerveld. 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 Koninklijke Bunge.


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Weijer 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 Buruma’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 health-care practice. In 2012, he acted in two out of the three Dutch Phase II hospital mergers and received assignments for litigating merger fines from, inter alia, Amlin.

He was resident partner at Houthoff Buruma’s Brussels office from 1997 to 2005, after which he returned to Amsterdam. He is chair 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

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