

THE MERGER  
CONTROL  
REVIEW

EIGHTH EDITION

Editor  
Ilene Knable Gotts

THE LAWREVIEWS

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The Merger Control Review

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# NETHERLANDS

*Gerrit Oosterhuis and Weyer VerLoren van Themaat*<sup>1</sup>

## 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<sup>2</sup> (ACM) when it comes to, for example, the full functionality of a joint venture<sup>3</sup> or the geographical allocation of turnover.<sup>4</sup>

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 105 notifications and reached 100 decisions in 2016 – considerably more than in 2015 (89 notifications and 88 decisions) and thereby reflecting the economic upturn.<sup>5</sup> The majority of notifications resulted in one-page short decisions. Only nine

---

1 Gerrit Oosterhuis is a counsel and Weyer VerLoren van Themaat is a partner at Houthoff Buruma.

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 Online Annual Report 2016 of the ACM (Dutch version), see <https://jaarverslag.acm.nl/jaarverslag-2016/concentraties>.

Phase I decisions were substantiated (with reasons, up from nine in 2015 and eight in 2014). The majority of these involved the healthcare sector, with three hospital mergers<sup>6</sup> and two transactions involving homecare providers.<sup>7</sup> Of the four remaining cases, two concerned the distribution and retail of pharmaceutical products,<sup>8</sup> one concerned the supply of hearing aids<sup>9</sup> and the other the production, sale and distribution of bread (products), banquet and pastry.<sup>10</sup> The ACM would have liked one more case: it asked the European Commission to refer the *Vodafone/Ziggo* case to it, but the European Commission reviewed that concentration itself.<sup>11</sup>

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 published only one such letter in 2016, and this one concerned whether special education for children with psychiatric or behavioural disorders must be regarded as an economic activity.<sup>12</sup> The ACM also issued a communication declaring the non-applicability of merger control to a specific case.<sup>13</sup>

The ACM concluded that a Phase II investigation was necessary in two cases,<sup>14</sup> one of which was subsequently cleared without remedies in Phase II.<sup>15</sup> The other is awaiting a final decision at the time of finalising this chapter in 2017.<sup>16</sup> In addition, the ACM reached a decision in another Phase II investigation that had already started in 2015. This concentration was allowed with remedies.<sup>17</sup>

An exemption from the mandatory waiting period has been granted four times. Two of these concerned healthcare providers, one the retail of shoes and clothing and the other one the production and supply of equipment for the shipping and offshore industry.<sup>18</sup>

The ACM did not impose any fines for a failure to notify a concentration in 2016.

- 
- 6 Decision ACM 22 November 2016 (*Waterlandziekenhuis/Westfriesgasthuis*) Case 16.0469.22; Decision ACM 6 December 2016 (*Slingeland Ziekenhuis/Streekziekenhuis Koningin Beatrix*) Case 16.0680.22 and Decision ACM 14 December 2016 (*Academisch Medisch Centrum/Stichting VUmc*) Case 16.0685.22.
- 7 Decision ACM 15 July 2016 (*Stichting AriënsZorgpalet/Stichting Bruggerbosch*) Case 16.0552.22 and Decision ACM 21 December 2016 (*Stichting Elisabeth/Stichting Avoord/Stichting Surplus Zorg*) Case 16.0540.22.
- 8 Decision ACM 1 April 2016 (*Holland Pharma/DA*) Case 15.1276.22 and Decision ACM 4 July 2016 (*Holland Pharma/FACO*) Case 16.0062.22.
- 9 Decision ACM 7 September 2016 (*Sonova/AudioNova*) Case 16.0721.22.
- 10 Decision ACM 31 October 2016 (*Incarlin/Bakkersland*) Case 16.0591.22.
- 11 Decision European Commission 3 August 2016 (*Vodafone/Liberty Global/Dutch JV*), Case M.7978.
- 12 Letter ACM (*Stichting Horizon/Stichting Altra*), Case 16.0330.15.
- 13 Letter ACM 13 December 2016 (*VDL/Componenta*), Case 16.1188.22.
- 14 Decision ACM 4 July 2016 (*Holland Pharma/FACO*) Case 16.0062.22 and Decision ACM 14 December 2016 (*Academisch Medisch Centrum/Stichting VUmc*) Case 16.0685.22.
- 15 Decision ACM 12 December 2016 (*Holland Pharma/FACO*) Case 16.0860.24.
- 16 Decision ACM 14 December 2016 (*Academisch Medisch Centrum/Stichting VUmc*) Case 16.0685.22.
- 17 Decision ACM 13 June 2016 (*Brocacef/Mediq*) Case 15.0849.24.
- 18 Decision ACM 15 April 2016 (*Arkin/Victas*) Case 16.0357.23; Decision ACM 15 July 2016 (*Pluryn Hoenderloo Groep/Intermetzo*) Case 16.0712.23; Decision ACM 19 January 2016 (*Zieng/Scapino*) Case 16.0066.23 and Decision ACM 28 November 2016 (*Nimbus/CIG*) Case 16.1181.22.

## ii Infringements of formal obligations and legal proceedings

Four merger decisions, being a relatively large number, were appealed in 2016, but the ACM won most of them.

In 2014 the ACM had allowed the acquisition of Geberit by Sanitec, creating a conglomerate.<sup>19</sup> The Rotterdam District Court stated that the ACM had correctly held that the creation of a conglomerate can be allowed even if it is detrimental to the position of competitors, as long as those would still be capable of disciplining the conglomerate.<sup>20</sup>

In 2008 the ACM had allowed a joint venture for laying fibre cables between Reggefiber and telecom incumbent KPN, under conditions. When KPN acquired sole control over the joint venture, the ACM did not re-impose these conditions, claiming that new sector regulation would impose the same restraints on KPN. The District Court agreed.<sup>21</sup>

Brocacef appealed the Phase II conditions that the ACM imposed on Brocacef's acquisition of Mediq (see Phase II mergers, *infra*). At the same time, it requested the Rotterdam District Court to suspend these conditions. The court refused such relief, holding that the conditions imposed would not cause immediate irreparable harm and that Brocacef would have to wait for the outcome of the substantive proceedings.<sup>22</sup>

In 2015 the ACM had for the first time prohibited a hospital merger, relying strongly on the opinion of the healthcare insurers that they would not be able to discipline the new entity.<sup>23</sup> The parties appealed, but the Court upheld the decision of the ACM, holding that ACM was allowed to give much weight to the insurers' opinion and that the ACM was not obliged to accept the – behavioural – pricing remedy that the parties had proposed.<sup>24</sup>

In the *Dutch Rusk* case, ACM had prohibited the acquisition by private label rusk producer Continental Bakeries of branded rusk producer Bolletje, on the basis that private label and branded rusk form one product market. The parties argued that branded and private label products are two separate markets, notably because retailers source them in a different way and because the retail price is set differently. The Regulatory Industrial Organisation Appeals Court (CBb) held that the ACM had not conclusively refuted the parties' arguments and quashed the ACM's decision.<sup>25</sup>

On a more formal note, the Rotterdam District Court held that if a merger is notified to the ACM, the filing fee is due even if the ACM holds that the relevant transaction is not notifiable and the notification is subsequently withdrawn.<sup>26</sup>

## iii Phase I decisions

Holland Pharma, a wholesaler of personal care products, notified the acquisition of DA, a rival wholesaler with an important personal care franchise. The ACM allowed the acquisition without remedies after ruling out foreclosure effects on the basis of the continued availability

19 Decision ACM 18 December 2014 (*Geberit/Sanitec*), Case 14.1154.22.

20 Rotterdam District Court 7 April 2016 (*Ucoson/ACM*), ECLI:NL:RBROT:2016:2292.

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

22 Rotterdam District Court 15 September 2016 (*Brocacef/ACM*), ECLI:NL:RBROT:2016:7082.

23 Phase II decision ACM 15 July 2015 (*Albert Schweitzer Ziekenhuis/Stichting Rivas Zorggroep*) Case 14.0982.24.

24 Rotterdam District Court 15 September 2016 (*Brocacer/ACM*), ECLI:NL:RBROT:2016:7082.

25 CBb 11 February 2016 (*Continental Bakeries/ACM*), ECLI:NL:CBB:2016:23.

26 Rotterdam District Court 21 July 2016, (*Parnassia Groep/ACM*), ECLI:NL:RBROT:2016:5486.

of other wholesalers.<sup>27</sup> When Holland Pharma wanted to buy FACO, another wholesaler of personal care products, ACM decided to investigate the risks of foreclosure in Phase II (see also under Phase II cases, *infra*).<sup>28</sup>

Producer of hearing aids Sonova was allowed to buy AudioNova, a chain of hearing aid shops, subject to the divestment of only two shops.<sup>29</sup>

The acquisition of industrial bakery Bakkersland by its competitor Borgesius – being respectively the numbers one and two fresh bread producers – was allowed without remedies, but only after Borgesius had formally withdrawn from a joint venture with some other industrial bakers and had adjusted its notification accordingly.

Two mergers of local hospitals<sup>30</sup> as well as two merger of homecare providers<sup>31</sup> were allowed without remedies, but were discussed in detail in the decisions, at least in part due to the political attention for the healthcare sector. The proposed merger between the two university hospitals of Amsterdam – AMC and VUmc – was referred to Phase II. The ACM distinguished a market for basic hospital care where sufficient competition remained due to the presence of other ‘basic’ hospitals in the Greater Amsterdam area, but saw a risk for competition on the market for ‘top competitive’ hospital care.<sup>32</sup>

#### iv Phase II cases

ACM held that the acquisition of Mediq, active with a wholesale and franchise business in pharmaceutical products, by its competitor Brocacef would significantly reduce competition. On the market for the wholesale supply of pharmaceutical products to hospitals Mediq had to sell its relevant subsidiary. To address problems on numerous local retail markets, the parties had to sell 89 pharmacies and commit to not supply these with their wholesale business for a period of two years.<sup>33</sup>

The acquisition of FACO by Holland Pharma, both active with wholesale and franchise of personal care products (see also under Phase I cases *infra*), was allowed without remedies in Phase II. The ACM concluded that there are alternative personal care wholesalers available. On the retail market, the new entity would be disciplined by large vertically integrated retail chains.<sup>34</sup>

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27 Decision ACM 1 April 2016 (*Holland Pharma/DA*), Case 15.1276.22.

28 Decision ACM 4 July 2016 (*Holland Pharma/FACO*), Case 16.0062.22.

29 Decision ACM 7 September 2016 (*Sonova/AudioNova*), Case 16.0552.22.

30 Decision ACM 22 November 2016 (*Waterlandziekenhuis/Westfriesgasthuis*) Case 16.0469.22 and Decision ACM 6 December 2016 (*Slingeland Ziekenhuis/Streekziekenhuis Koningin Beatrix*) Case 16.0680.22.

31 Decision ACM 15 July 2016 (*Stichting AriënsZorgpalet/Stichting Bruggerbosch*) Case 16.0552.22 and Decision ACM 21 December 2016 (*Stichting Elisabeth/Stichting Avoord/Stichting Surplus Zorg*) Case 16.0540.22.

32 Decision ACM 14 December 2016 (*Academisch Medisch Centrum/Stichting VUmc*), Case 16.0685. Phase II of this case was still pending at the time of writing.

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

34 Decision ACM 12 December 2016 (*Holland Pharma/FACO*), Case 16.0860.24.



## v Exemptions from the standstill period

The ACM granted an exemption of the mandatory standstill period before closing of a concentration is permitted on four occasions.<sup>35</sup> They all involved an inevitable bankruptcy on the side of the target.

In one case concerning a chain of consumer retail stores, the ACM found that due to the bankruptcy of the target, suppliers refused to ship the spring and summer collections from China. The ACM granted an exemption because these collections were considered essential for the continuity of the stores and supply could not wait any longer due to shipping delays.<sup>36</sup>

At the bankruptcy of healthcare providers *Victas* and *Intermetzo*, the concern that the continuity of care was at risk, led to exemptions of the waiting period.<sup>37</sup>

It must be noted that the ACM is able to render an exemption from the standstill period much faster than in the recent past: in the cases of *Scapino* and *Victas* an exemption was even granted within a day.

## vi Impact assessment reports

The ACM published two reports, one regarding the use of conjoint analysis in merger control and the other regarding the effects of hospital mergers on the quality of care.

The first report examined how conjoint analysis can be applied in merger cases by competition authorities. The authors, three economists of the ACM, note that European competition authorities make little use of this technique.<sup>38</sup> Using actual examples from ACM's practice, they explain how conjoint analysis can be used successfully but also what pitfalls should be avoided.

The second report, conducted by Significant, investigated hospital mergers that took place between 2007 and 2014 and their effects on the quality of care. It found that there are no indications that the quality of care improves significantly after hospital mergers, and suggested on the contrary that hospital mergers cause important price raises. The report has been criticised, for example, because the price raises it discusses seem to be based on economic models and not on real price data.<sup>39</sup>

## 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.

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35 Decision ACM 15 April 2016 (*Arkin/Victas*) Case 16.0357.23; Decision ACM 15 July 2016 (*Pluryn Hoenderloo Groep/Intermetzo*) Case 16.0712.23; Decision ACM 19 January 2016 (*Ziengs/Scapino*) Case 16.0066.23 and Decision ACM 28 November 2016 (*Nimbus/CIG*) Case 16.1181.22.

36 Decision ACM 19 January 2016 (*Ziengs/Scapino*) Case 16.0066.23.

37 Decision ACM 15 April 2016 (*Arkin/Victas*) Case 16.0357.23 and Decision ACM 15 July 2016 (*Pluryn Hoenderloo Groep/Intermetzo*) Case 16.0712.23.

38 See here: [www.acm.nl/nl/publicaties/publicatie/15746/ACM-Working-Paper-over-conjunct-meten-in-concentratiezaken/](http://www.acm.nl/nl/publicaties/publicatie/15746/ACM-Working-Paper-over-conjunct-meten-in-concentratiezaken/).

39 See here: [www.acm.nl/nl/publicaties/publicatie/16256/Ziekenhuisfusies-en-kwaliteit-van-zorg/](http://www.acm.nl/nl/publicaties/publicatie/16256/Ziekenhuisfusies-en-kwaliteit-van-zorg/).

Alternative jurisdictional thresholds exist for the following undertakings.<sup>40</sup>

### ***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).<sup>41</sup> 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.<sup>42</sup>

### ***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.<sup>43</sup>

## **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

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40 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.

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

42 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 healthcare mergers, Government Gazette 2012, 515.

43 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).

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 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 *Coöperatie Vlietland/Vlietland Ziekenhuis*.<sup>44</sup> There are no requirements for pre-notification.

### ***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

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

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.

In both 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.<sup>45</sup>

##### ***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.<sup>46</sup> 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,<sup>47</sup> but does require, *inter alia*:

- a* the proposal to be in writing;
- b* a detailed description of the nature and size of the remedy;
- 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 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 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

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45 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](http://www.acm.nl/nl/download/publicatie/?id=11348) (in Dutch).

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

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

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.<sup>48</sup>

### ***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,<sup>49</sup> 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.

## **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.

## **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

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

49 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](http://www.acm.nl/en/download/attachment/?id=12098)).

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 authority. The authority 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* 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* 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 & 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.<sup>50</sup>

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 healthcare specific merger test of the NZa.<sup>51</sup> The Minister had proposed to transfer this test to the ACM as per 1 January 2017,<sup>52</sup> which may bring some procedural efficiency. The transfer would not affect the essence of the test and hence will continue to pose a heavy administrative burden on the parties involved. At the time of finalising this chapter in 2017 the legislative proposal had not been adopted by any of the two houses of the Dutch parliament.<sup>53</sup>

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.<sup>54</sup> 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.<sup>55</sup>

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50 See footnote 33.

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

52 Proposal of law of 8 April 2016, 34445.

53 See here: [www.tweedekamer.nl/kamerstukken/wetsvoorstellen/detail?id=2016Z07311&dossier=34445](http://www.tweedekamer.nl/kamerstukken/wetsvoorstellen/detail?id=2016Z07311&dossier=34445).

54 See here: [www.internetconsultatie.nl/telecommunicatie](http://www.internetconsultatie.nl/telecommunicatie).

55 See here: <https://fd.nl/Print/krant/Pagina/Voorpagina/1199825/kamp-dreigt-metzaardere-wapens-tegen-overnames>.

The trend for third parties to challenge mergers that are approved by the ACM continues, but this concerns only a few very sensitive cases.<sup>56</sup>

The fining ceilings of the ACM rose considerably from 1 July 2016. 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.<sup>57</sup>

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

57 Law of 23 December 2015 changing 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 (proposal 34190). This law was adopted despite negative advice from the Council of State and a lack of enthusiasm of the ACM itself, in what could be characterised as a slightly populist measure.

## GERRIT OOSTERHUIS

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Gerrit Oosterhuis is a counsel at the offices of Houthoff Buruma in Brussels and Amsterdam. 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 *Varol/Argos DSE/Vitol/Carlyle/Reggeborgh*, *DEME/Oceanflore* and *Parcom/Pon/Imtech Marine*, concentrations in the food sectors such as *FrieslandCampinal/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.

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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 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 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 Buruma'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* (2015 edition), *Legal 500* (2015 edition), *Who's Who Legal* (2014 edition) and *Best Lawyers* (2014 edition). He is described as 'smart and strategic' (*Legal 500* (2017 edition: EU and Competition) and 'praised by his clients for his expertise in cartel cases and excellent litigation skills' (*Chambers Europe*, 2013 edition: EU and competition). Sources describe him as an enthusiastic and active lawyer: 'When I need a really good opinion I get him involved' (*Chambers Europe*, 2013 edition: EU and competition).

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