



Merger Control

2020

Ninth Edition

Editor:
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Netherlands

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Overview of merger control activity during the last 12 months

The Dutch Competition Authority (the ‘Authority for Consumers & Markets’, hereinafter: ‘ACM’) dealt with a total number of 109 merger notifications in 2019, 106 of which were cleared in Phase I. Four mergers were referred to Phase II. The most notable merger cases were the takeover of Sandd by Post NL in the postal sector and the takeover of Iddink Group by Sanoma Learning in the education publishing sector. The number of merger notifications is slightly higher compared to the last three years. It remains remarkable how low the number of Phase II merger control cases is. A Phase II merger investigation constitutes an in-depth investigation of an intended concentration by the ACM, if the ACM foresees significant impediments of effective competition in the Netherlands because of the notified transactions, which require closer investigation.

New developments in jurisdictional assessment or procedure

There were no remarkable new developments in the concentration control procedure or jurisdictional assessment of mergers in the Netherlands in 2019. Currently, there are also no foreseen changes in this regard in the Netherlands, such as the introduction of transaction thresholds. The topic of key policy developments will be addressed under a separate heading (see ‘Key policy developments’).

Key industry sectors reviewed and approach adopted to market definition, barriers to entry, nature of international competition, etc.

The ACM remains focused on the healthcare sector. In 2019, the ACM investigated 25 mergers in this sector. Interesting clearances in this sector concerned the cleared acquisition of parts of the MC Slotervaart by the hospital OLVG as well as the acquisition of MC IJsselmeer Hospitals Lelystad by St Jansdal Hospital. Due to the state of emergency at the end of 2018 when bankruptcies arose, the ACM gave permission in early 2019 to start the takeovers before clearance. The ACM only provides such exemptions in extraordinary situations.

In 2019, ACM announced that the acquisition of schoolbook distributor Iddink Group by publisher Sanoma Learning was conditionally approved. Iddink Group is the owner of Magister, a digital platform that is used by many high schools in the Netherlands. Sanoma Learning owns publishing house Malmberg, an educational publisher which offers paper and digital learning resources. Therefore, the ACM has imposed the condition that after the acquisition Sanoma’s competitors will gain access to Magister and data from Magister. This, according to the ACM, guarantees that other publishers can also continue to improve their products and services.

After extensive investigation, the ACM decided in 2019 not to authorise the takeover of Sandd by PostNL. With that takeover, a monopolist in the area of postal deliveries was expected to arise. It was expected that PostNL would have been in a position to increase prices for business mail by 30 up to 40%. However, the Secretary of State for Economic Affairs and Climate Change finally overruled the ACM and allowed the takeover, for reasons of general interest which, according to the Secretary of State, were more important than the negative consequences for competition foreseen by the ACM.

Key economic appraisal techniques applied e.g. as regards unilateral effects and co-ordinated effects, and the assessment of vertical and conglomerate mergers

The test the ACM uses is whether the concentration in question significantly impedes effective competition. The test is in accordance with the SIEC test which the European Commission uses in its concentration control practice. It covers all competition issues raised by concentrations, including unilateral effect cases. The ACM applies the same theories of harm that the European Commission uses.

Key indicators that the ACM takes into account are the position of the undertakings compared to their competitors, the dependency of suppliers and customers, and the barriers to entry into the market.

The ACM is hesitant to accept economic efficiencies as a justification for restricting competition. The ACM will only accept these efficiencies if they positively affect consumers. The focus will therefore be on the question of whether the efficiency gains are passed on to consumers.

Approach to remedies (i) to avoid a second stage investigation, and (ii) following a second stage investigation

In order to avoid a second stage investigation, an undertaking can offer remedies. Such an offer is possible if the competition problem is clear, the remedies clearly remove or remedy the problem in question, and they do so before a certain deadline. It is also possible for undertakings to make amendments to the intended concentration, and hence their ACM notification.

The ACM's guidelines on remedies are similar to the approach the European Commission takes towards remedies. Both structural and behavioural remedies are possible. In practice, the ACM generally favours structural remedies, logically because this type of remedy provides structural changes and a structural solution for the competition problems that the ACM has identified. There is also room for the acceptance of behavioural remedies, such as, for instance, in concentrations in the healthcare sector (e.g. mergers between hospitals).

In the second stage investigation, the ACM can aim at conditions and/or restrictions to change the transaction. Most undertakings then consider and offer remedies by way of divestments. For divestments, undertakings must show that a prospective purchaser, independent from the companies in question, with sufficient expertise and financial resources, is ready to acquire the part of the business that is to be divested. Furthermore, the undertakings must ensure that competition is not otherwise impeded by the divestment (for instance, because the prospective purchaser has a dominant position in the relevant market where the business part would fall into). The ACM can deal with divestiture issues itself. The ACM can also appoint a trustee, who will supervise the divestment.

Key policy developments

At the end of 2017, the ACM announced that it would intensify its review of competition risks related to hospital concentrations. This means that the ACM may identify competition problems more often, and prohibit hospital concentrations more quickly than before. This will take place on the basis of the existing competition test and the current concentration control rules. So, there will be no modification of the existing legal (concentration control) framework.

Additionally, the ACM announced at the end of 2018 that, from now on, it will analyse product markets in hospital care at the patient group level. The ACM previously applied a classification into basic care and top care, where basic care was further classified into clinical and non-clinical hospital care. Within the basic care classification, the ACM did not differentiate between specialisms or sub-specialisms except when the merging parties overlapped on a limited number of specialisms.

In 2019, the ACM started working with the new approach. This means that hospitals and independent treatment centres that wish to merge must describe per patient group which alternative care providers remain available for patients and health insurance companies after the proposed transaction. This is necessary, according to the ACM, because hospitals differentiate themselves more and more in their range of care. Due to specialisation, they no longer offer all the various types of complex care in one location anymore.

The ACM also seems to have found a stronger interest in labour markets recently. The ACM has published guidelines on which agreements can be made among self-employed professionals (*freelancers*) in 2019 so as to guarantee them a certain minimum income for the services they render. The ACM considers it important that companies do not use self-employed professionals to undermine minimum socio-economic and working conditions that apply to, for instance, employees.

In April 2020, ACM cleared the takeover of Sanoma Media by DPG Group. In this context, freelance journalists voiced concerns about their negotiating position now that two important clients of journalistic services were merging forces in the market for hiring freelance journalists. The ACM investigated the possible consequences of the acquisition in this area. However, given the diversity of expertise and functions of the journalists working for the two companies, this takeover was not found to have a major impact on journalists' negotiating position. Moreover, the ACM concluded that among the total number of freelance journalists in the Netherlands, the *DPG Media/Sanoma* combination only made use of a modest number. Therefore, the ACM concluded that as a result of the merger, DPG Media/Sanoma would not acquire an overly strong position in the market for hiring freelance journalists. The merger was cleared.

Reform proposals

In the Netherlands, currently two different tests apply regarding concentrations in the healthcare sector. Both the NZa (the Dutch healthcare regulator) and the ACM must be notified of an intended merger or acquisition in the healthcare sector. The agencies carry out their supervisory tasks on the basis of separate laws with their own distinctive aim and purpose. The Dutch Competition Act (and its concentration control paragraph) lays down the legal framework for the ACM; the Dutch *Health Care Market Regulation Act* lays down the legal framework on the basis of which the NZa acts.

According to the current legislation, the NZa tests intended concentrations in healthcare by reviewing whether the parties involved have taken due account of the interests and opinions

of the stakeholders (such as the staff of the healthcare providers involved and their patients). The ACM subsequently checks whether intended concentrations may significantly impede effective competition in the healthcare market. Thus the supervisory objectives of both legal regimes vary. Furthermore, they use different application thresholds to define their scope: (i) the concentration control regime in the Dutch *Competition Act* uses turnover thresholds; while (ii) the concentration control regime in the Dutch *Health Care Market Regulation Act* uses a threshold revolving around the number of staff members that are employed by the healthcare organisations involved (but this threshold may be changed in the near future).

The initial reason for a separate test on behalf of the NZa was to maintain quality and due process in the healthcare sector. On the other hand, two different enforcement agencies are involved in the assessment of one healthcare concentration time and again, which is not in favour of the efficiency of control and the processing speed of the application(s).

Therefore, the Dutch legislator has taken the initiative of placing total (concentration) control regarding the healthcare sector in the hands of the ACM. A new bill transfers the supervision on the care-specific concentration control paragraph in the Dutch *Health Care Market Regulation Act* to the ACM. The rationale behind this modification is that the ACM is also better equipped to supervise markets, including the healthcare market, since it monitors all sectors of the economy. The bringing together of supervisory tasks will contribute to the consistency of control as well. The transfer means that in the near future there will be only one authority for merger control issues in the healthcare sector (namely, the ACM).

The new bill that brings about this change is still pending in Dutch parliament. The ACM has provided several policy suggestions to the Dutch legislator in this context; two of these suggestions are currently being considered by the Dutch Government. It remains unclear when supervision will entirely transfer to the ACM.

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