
THE MERGER CONTROL REVIEW

FIFTH EDITION

EDITOR
ILENE KNABLE GOTTS

LAW BUSINESS RESEARCH

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The Merger Control Review

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THE MERGER CONTROL REVIEW

Fifth Edition

Editor
ILENE KNABLE GOTTS

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EDITOR'S 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. 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 45 jurisdictions, as well as a discussion of recent decisions, strategic considerations and likely upcoming developments. 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 either already vest exclusive authority to transactions in one agency or are moving in that direction (e.g., Brazil, France and the UK). 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). 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; and Hungary, Ireland and Romania have a 30-calendar-day time limit from 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., United States, Ukraine, Greece, and Portugal). Brazil issued its first 'gun jumping' fine this year. 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 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 European Union 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 even to be provided with a redacted copy of the merger notification and have the right to participate in merger hearings before the Competition Tribunal, and the Tribunal will typically 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 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. 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 Chile. 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 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., 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 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. Several agencies in the past few years have analysed partial ownership acquisitions on a standalone basis as well as in connection with joint ventures (e.g., Canada, China, Cyprus, Finland and Switzerland). Vertical mergers were also the subject of review (and even resulted in some enforcement actions) in a number of jurisdictions (e.g., 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. As discussed in the last chapter, International Merger Remedies, 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 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 year have imposed a variety of such behavioural remedies (e.g., China, the EU, France, Netherlands, Norway, South Africa, Ukraine and the US). This book should provide a useful starting point in navigating cross-border transactions in the current enforcement environment.

Ilene Knable Gotts

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Chapter 28

NETHERLANDS

*Gerrit Oosterhuis and Weijer 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 EC Merger Regulation (ECMR). 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 & Markets² (ACM, formerly the Dutch competition authority, NMa) when it comes to, for example, the full functionality of a joint venture³ 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 €113.45 million in the calendar year preceding the concentration,

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

2 The ACM is the result of the merger between the NMa, the Dutch Consumer Authority and the telecoms authority OPTA. The merger was effectuated as per 1 April 2013. As the authority functions under the name the ACM at the time of publication, this name is used in this review. 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 ECMR, the Consolidated Jurisdictional Notice and the decision practice of the European Commission, please refer to the European Union chapter.

and at least two of the undertakings concerned each achieved at least a €30 million turnover in the Netherlands. Various sector-specific thresholds and proposed changes to these 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 91 notifications and reached 85 decisions in 2013, about the same number as in 2012 (91 notifications and 99 decisions).⁵ The majority of notifications resulted in one-page short decisions. Only 15 Phase I decisions were substantiated (with reasons, down from 16 in 2012). The overwhelming majority of these involved the health care sector (13),⁶ with the remaining two concerning heavy industry⁷ and production 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 four in 2013, down from 10 in 2012. Sometimes, the press releases of the ACM may give much more

5 Statistics from the Annual Report of the ACM (*Jaarverslag 2013*), p.116.

6 Decision NMa 21 January 2013 (*HagaZiekenhuis–Reinier de Graaf Groep*), Case 7545; Decision NMa 8 February 2013 (*NPM Healthcare–Orthopedium*), Case 7563; Decision NMa 11 March 2013 (*Arkin–Sinai*), Case 7582; Decision ACM 16 April 2013 (*Parnassia Groep–InP*), Case 7558; Decision ACM 31 May 2013 (*Star MDC–Reinier de Graaf Groep*), Case 13.0100.22; Decision ACM 12 June 2013 (*Lievensberg Ziekenhuis–St Franciscus Ziekenhuis*), Case 7562; Decision ACM 7 August 2013 (*Stichting Laurens–Stichting Thuiszorg Rotterdam*), Case 13.0366.22; Decision ACM 6 September 2013 (*Bronovo–Medisch Centrum Haaglanden*), Case 13.0512.22; Decision ACM 10 October 2013 (*Stichting ZorgSaam Zeeuws–Vlaanderen–Stichting Curamus*), Case 13.0606.22; Decision ACM 17 October 2013 (*Stichting MeanderGroep Zuid–Limburg–Stichting GroenekruisDomicura*), Case 13.0720.22; Decision ACM 24 October 2013 (*EmCart Thuiszorg Uitleen BV–Vital Uitleenservice BV, Vitaal Hulpmiddelen BV en Vitaal Transport BV*), Case 13.0858.22; Decision ACM 6 November 2013 (*Stichting Noordelijke Laboratorium Groep–Stichting Klinisch Chemisch Laboratorium Leeuwarden*), Case 13.0754.22; Decision ACM 3 December 2013 (*Stichting Sint Antonius Ziekenhuis–Stichting Zuwe Hofpoort Ziekenhuis*), Case 13.0780.22.

7 Decision NMa 25 January 2013 (*Damen–Shipdock*), Case 7537.

8 Decision ACM 16 December 2013 (*HAL–Gispén*), Case 13.0833.22.

insight into the reasoning of the ACM than the actual decision (without reasons) on the relevant concentration.⁹

Two notifications, both in the health care sector, required a Phase II investigation,¹⁰ but were cleared without remedies in Phase II.¹¹

An exemption from the mandatory waiting period has been granted twice.¹² One case, exceptionally, did not concern a bankruptcy: the ACM granted an exemption from the waiting period to allow a joint venture to be established in time to apply for a licence.

The ACM imposed one fine for a failure to notify a concentration.¹³

ii Infringements of formal obligations and legal proceedings

According to the Fining Guidelines 2007 of the ACM, a fine for failure to notify will be calculated on the basis of 0.75 per cent of the turnover of the undertaking concerned in the Netherlands in the year preceding the year that the fining decision was taken. In the *Amlin* case, the fining decision was taken in the year following the year that the failure to notify occurred, to the effect that the turnover of the target that Amlin had acquired (Fortis Corporate Insurance) was taken into account for the calculation of the 0.75 per cent of the group turnover in the Netherlands. Amlin argued that this rigid application of the Fining Guidelines could lead to arbitrariness. The Rotterdam District Court found that the ACM could not explain why the outcome in the *Amlin* case was not arbitrary¹⁴ and ruled that the fine should be calculated on the turnover that Amlin had achieved in the Netherlands before the acquisition.¹⁵

9 See, e.g., Decision ACM 7 June 2013 (*Gemeente Den Haag en HTM Personenvervoer NV*), Case 13.0204.22 and the accompanying press release at www.acm.nl/nl/publicaties/publicatie/11539/NS-mag-belang-nemen-in-HTM, and Decision ACM 29 August 2013 (*Stichting Vierstroom–Stichting Het Lange Land Ziekenhuis*), Case 13.0468.22 and press release at www.acm.nl/nl/publicaties/publicatie/11918/Zorgaanbieder-Vierstroom-mag-LangeLand-Ziekenhuis-overnemen.

10 Down from five notifications that required a Phase II investigation in 2012.

11 Decision ACM 30 September 2013 (*Bronovo–Medisch Centrum Haaglanden*), Case 13.0438.24 and Decision ACM 6 December 2013 (*Stichting Lievensberg Ziekenhuis–Stichting St. Franciscus Ziekenhuis*), Case 13.0758.24.

12 Decision ACM 18 June 2013 (*BAS Dexcom–winkels van iCentre*), Case 13.0377.23 and Decision ACM 18 August 2013 (*TDH Services–Erasmus MC–LUMC*), Case 13.0659.22.

13 Decision NMa 28 March 2013 (*Motorhuis*), Case 7491. For a discussion of this case, see Section II.ii, *infra*.

14 In 2012, the Rotterdam District Court had ordered the ACM to explain in a new decision why the outcome in the *Amlin* case was not arbitrary: Rotterdam District Court 28 June 2012 (*Amlin Limited and Amlin plc v. Nederlandse Mededingingsautoriteit*), Case AWB 11/2812 (LJN BW9829).

15 This resulted in a fine of only €65,250. The Court doubled that amount to €130,000 to take the size of Amlin as a whole into account. Rotterdam District Court 23 May 2013, ECLI:NL:RBROT:2013:CA1229.

In 2009 the ACM imposed a fine on Refresco¹⁶ for providing incorrect information in its merger filing.¹⁷ The Regulatory Industrial Organisation Appeals Court (CBb), the highest court in competition cases, confirmed that the fact that the incorrect information had been the result of mere negligence was not an excuse. The CBb lowered the fine from €468,000 to €312,000 as there had hardly been any impact on the material assessment of the case.¹⁸

In the only gun-jumping case of the year, the ACM clarified that it will give a reduction – in this case of 20 per cent – in the event that the undertaking abides by a standstill agreement and fully cooperates with the ACM.¹⁹ No reduction will be granted because the infringement was merely due to the negligence of the parties or their advisers.²⁰

On 1 February 2013, the Ministry of Finance expropriated bank/insurer SNS. The Dutch Association of Shareholders VEB claimed in court that the expropriation amounted to a concentration that should have been notified. The Council of State refused to annul the expropriation on the basis that the merger regime is not designed to protect the interests of shareholders in parties to a merger.²¹ On 18 December 2013, the ACM decided that the expropriation was not a concentration as the ownership by the Ministry was only temporary in nature. The transfer to the government agency FNLI, which also holds the shares in ABN AMRO, was deemed not notifiable, as SNS and ABN AMRO would continue to have independent power of decision.²²

iii Phase I decisions

The ACM cleared the acquisition of office furniture manufacturer Gispén by private equity firm HAL, although Gispén and HAL's other investment Ahrend would have a combined market share of above 50 per cent regarding the refurbishing of offices of medium to large companies. The next competitor, VDB, has only a 10 to 20 per cent market share. On the basis of tender data over a long period, the ACM concluded that VDB exerts significant pricing pressure, that even smaller competitors are capable of winning large tenders and that Gispén and Ahrend are not each other's closest competitors.²³

The ACM allowed home care provider Vierstroom to acquire the hospital LangeLand Ziekenhuis, as both are active in different product markets. The fact that

16 Decision ACM 5 August 2009 (*Refresco*), Case 6687.

17 The District Court of Rotterdam confirmed the decision of the ACM in 2011: Rotterdam District Court 27 January 2011, ECLI:NL:RBROT:BP2278

18 CBb 14 May 2013, ECLI: NL:CBB:2013:CA3055.

19 Decision NMa 28 March 2013 (*Motorhuis*), Case 7491.

20 This later appeared to be in line with the later Decision by the EU Court of Justice in the Schenker Case: EU Court of Justice 18 June 2013 (*Schenker & Co et al*), OJ C 225, p. 22.

21 ABRvS 25 February 2013, JOR 2013/140.

22 Letter of the ACM of 18 December 2013 (*Besluit overdracht SNS Reaal aan NLF*), Case 13.0348.26. The ACM referred to recital 22 of the ECMR and paragraphs 192–194 of the Consolidated Jurisdictional Notice of the European Commission.

23 Decision ACM 16 December 2013 (*HAL–Gispén*), Case 13.0833.22

the parties would be referring patients to each other was deemed not problematic, as Vierstroom refers only a very small percentage of its patients to hospitals. LangeLand Ziekenhuis makes more referrals, but a new competitor of Vierstroom successfully entered the market despite pre-existing exclusive referrals from LangeLand Ziekenhuis to Vierstroom.²⁴

Dutch train incumbent NS was permitted to take over HTM, which provides passenger transport services by tram in The Hague. The ACM considered that NS is not a competitor for the tram services provided by HTM, as the municipality of The Hague has not yet put these services out for tender. The passenger transport services by train offered by NS were deemed only complementary to the tram transport services offered by HTM and not in competition with the same. Interestingly, the ACM considered it unlikely that the quality of the services of the parties would deteriorate, referring to legislation that guarantees the quality of transport services.²⁵

The acquisition of shipyard Shipdock by its rival Damen was allowed without remedies, despite the fact that the transaction reduced the number of parties able to provide repair services to large navy ships on the Dutch market from three to two. The ACM considered that Damen/Shipdock and its sole remaining rival Keppel Verolme would have strong incentives to compete due to the attractiveness of the tenders of the Royal Dutch Navy and the high fixed costs of dry docks. Coordinated effects were deemed unlikely as tenders are few and far between as well as different in size, rendering it hard to coordinate and to discipline deviating market behaviour.²⁶

iv Phase II cases

Both Phase II cases in 2013 concerned hospital mergers. The first, concerning the Western Brabant Hospitals, went into second phase, *inter alia*, because the parties talked about a smaller geographical market in their internal documentation than that referred to in their notification to the ACM. After the Phase II investigation, the ACM was convinced that the presence of a hospital in the neighbouring region allowed the health insurers to discipline the competitive behaviour of the merging hospitals. Much weight was attached to the counterfactual that without the merger, the two hospitals individually would probably not be able to meet the quality standards in respect of a number of services.²⁷

24 Decision ACM 29 August 2013 (*Stichting Vierstroom–Stichting Het Lange Land Ziekenhuis*), Case 13.0468.22 and press release at www.acm.nl/nl/publicaties/publicatie/11918/Zorgaanbieder-Vierstroom-mag-LangeLand-Ziekenhuis-overnemen.

25 Decision ACM 7 June 2013 (*Gemeente Den Haag en HTM Personenvervoer NV*), Case 13.0204.22 and accompanying press release at www.acm.nl/nl/publicaties/publicatie/11539/NS-mag-belang-nemen-in-HTM.

26 Decision NMa 25 January 2013 (*Damen–Shipdock*), Case 7537. The analysis was based on the hypothetical Dutch market, despite the parties' argument that the geographical market is larger because of Directive 2009/81/EC regarding public procurement in the defence sector.

27 Decision ACM (*Stichting Lievensberg Ziekenhuis–Stichting St Franciscus Ziekenhuis*), Case 13.0438.24.

The merger between two hospitals in The Hague went into a second Phase II mainly because some of the health insurers active in The Hague provided negative feedback. Nevertheless, the relevant patient bodies reacted positively, and after the in-depth investigation, the ACM held that the health insurers would be able to discipline the merged entity, which would have a market share of 40 to 50 per cent.²⁸

v Health care sector

On 5 July 2013, the Minister of Economic Affairs issued a Notice on Concentrations of Health Care Suppliers and Health Care Insurers.²⁹ It provides that in all cases where the concentration results in a market share of above 35 per cent, the ACM must discuss the quality of the care, the willingness of patients to travel, market entry and the influence of insurers on patients. The ACM must also ask the advice of the relevant patient councils, municipalities and health care insurers. Finally, the ACM is obliged to substantiate all decisions, which explains why the overwhelming majority of reasoned decisions in 2013 concern the health care sector.

Finally, the ACM published a Notice on Partnerships and Hospitals explaining that it will treat, in principle, a partnership of doctors and the hospitals where these doctors work as one economic entity.³⁰

III THE MERGER CONTROL REGIME

i Merger control thresholds

As previously indicated, Article 29 DCA provides that a concentration must be notified if:

- a* the combined turnover of all undertakings concerned exceeds €113.45 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.

The threshold for the combined worldwide turnover should be raised to €150 million as per 1 August 2014.³¹

Alternative jurisdictional thresholds exist for the following undertakings.

28 Decision ACM 6 September 2013 (*Bronovo–Medisch Centrum Haaglanden*), Case 13.0512.22.

29 Notice of the Minister of Economic Affairs, dated 5 July 2013, No. WJZ//13118300, establishing specific rules for concentrations of health care suppliers and health care insurers.

30 ACM Notice on Partnerships and Hospitals of 6 July 2013. This represents a change of approach compared with the Guidance of the ACM regarding the health care sector of 2010.

31 The legislative proposal for the streamlining of market surveillance by the ACM, which includes this change, was adopted on 24 June 2014 and most provisions are expected to enter into force on 1 August 2014 (according to information available when this chapter was finalised). The new threshold would correct the amount of €113.45 introduced in 1998 for inflation purposes and would (slightly) lower the administrative burden for businesses.

Health care undertakings (having at least €5.5 million turnover)

All transactions between health care undertakings must be notified to the Dutch Healthcare Authority (NZa) if they employ or contract more than 50 health care providers (persons).³² The NZa evaluates, *inter alia*, the accessibility and quality of services. If the NZa advises positively, the transaction must be notified to the ACM if it meets the thresholds explained below.

A concentration between at least two 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.

These thresholds will continue to apply until at least 1 January 2018.³³

Insurance companies

In the case of insurance companies within the meaning of the Act on Financial Supervision, Article 31(2) DCA stipulates that the concentration must be notified if:

- a* the combined turnover or gross premiums written of all undertakings concerned exceeded €113.45 million in the calendar year preceding the concentration; and
- b* of this turnover or gross premiums written, at least two of the undertakings concerned:
 - each received at least €4.54 million (if both insurance companies) from Dutch residents in the previous financial year; or
 - at least one of the undertakings concerned received at least €4.54 million from Dutch residents (insurance company) in the previous financial year and at least one of the undertakings at least €30 million (regular undertaking) in the Netherlands in the previous calendar year.³⁴

The above-mentioned €4.54 million threshold should be abolished as per 1 August 2014, and the regular €30 million threshold will apply to insurance companies as well.³⁵

32 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.

33 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.

34 Rotterdam District Court 28 June 2012 (*Amlin Limited and Amlin plc v. Nederlandse Mededingingsautoriteit*), Case AWB 11/2812 (LJN BW9829).

35 See footnote 31.

Credit and financial institutions

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

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 Two phases of investigation

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 €15,000 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 €30,000 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*.³⁶ 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 ECMR. 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).

If the authority subsequently prohibits the concentration, the concentration must be unwound.

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. However, if the authority subsequently prohibits the concentration, the concentration must be unwound.

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.³⁷

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

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

37 The NMa 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/publicaties/publicatie/11348/Wijziging-Spelregels-bij-concentratiezaken (in Dutch).

in both instances and are laid down in guidelines.³⁸ 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. For example, 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,³⁹ 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 to be attached; 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 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.⁴⁰

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 the Fining Guidelines 2013 of the Minister of Economic Affairs, the ACM generally calculates its fines on the basis of 0.75 per cent of the total Dutch turnover in the preceding financial year for the buyer, multiplied by a gravity factor ranging from one to five (which will normally be set at one).⁴¹

38 Guidelines remedies 2007. This section is based on these guidelines.

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

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

41 Fining Guidelines of the Minister of Economic Affairs of 19 April 2013, No. WJZ/12366159. As far as infringements of the DCA are concerned, these guidelines are the same as the 2009 fining guidelines pertaining to the NMa.

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 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 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. 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. The merged entity, the ACM, is headed by Chris Fonteijn, previously the chair of OPTA and the NMa. The proposed changes to the powers of the authority, such as the increase in merger thresholds and the possibility for the ACM to exchange information with other government agencies, should enter into force on 1 August 2014.⁴²

Since the merger, the ACM is clearly placing more priority on consumer protection than on the competitive structure of the market. This is most evident from the reduction

42 See footnote 31.

of cartel investigations. The new focus of the ACM has less consequences 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.

A new challenge may be the increasing use that private parties make of the possibility to rely on civil law and administrative law proceedings to enforce competition law. So far, this phenomenon was restricted mainly to cartel infringements, but the claim by the VEB regarding the expropriation of SNS (discussed in Section II.ii, *infra*) shows that the merger control regime is also under scrutiny by private parties.

Appendix 1

ABOUT THE AUTHORS

GERRIT OOSTERHUIS

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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 *Reggeborgh/Boskalis/VSMC*, as well as concentrations in the food and retail sectors such as *Eurelco/Intres* and *FrieslandCampina/Zijerveld*. Mr Oosterhuis has been involved in defence work in the major Dutch cartel cases. He has a substantial behavioural practice, advising clients such as Philip Morris, SHV Energy, Hasbro Europe and Koninklijke Bunge.

Mr Oosterhuis joined Houthoff Buruma in 1999 in Amsterdam and moved to the Brussels office in 2001. He now divides his time between these two offices.

WEIJER VERLOREN VAN THEMAAT

Houthoff Buruma

Weijer VerLoren van Themaat has been assisting international clients for over 24 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 Europe* (2014 edition), *Legal 500* (2014 edition), *Who's Who Legal* (2014 edition) and *Best Lawyers* (2014 edition). He is 'praised by his clients for his expertise in cartel cases and excellent litigation skills' (*Chambers Europe*, 2013 edition: EU & 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 & Competition).

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