

THE MERGER
CONTROL
REVIEW

NINTH EDITION

Editor
Ilene Knable Gotts

THE LAWREVIEWS

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PREFACE

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

Given the ability of most competition agencies with pre-merger notification laws to delay, and even block, a transaction, it is imperative to take each jurisdiction – small or large, new or mature – seriously. For instance, in 2009, China blocked the Coca-Cola Company’s proposed acquisition of China Huiyuan Juice Group Limited and imposed conditions on four mergers involving non-China-domiciled firms. In *Phonak/ReSound* (a merger between a Swiss undertaking and a Danish undertaking, each with a German subsidiary), the German Federal Cartel Office blocked the entire merger, even though less than 10 per cent of each of the undertakings was attributable to Germany. It is, therefore, imperative that counsel for such a transaction develops a comprehensive plan prior to, or immediately upon, execution of an agreement concerning where and when to file notification with competition authorities regarding such a transaction. To this end, this book provides an overview of the process in 36 jurisdictions, as well as a discussion of recent decisions, strategic considerations and likely upcoming developments. Given the number of recent significant M&A transactions involving media, pharma and high-technology companies, we have included chapters that focus on the enforcement trends in these important sectors. In addition, as merger review increasingly includes economic analysis in most, if not all, jurisdictions, we have added a chapter that discusses the various economic tools used to analyse transactions. The intended readership of this book comprises both in-house and outside counsel who may be involved in the competition review of cross-border transactions.

Some common threads in institutional design underlie most of the merger review mandates, although there are some outliers as well as nuances that necessitate careful consideration when advising a client on a particular transaction. Almost all jurisdictions vest exclusive authority to review transactions in one agency. The United States is now the major exception in this regard since China consolidated its three antitrust agencies into one agency

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

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

The potential consequences for failing to file in jurisdictions with mandatory requirements vary. Almost all jurisdictions require that the notification process be concluded 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 competition authority imposed a €4 million fine on Castel Frères for failure to notify its acquisition of part of the Patriache group. In Ukraine and Romania, the competition authorities have focused their efforts on discovering consummated transactions that had not been notified, and imposing fines on the parties. Chile's antitrust enforcer recommended a fine of US\$3.8 million against two meat-packing companies, even though the parties had carved the Chilean business out of the closing.

Some jurisdictions impose strict time frames within which the parties must file their notification. For instance, Cyprus requires filing within one week of signing of the relevant documents and agreements; Serbia provides for 15 days after signing of the agreement; and Hungary, Ireland and Romania have a 30-calendar-day time limit for filing the notification that commences with entering into the agreement. Some jurisdictions that mandate filings

within specified periods after execution of the agreement also have the authority to impose fines for 'late' notifications (e.g., Bosnia and Herzegovina, Indonesia, and Serbia). Most jurisdictions also have the ability to impose significant fines for failure to notify or for closing before the end of the waiting period, or both (e.g., Austria, Canada, China, Greece, Portugal, Ukraine and the United States). In Macedonia, the failure to file can result in a misdemeanour and a monetary fine of up to 10 per cent of the worldwide turnover. In Belgium, the competition authority fined a party for late submission of information.

In addition, other jurisdictions have joined the European Commission (EC) and the United States in focusing on interim conduct of the transaction parties, commonly referred to as 'gun jumping'. Brazil, for instance, issued its first gun-jumping fine in 2014 and recently issued guidelines on gun-jumping violations. Since then, Brazil has continued to be very active in investigating and imposing fines for gun-jumping activities. In addition, the sharing of competitively sensitive information prior to approval appears to be considered an element of gun jumping. And the fines that are being imposed has increased. For example, the EC imposed the largest gun-jumping fine ever of €124.5 million against Altice.

In most jurisdictions, a transaction that does not meet the pre-merger notification thresholds is not subject to review or challenge by the competition authority. In Canada – like the United States – however, the Canadian Competition Bureau can challenge mergers that were not required to be notified under the pre-merger statute. In Korea, Microsoft initially filed a notification with the Korea Fair Trade Commission (KFTC), but when it faced difficulties and delays in Korea the parties restructured the acquisition to render the transaction non-reportable in Korea and consummated the transaction. The KFTC, however, continued its investigation as a post-consummation merger investigation and eventually obtained a consent order.

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

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

The role of third parties also varies across jurisdictions. In some jurisdictions (e.g., Japan), there is no explicit right of intervention by third parties, but the authorities can choose

to allow it on a case-by-case basis. In contrast, in South Africa, registered trade unions or representatives of employees must be provided with a redacted copy of the merger notification from the outset and have the right to participate in merger hearings before the Competition Tribunal: the Tribunal will typically also permit other third parties to participate. Bulgaria has announced a process by which transaction parties even consent to disclosure of their confidential information to third parties. In some jurisdictions (e.g., Australia, the EC and Germany), third parties may file an objection to a clearance decision. In some jurisdictions (including Canada, the EC and the United States), third parties (e.g., competitors) are required to provide information and data if requested by the antitrust authority. In Israel, a third party that did not comply with such a request was recently fined by the authority.

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

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

The impact of such multi-jurisdictional cooperation was very evident this year. For instance, the transaction parties in *Applied Materials/Tokyo Electron* ultimately abandoned the transaction due to the combined objections of several jurisdictions, including the United States, Europe and Korea. In *Office Depot/Staples*, the FTC and the Canadian Competition Bureau cooperated and both jurisdictions brought suits to block the transaction (although the EC had also cooperated on this transaction, it ultimately accepted the undertakings offered by the parties). In the *GE/Alstom* transaction, the United States and the EC coordinated throughout, including at the remedies stage. Additionally, in the *Halliburton/Baker Hughes* transaction, the United States and the EC coordinated their investigations, with the United

States suing to block the transaction while the EC's investigation continued. Also, in *Holcim/Lafarge*, the cooperation between the United States and Canada continued at the remedies stage, where both consents included assets in the other jurisdiction's territory. The United States, Canada and Mexico coordinated closely in the review of the *Continental/Veyance* transaction. In fact, coordination among the jurisdictions in multinational transactions that raise competition issues is becoming the norm.

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

For transactions that raise competition issues, the need to plan and to coordinate among counsel has become particularly acute. Multi-jurisdictional cooperation facilitates the development of cross-border remedies packages that effectively address competitive concerns while permitting the transaction to proceed. The consents adopted by the United States and Canada in the *Holcim/Lafarge* merger exemplify such a cross-border package. As discussed in the 'International Merger Remedies' chapter, it is no longer prudent to focus merely on the larger mature authorities, with the expectation that other jurisdictions will follow their lead or defer to their review. In the current enforcement environment, obtaining the approval of jurisdictions such as Brazil and China can be as important as the approval of the EC or the United States. Moreover, the need to coordinate is particularly acute to the extent that multiple agencies decide to impose conditions on the transaction. Although most jurisdictions indicate that 'structural' remedies are preferable to 'behavioural' conditions, a number of jurisdictions in the past few years have imposed a variety of such behavioural remedies (e.g., China, the EC, France, the Netherlands, Norway, South Africa, Ukraine and the United States). For instance, some recent decisions have included as behavioural remedies pricing, sales tariffs and terms of sale conditions (e.g., Korea, Ukraine and Serbia), employee retrenchment (South Africa) and restrictions on bringing anti-dumping suits (e.g., Mexico).

Many recent decisions have imposed behavioural remedies to strengthen the effectiveness of divestitures (e.g., Canada's decision in the *Loblaw/Shoppers* transaction, China's MOFCOM remedy in *Glencore/Xstrata*, and France's decision in the *Numericable/SFR* transaction). This book should provide a useful starting point in navigating cross-border transactions in the current enforcement environment.

Ilene Knable Gotts

Wachtell, Lipton, Rosen & Katz

New York

July 2018

NETHERLANDS

*Gerrit Oosterhuis and Weyer VerLoren van Themaat*¹

I INTRODUCTION

Dutch merger control is similar to European merger control, certainly as regards the substantive rules. Thus, the Dutch concept of a concentration is similar to the definition of a concentration as laid down in the EU Merger Regulation (EUMR). It includes the acquisition of control and the possibility to influence strategic decisions of the target. Furthermore, the concept of undertakings concerned and the methodology of allocating turnover to the undertakings concerned are identical. Moreover, the European Commission's decision practice and the Commission's Consolidated Jurisdictional Notice are closely followed by the Dutch Authority for Consumers and Markets² (ACM) 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 €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 102 notifications and reached 103 decisions in 2017 – which is similar to the ACM's workload in 2016 (105 notifications and 100 decisions).⁵ The majority of notifications resulted in one-page short decisions. Only 14 Phase I decisions were

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

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

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

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

5 Statistics from the Online Annual Report 2017 of the ACM (Dutch version), see <https://jaarverslag.acm.nl/jaarverslag-2017/concentraties>.

substantiated (with reasons, up from nine in 2016 and nine in 2015). The majority of these decisions concerned the healthcare sector, with three hospital mergers,⁶ one merger of mental-healthcare institutions,⁷ and five mergers in the field of home care, elderly care and rehabilitation care.⁸

Of the five remaining cases, two concerned the medical sector⁹ and the others wholesale trade,¹⁰ medical microbiological laboratory diagnostics¹¹ and the collection and processing of waste.¹²

The continuing policy of the ACM to issue only a limited number of reasoned decisions results in a lack of guidance on market definitions, jurisdictional issues, economic analyses and theories of harm. This can render the notification process unpredictable. The ACM only partially makes up for the 'guidance deficit' by publishing informal guidance letters addressed to parties seeking guidance on the interpretation of the merger rules. It did not issue any informal opinions in 2017.

The ACM concluded that a Phase II investigation was necessary in one case.¹³ Subsequently, the involved parties decided to refrain from applying for a licence and terminated their merger plans.¹⁴ The ACM reached a decision in two Phase II investigations where the procedure had started already in 2016.¹⁵ One was allowed without remedies¹⁶ and the other with remedies.¹⁷

An exemption from the mandatory waiting period has been granted once, which concerned youth and childcare providers.¹⁸

The ACM did not impose any fines for a failure to notify a concentration in 2017.

ii Infringements of formal obligations and legal proceedings

Two merger decisions were appealed in 2017. In both cases, the Rotterdam District Court (the Court) ruled in favour of the ACM.

6 Decision ACM 17 November 2017 (*Stichting Catharina Ziekenhuis/Stichting Sint Anna Zorggroep*) Case 17.0090.17, Decision ACM 21 April 2017 (*Erasmus MC/Admiraal De Ruyter Ziekenhuis*) Case 16.1297.22, Decision ACM 26 June 2017 (*St. Antonius Ziekenhuis/ Maartenskliniek Woerden*) Case 17.0459.22

7 Decision ACM 9 February 2017 (*Pluym-Hoenderloo Groep/Intermetzo*) Case 16.0714.22.

8 Decision ACM 24 March 2017 (*Tzorg/Amstelring*) Case 17.0167.22, Decision ACM 30 June 2017 (*SHDH/Amie*) Case 17.0420.22, ACM Decision 28 July 2017 (*Stichting Surplus/Stichting Elisabeth/Stichting deBreedonk*) Case 17.0517.22, Decision ACM 31 July 2017 (*Stichting voor Regionale Zorgverlening/ Stichting Ouderenzorg Kanaalzone*) Case 17.0473.22, Decision ACM 30 August 2017 (*Stichting Sophia/ Stichting Rijnlands Revalidatie Centrum*) Case 17.0432.22.

9 Decision ACM 10 July 2017 (*Talpa/Sanoma*) Case 17.0453, Decision ACM 1 May 2017 (*Mediahuis/ TMG*) Case 17.0337.22.

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

11 Decision ACM 8 June 2017 (*Stichting Certe Medische Diagnostiek en Advies/Stichting Izore*) Case 17.0107.22.

12 Decision ACM 14 February 2017 (*Shanks/Van Gansewinkel*) Case 16.1044.22.

13 Decision ACM 17 November 2017 (*Stichting Catharina Ziekenhuis/Stichting Sint Anna Zorggroep*) Case 17.0090.17.

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

15 Decision ACM 12 June 2017 (*Parnassia/Antes*) Case 15.1259.24, Decision ACM 4 September 2017 (*AMC/ VUmc*) Case 17.0166.24.

16 Decision ACM 4 September 2017 (*AMC/VUmc*) Case 17.0166.24.

17 Decision ACM 12 June 2017 (*Parnassia/Antes*) Case 15.1259.24.

18 Decision ACM 29 December 2017 (*Parnassia Groep/Virenze*) Case 17.0248.98.

In 2015, the ACM granted a licence for the merger between two providers of games of chance: Stichting Exploitatie Nederlandse Staatsloterij (SENS) and Stichting Nationale Sporttotalisator (SNS).¹⁹ The ACM stated that the parties hardly competed with each other, as games of chance are strictly regulated.²⁰ Lotto and Stichting Speel Verantwoord (SSV) appealed the ACM's approval of the merger.²¹ The ACM had stated that the relevant market would most likely be the market for lotteries and lotto games, and therefore had investigated the effects of the concentration on that possible market, but it had not definitely defined the market. The Court ruled that the ACM had sufficiently justified its decision to leave the definition of the market open: it held that defining this market is not a goal in itself but merely a tool to assess market power. Moreover, a narrower definition of the market would lead to the conclusion that the concentration would not significantly impede competition, as the parties would then be active on different markets. According to the Court, the ACM was also correct to conclude that Dutch regulations on lotteries and lotto games reduce the opportunity for competition. Based on these regulations, only one licence can be granted per category of game. The Court held that the ACM had carefully analysed its collected data in a scientifically sound manner, and was right to conclude that the reporting parties only competed with each other to a limited degree. Furthermore, the ACM was correct to conclude that it would be unlikely that the merged entity could transfer its market power to a new online market segment (i.e., because of the presence of several strong potential foreign competitors). SVV submitted an appeal with the Trade and Industry Appeals Tribunal (CBB).

In 2016, the ACM granted a licence under conditions for the acquisition of Mediq by its competitor Brocacef.²² Both parties operate a chain of pharmacies in the Netherlands, and are active in the field of retail trade and in the pharmaceutical sector, as well as the import of medicines under the licence, Brocacef was obliged to sell 89 local pharmacies. Mosadex CV and two groups of health insurers appealed the ACM's decision, arguing that the remedy did not go far enough (i.e., as it did nothing to address many local monopolies). The Court held the remedies eliminated overlap where necessary: under the merger control regime the ACM could only remedy new problematic overlap but could not address pre-existing local monopolies.²³ Accordingly, the Court upheld the decision of the ACM. Mosadex also lodged an appeal with the CBB.

19 Decision ACM 7 December 2015 (*SENS/SNS*) Case 15.0783.24.

20 ACM, 'ACM clears merger between two Dutch games of chance', 08-1-2015, <https://www.acm.nl/en/publications/publication/15043/ACM-clears-merger-between-two-Dutch-games-of-chance>.

21 Rotterdam District Court 27 July 2017 (*Lottovate en Stichting Speel Verantwoord/ACM*) ECLI:NL:RBROT:2017:5738.

22 Decision ACM 13 June 2016 (*Brocacef/Mediq*), Case 15.0849.24 and see Chapter 30 'The Netherlands'.

23 Rotterdam District Court 7 September 2017 (*Mosadex e.a./ACM*) ECLI:NL:RBROT:2017:6833). Brocacef also requested the Rotterdam District Court to suspend the conditions that ACM had imposed, but the Court refused a request for a provisional ruling. See Rotterdam District Court 15 September 2016 (*Brocacef/ACM*), ECLI:NL:RBROT:2016:7082 and Chapter 30 'The Netherlands'.

iii Phase I decisions

In 2017, two mergers of hospitals were allowed without remedies.²⁴ The proposed merger between the Catharina Hospital and the St. Anna Hospital was referred to Phase II.²⁵ The ACM concluded that the merger would weaken the bargaining power of health insurers in the greater Eindhoven area, as St. Anna Hospital would cease to serve as a cheaper alternative to St. Catharina Hospital and other hospitals. The ACM also established that the competitive pressure of surrounding hospitals would be insufficient to discipline the hospitals after the proposed merger. As such, the merger could result in higher healthcare costs for patients.

The ACM allowed several other mergers in the field of (mental) healthcare: one merger of mental healthcare institutions,²⁶ and five mergers in the field of home care, elderly care and rehabilitation care.²⁷

The merger between Stichting Certe Medische Diagnostiek en Advies and Stichting Izore, both active in the field of medical microbiological laboratory diagnostics, was allowed without remedies.²⁸

Talpa was allowed to buy Sanoma without remedies. Both parties are active on the markets for television advertising and online advertising. Regarding the vertical relationship between Sanoma as an operator of television channels and Talpa as a producer of content for television programmes, the ACM considered it unlikely that the merger would have anticompetitive effects due to the limited market share and size of Sanoma's television channels.²⁹ The ACM concluded that Talpa would also not be able to foreclose competitors by bundling the provision of television and radio advertising, among other things because Talpa could not transfer its strong position on the radio-advertising market to the television-advertising market: the limited market share of Sanoma's television channels would prevent the merged entity from reaching a sufficiently large target group for a successful exclusion strategy.

The acquisition of Telegraaf Media Group NV (TMG) by Mediahuis NV (Mediahuis), both newspaper companies, was allowed without remedies.³⁰ The ACM acknowledged, among other things, that online news media and online advertising increasingly exercise competitive pressure on the parties in the relevant reader market for paid regional and

24 Decision ACM 21 April 2017 (*Erasmus MC/Admiraal De Ruyter Ziekenhuis*) Case 16.1297.22, Decision ACM 26 June 2017 (*St. Antonius Ziekenhuis/ Maartenskliniek Woerden*) Case 17.0459.22.

25 Decision ACM 17 November 2017 (*Stichting Catharina Ziekenhuis/Stichting Sint Anna Zorggroep*) Case 17.0090.17.

26 Decision ACM 9 February 2017 (*Phlyrn-Hoenderloo Groep/ Internetzo*) Case 16.0714.22.

27 Decision ACM 24 March 2017 (*Tzorg/Amstelring*) Case 17.0167.22, Decision ACM 30 June 2017 (*SHDH/Amie*) Case 17.0420.22, ACM Decision 28 July 2017 (*Stichting Surplus/Stichting Elisabeth/Stichting deBreedonk*) Case 17.0517.22, Decision ACM 31 July 2017 (*Stichting voor Regionale Zorgverlening/ Stichting Ouderenzorg Kanaalzone*) Case 17.0473.22, Decision ACM 30 August 2017 (*Stichting Sophia/ Stichting Rijnlands Revalidatie Centrum*) Case 17.0432.22.

28 Decision ACM 8 June 2017 (*Stichting Certe Medische Diagnostiek en Advies/Stichting Izore*) Case 17.0107.22.

29 The vertical relationship between the parties was assessed in a former decision: Decision NMA 22 July 2011, (*Sanoma/SBS*) Case 7185 – *Sanoma/SBS*. In this decision, the ACM considered that both parties has relatively limited market shares and that multiple alternatives would remain available. The ACM followed this approach.

30 Decision ACM 1 May 2017 (*Mediahuis/TMG*) Case 17.0337.22. The ACM considered that the merger would not have effects on (1) the national and regional market for newspapers, (2) the provision of advertising space in regional and national newspapers, (3) the provision of online advertising space and (4) the provision of online space for job advertisements.

national newspapers, as well as the market for national advertising in regional and national newspapers. Nevertheless, the ACM left it open whether these online media would fall within the scope of the relevant markets.

Waste company Shanks was allowed to acquire its competitor Van Gansewinkel, leading to the merger of two of the three largest waste companies in the Netherlands.³¹ Based on an extensive investigation, the ACM concluded that a sufficient range of options would remain available for the collection of different types of waste and waste-treatment services. It appeared that the parties were often not close competitors and that smaller competitors exercise significant competitive pressure. Regarding the certain types of dangerous waste, Shanks was the only processor and Van Gansewinkel supplier. The ACM nevertheless held that there was no risk of foreclosure as Shanks would need to continue to process waste of competitors to fill the capacity of its facilities.

The ACM also cleared the acquisition of a part of Heineken's whole sale activities by whole food supplier Sligro.³² The ACM concluded that the acquisition would not give rise to competition problems, as a sufficient number of wholesalers for food products and related non-food products would continue to exist. The distribution agreement between Heineken and Sligro did not change this. This decision was appealed by competitors of Sligro.

iv Phase II cases

The ACM held that the concentration between the mental-healthcare institutions Parnassia Group and Stichting Antes would result in a near-monopoly position in the greater Rotterdam area. The concentration was allowed under the strict condition that both Parnassia and Antes would transfer several clinics, treatment centres and patients to the competitor GGZ Delfland.³³ The parties also had to commit to comply fully with the obligations as laid down in the administrative agreement for mental healthcare. Accordingly, the parties must reduce their combined number of beds by 31 December 2019. This would mean that the buyer under the remedy, GGZ Delfland, would not have to reduce its capacity.

The merger between Academic Medical Center (AMC) and the VU University Medical Center (VUmc), the two university hospitals in Amsterdam, was cleared without remedies in Phase II. The ACM concluded that patients and health insurers would have access to sufficient options in the fields of basic care and complex hospital care in the greater Amsterdam area. In the market for unique care there is little to no competition. However, this was no consequence of the merger, as the relevant care is usually only provided by one university hospital. The parties could use their dominant position in the unique care sector to strengthen their negotiation position with health insurers regarding basic care and complex hospital care.

v Exemptions from the standstill period

The ACM granted an exemption of the mandatory standstill period before closing of a concentration on one occasion.³⁴

The case concerned the bankruptcy of the child and youth care provider Virenze. Although the ACM was concerned that the continuity of care was at risk, it did not rule

31 Decision ACM 14 February 2017 (*Shanks/Van Gansewinkel*) Case 16.1044.22.

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

33 Decision ACM 12 June 2017 (*Parnassia/Antes*) Case 15.1259.24.

34 Decision ACM 29 December 2017 (*Parnassia Groep/Virenze*) Case 17.0248.98.

out the possibility that a licence would be required. Therefore, the exemption was granted under the condition that the buyer Parnassia would not take steps regarding organisational and operational integration of Virenze until the ACM assessed the concentration. However, Parnassia withdrew its notification in 2018, as the proposed transaction did not, after all, fall within the scope of the merger control of the ACM.³⁵

vi Impact assessment reports

The ACM published a report in which it investigated the price and volume effects of 12 hospital mergers between 2007 and 2014.³⁶ This report argues that hospital mergers lead to price increases but not to better care. However, these conclusions are, by its own admission, often based on figures that are statistically not significant, and leave out many relevant parameters. It must be hoped that the ACM will not let its actual merger decisions be influenced by the highly politicised debate about healthcare mergers.

III THE MERGER CONTROL REGIME

i Merger control thresholds

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

- a the combined turnover of all undertakings concerned exceeds €150 million in the calendar year preceding the concentration; and
- b of this turnover, at least two concerned undertakings each achieved at least €30 million in the Netherlands.

Alternative jurisdictional thresholds exist for the following undertakings.³⁷

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).³⁸ 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

35 See here: <https://www.acm.nl/nl/publicaties/intrekking-melding-overname-del-van-virenze-door-panassia-eindmededeling>.

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

37 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.

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

b of this turnover, at least two of the undertakings concerned each achieved at least €10 million in the Netherlands.³⁹

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.⁴⁰

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.

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.

39 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.

40 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).

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*.⁴¹ 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 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.⁴²

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

42 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).

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.⁴³ 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,⁴⁴ 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 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.⁴⁵

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,⁴⁶ 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.

⁴³ Remedies guidelines 2007. This section is based on these guidelines.

⁴⁴ In its guidelines, the authority does refer to model texts from the European Commission.

⁴⁵ For example, the €2 million fine imposed on Wegener; for more information, see the Netherlands chapter in the 2013 edition of this publication.

⁴⁶ 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).

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 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 2014.⁴⁷

47 See footnote 33.

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.⁴⁸ The Minister had proposed to transfer this test to the ACM as per 1 January 2017,⁴⁹ 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.⁵⁰

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.⁵¹ 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.⁵²

The trend for third parties to challenge mergers that are approved by the ACM continues, but this concerns only a few very sensitive cases.⁵³

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.⁵⁴

48 Article 49 of the Healthcare (Market Regulation) Act of 1 October 2006.

49 Proposal of law of 8 April 2016, 34445.

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

51 See here: www.internetconsultatie.nl/telecommunicatie.

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

53 See the NPCF and Reggefiber cases discussed in Section II.ii below.

54 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.

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Gerrit Oosterhuis is a counsel at the offices of Houthoff 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 *FrieslandCampina/Zijerveld* and major Dutch cases such as *Euretco/Intres* and *Shanks/Van Gansewinkel*. Mr Oosterhuis has been involved in defence work in major Dutch cartel cases. He has a substantial behavioural practice, advising clients such as SHV Energy, Hasbro Europe and Royal Bunge.

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