Merger control in The Netherlands: overview

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Country Q&A | Law stated as at 01-Nov-2018 | The Netherlands

A Q&A guide to merger control in The Netherlands.

The Q&A gives a high level overview of merger control, regulatory framework and regulatory authorities, relevant triggering events and thresholds in The Netherlands. It also covers notification requirements, procedures and timetables, publicity and confidentiality, third party rights, substantive test, remedies, penalties, appeals, joint ventures and proposals for reform.

For information on restraints of trade, monopolies and abuses of market power in The Netherlands, visit *Restraints of trade and dominance in The Netherlands: overview*.

This Q&A is part of the global guide to competition and cartel leniency. For a full list of jurisdictional Merger Control Q&As visit *www.practicallaw.com/mergercontrol-guide*. For a full list of jurisdictional Restraints of Trade and Dominance Q&As visit *www.practicallaw.com/restraintsoftrade-guide*.

For a full list of jurisdictional Cartel Leniency Q&As, which provide a succinct overview of leniency and immunity, the applicable procedure and the regulatory authorities in multiple jurisdictions, visit *www.practicallaw.com/leniency-guide*.

Regulatory framework

1. What (if any) merger control rules apply to mergers and acquisitions in your jurisdiction? What is the regulatory authority?

Regulatory framework

The primary basis for competition law, including for merger/concentration control, is the Dutch Competition Act (*Mededingingswe*t) (DCA). Further, with regards to procedural law, the General Administrative Law Act (*Algemene Wet Bestuursrecht)* and the Act Establishing the ACM (*Instellingswet ACM*) are applicable in mergers and acquisitions.

Regulatory authority

The ACM (Authority for Consumers and Markets) (*Autoriteit Consument & Markt*) is the responsible regulatory authority for the enforcement of the DCA. It is also the competent authority for matters relating to Regulation (EC) 139/2004 on the control of concentrations between undertakings (Merger Regulation).

The ACM is an autonomous administrative authority and part of the Dutch central government, but it is independent from the Ministry of Economic Affairs.

The ACM assesses concentrations in two phases. The first phase is the notification phase (Phase 1) and the second phase is the application for a licence (Phase 2). However, if the ACM refuses to grant a licence for a concentration, the Minister of Economic Affairs can decide on request to grant a licence if, in his or her opinion, important public interests outweigh the expected impediment of competition (*Article 47(1), DCA*).

See box, *The regulatory authority*.

Triggering events/thresholds

2. What are the relevant jurisdictional triggering events/thresholds?

Triggering events
The concentration provisions of the DCA apply to the same types of transactions that fall under Article 3 of the Merger Regulation. The following types of transactions are subject to merger control (*Article 27, DCA*):

- The merger of two or more previously independent undertakings.
- The acquisition of direct or indirect control by:
  - one or more natural person or legal entities which already control one undertaking;
  - one or more natural person or legal entities which already control one undertaking, or
  - one or more undertakings of the whole or parts of one or more other undertakings, through the acquisition of a participating interest in the capital or assets, under an agreement or by any other means.

The definition of control is the ability of exercising decisive influence on the activities of an undertaking on the basis of factual (de facto) or legal (de jure) circumstances (*Article 26, DCA*).

Thresholds
Article 29 DCA states that a concentration must be notified if both:

- The combined turnover of all the undertakings concerned is more than EUR150 million in the calendar year preceding the concentration.
- Of this turnover, at least two concerned undertakings each earned at least EUR30 million in The Netherlands.

Where the concentration is implemented through the acquisition of control over part of an undertaking, only the turnover relating to the part that is subject to the transaction will be taken into account in the determination of turnover.

Minority interests are included for turnover thresholds if they give rise to "control", for example, as a result of contractual veto rights or if a smaller shareholding allows blocking of important strategic decisions due to qualified majority voting requirements.

There are also some sector-specific thresholds:

- For credit and financial institutions, within the meaning of Article 1:1 of the Act on Financial Supervision (*Wet op het financieel toezicht*), instead of the turnover, the income items of the preceding financial year must be calculated, which are the following (*Article 31(1), DCA*):
    - interest income;
    - income from securities;
    - received commissions;
    - net profit on financial operations and other operating income, after deduction of value added tax and other taxes directly related to these income items.
- For insurance companies and pension funds, within the meaning of the Act on Financial Supervision, the turnover must be replaced by the gross premiums in the previous calendar year (*Article 31(2), DCA*).
- A concentration between at least two healthcare undertakings must be notified if:
    - the combined turnover off all undertakings concerned is more than EUR55 million in the calendar year preceding the concentration; and
    - of this turnover, at least two concerned undertakings each earned at least EUR10 million in The Netherlands.

The relevant turnover in relation to the thresholds for healthcare undertakings is the complete turnover of the undertakings concerned, and not only the turnover that has been achieved with providing healthcare services.

Notification

3. What are the notification requirements for mergers?

Mandatory or voluntary
Filing is mandatory if the concentration meets the thresholds (*see Question 2, Thresholds*).

Timing
A transaction should be notified before completion. There is no deadline by which the notification must be filed. The only requirement is that the concentration must not come into effect before the ACM is notified and four weeks have passed after the notification (*Article 34(1), DCA*).

Pre-notification and formal/informal guidance
There is no requirement to have pre-notification contacts, but the ACM welcomes pre-notification discussions. Such pre-notification discussion usually take place in more complex cases with significant competition issues. The ACM is in general prepared to give informal guidance regarding jurisdictional matters in individual cases.

Responsibility for notification
The parties intending to establish a concentration are responsible for the notification. In case of a merger that would be the acquiring companies. If a company acquires control of another company, the acquiring company should notify. In a public bid, the bidder should notify.

Relevant authority
The relevant authority is the ACM. If the concentration, however, concerns a healthcare undertaking that employs 50 or more healthcare providers, the Dutch Healthcare Authority (NZa) must be notified if a merger involves a healthcare provider. In short, the NZa reviews the accessibility and quality of healthcare services and the integration plans. If the NZa gives the green light, the transaction must be notified to the ACM if the relevant thresholds (*see Question 2*) are met. These rules were expected to change during 2018. After the legislative changes have been implemented the ACM will be responsible for the NZa test.

Form of notification
There are standards forms for notification, one for notifications (Phase 1) and one for applications for a licence (Phase 2). These forms are only available in Dutch on the website of the ACM: *www.acm.nl/sites/default/files/old_download/aanvraagformulieren/formulier-voor-het-aanmelden-van-een-concentratie-2016-01-07.pdf*.

These standards forms are provided for by law (*Besluit vaststelling formulieren mededingingswet 2007*).

Filing fee
Undertakings are required to pay a filling fee. For a decision in the notification phase (Phase 1) the fee is EUR17,450. For an application for a licence (Phase 2) the fee is EUR34,900. This is in addition to the EUR17,450 Phase I fee. The fees must be paid even if the parties later decide to withdraw their notification.

Obligation to suspend
It is prohibited to implement a concentration before the end of the four weeks statutory waiting period following notification of the proposed concentration. The obligation to wait does not apply in two situations:

- The implementation of a public bid is not prohibited as long as the ACM is notified immediately and the acquirer does not exercise its voting rights.
- Merging parties can file a request for an exemption from the standstill period on the basis of Article 40 of the DCA, which is equivalent to section 7(3) of the EU Merger Regulation. To be exempted, the requesting parties must demonstrate that the period it takes for the ACM to reach its decision will result in irreparable damage which would make the whole transaction redundant. A full assessment will, however, still take

place including the optional outcome of a blockage of the merger even after the request has been granted. Therefore, acting on an Article 40 request is at the risk of the merging parties.

If an application for a licence is required (Phase 2), the concentration will be further suspended for the 13-week period following the application for a licence. Also during a Phase 2 investigation, an exemption can be granted on a request to prevent irreparable damage.

If the ACM decides that additional information is necessary to assess the notification, it sends an information request to the notifying parties. A request for additional information will "stop the clock", and suspend the four-week period, or in Phase 2, the 13-week period. In practice, the ACM frequently requests additional information. It is important that parties take this into account in their planning.

Procedure and timetable

4. What are the applicable procedures and timetable?

The review process of merger control notifications under the DCA consists of two phases: the notification phase (Phase 1) and the licence phase (Phase 2).

Phase 1 starts when the ACM receives the notification. During Phase I the ACM must decide within four weeks whether the transaction requires a licence. If no licence is required, the parties can execute the transaction.

If the ACM decides that a licence is required, the parties can apply for the licence at their discretion and according to their own timetable. However, without a licence the transaction cannot be implemented. Phase 2 is initiated with the submission of a licence request. During Phase 2, the ACM will conduct a more in-depth analysis of the effects of the concentration. To obtain the necessary licence, the undertakings concerned must provide more detailed information to the ACM. The ACM must decide on the licence request within 13 weeks. On average, however, a Phase 2 procedure typically takes five to six months. In most cases, stop-the-clock interruptions (*see Question 3*) cause the extra time. If the ACM decides not to grant a licence, the notifying parties are not allowed to execute the transaction.

For an overview of the notification process, see flowchart, *The Netherlands: merger notifications*.

Publicity and confidentiality

5. How much information is made publicly available concerning merger inquiries? Is any information made automatically confidential and is confidentiality available on request?

Publicity
When the ACM receives a notification, it will publish an announcement in the *Government Gazette* (*Staatscourant*) (*Article 36, DCA*). The purpose of this publication is to give interested parties the opportunity to comment on the proposed concentration. The announcement in the *Government Gazette* contains no other information than the names and activities of the undertakings concerned, the date of receipt of the notification, the type of concentration and the case number. Interested parties can make their comments known in writing within seven days of the publication. A similar publication is made for a licence application (*Article 42(3), DCA*).

All merger control decisions are published in full on the ACM website and in the *Government Gazette*. Most Phase 1 decisions are published as "short-form" decisions containing only the names of the parties, the date of the notification, a short description of the transaction and the fact that the ACM does not object to the transaction. Next to the publication, the ACM often issues a press release on its website. The ACM can also publish press releases.

Automatic confidentiality
Automatic confidentiality applies to the submitted merger notification form, the progress of the review and the timetable for clearance. Automatic confidentiality does not apply to the decision of the ACM, however, parties can indicate which parts of the decision should be treated as confidential (*see also Question 6*).

Confidentiality on request
Before publication of the decision, the ACM gives the parties the opportunity to indicate which passages in the decision are confidential and should be removed from the public version of the decision.

Rights of third parties

6. What rights (if any) do third parties have to make representations, access documents or be heard during the course of an investigation?

Representations
Interested parties can submit their comments on the proposed concentration within seven days after the publication in the *Government Gazette* (*see Question 5, Publicity*). In more complex cases, the ACM can contact third parties, such as customers, suppliers and competitors, for them to comment on the proposed concentration, to verify the submission of the parties and to get insight into the market.

Document access

Third parties can request information from the ACM relating to the concentration on the basis of the Government Information (Public Access) Act (*Wet Openbaarheid van Bestuur*). Confidential information will not be disclosed. In addition, access to documents is not granted if it would harm the monitoring of concentration or would disproportionately harm one party compared to other market participants.

During Phase 2, no access is provided to any documents in relation to the investigation, as this could impede the investigation and the interests of parties.

Be heard
Third parties that submitted their views on the application for a licence (Phase 2) can be invited by the ACM to an oral hearing. There is however no obligation for the ACM to organise such an oral hearing. Third parties can also be heard in alternative ways.

Substantive test

7. What is the substantive test?

In Phase 1, the substantive test is whether the ACM has reasons to be believe that the concentration may significantly impede effective competition in the Dutch market or a part of it, in particular as a result of the creation or strengthening of a dominant position. If the ACM believes that this could be the case, it will either require remedies to alleviate these concerns or require a licence under the licence procedure with the ACM (Phase 2).

In Phase 2, the substantive test is whether the concentration will significantly impede effective competition in the Dutch market or on a part of it, in particular as a result of the creation or strengthening of a dominant position.

8. What, if any, arguments can be used to counter competition issues (efficiencies, customer benefits)?

As under the EU Merger Regulation it is possible for the merging firms to counter any apparent reduction of competition caused by the merger, with economic efficiency considerations resulting from the merger. In its review the ACM will in particular focus on whether it is credible The ACM will consider a failing firm defence. The onus is on the merging parties to demonstrate that the firm meets the failing firm test as follows:

- The failing firm would soon be forced out of the market because of financial difficulties.
- There is no less anti-competitive alternative scenario.

- Without the transaction, the failing firm's assets would inevitably exit the market.
- That efficiency gains will be passed on to consumers.

9. Is it possible for the merging parties to raise a failing/exiting firm defence?

The ACM will consider a failing firm defence. The onus is on the merging parties to demonstrate that the firm meets the failing firm test (*see Question 8*).

Remedies, penalties and appeal

10. What remedies (commitments or undertakings) can be imposed as conditions of clearance to address competition concerns? At what stage of the procedure can they be offered and accepted?

If competition concerns arise as a result of the realisation of a concentration, the parties can make proposals to remove these concerns. The ACM can include the commitments proposed by the parties (remedies) as limitations and instructions in its decision granting its consent to the concentration.

The ACM has published guidelines on remedies that are largely in line with the European Commission's guidance and practice. The proposed remedies must be effective, clear and detailed. Remedies can be proposed during pre-notification discussions, Phase I (ultimately one week before expiry of the four-week review period) and Phase II (ultimately three weeks before expiry of the 13-week review period).

Both structural and behavioural remedies are possible, however the ACM has a strong preference for remedies of a structural nature (that is, divestment) that ensure that the structure of the market changes permanently and requires no further supervision after implementation. The part of the company to be divested must be a "going concern". It must be able to operate independently of the parties.

Proposed remedies are tested by the ACM for feasibility and effectiveness by carrying out a market test among market players. Once the ACM has approved the proposed remedies, an independent trustee is responsible for ensuring the implementation of and compliance with these.

The DCA does not offer the possibility of taking a conditional decision in the first phase of the assessment of a concentration. Under certain circumstances, however, it is possible to amend the notified transaction in this phase and, by doing so, to remove the competition concerns. This avoids a far-reaching second phase investigation. The

ACM can only accept an amendment to the transaction if the competition problem can be precisely defined and if the proposals made by the parties offer a full and final solution to this problem.

11. What are the penalties for failing to comply with the merger control rules?

Failure to notify correctly
Failure to notify correctly may result in a void transaction and the ACM can impose an administrative fine up to a maximum of EUR900,000 or 10% of the annual turnover of the company (whichever is higher). The administrative fine can be imposed on each party that is responsible for filing.

In addition, the ACM can impose an order subject to penalty payments, that the undertakings concerned cease or reverse the infringement.

Implementation before approval or after prohibition
The penalties for implementation before approval or after prohibition are the same as those for failure to notify correctly (*see above, Failure to notify correctly*).

Failure to observe
The penalties for failure to observe a decision of the ACM are the same as those for failure to notify correctly (*see above, Failure to notify correctly*).

12. Is there a right of appeal against the regulator's decision and what is the applicable procedure? Are rights of appeal available to third parties or only the parties to the decision?

Rights of appeal
Parties can appeal any formal ACM decision regarding their merger control proceedings.

Procedure
Appeals must be lodged with the District Court of Rotterdam (Chamber of Administrative Law). The judgment of the court can be further appealed to the Trade and Industry Appeals Tribunal.

An appeal must be lodged within six weeks from the decision. It is possible to lodge a pro forma appeal and put forward the grounds for appeal at a later stage determined by the court.

Third party rights of appeal
Third parties whose interests are directly affected by a merger control decision of the ACM have the right to appeal. The procedure and timing described above also applies to third parties.

Automatic clearance of restrictive provisions

13. If a merger is cleared, are any restrictive provisions in the agreements automatically cleared? If they are not automatically cleared, how are they regulated?

Restrictive provisions are not automatically cleared. Parties must indicate in their notification whether there are any ancillary restraints. Parties can ask the ACM to declare that the restraints described fall within Article 10 of the DCA, meaning that they are directly related to and necessary for the implementation of the concentration. If the ACM agrees with parties that the restraints are ancillary they are cleared with the clearance of the merger.

Regulation of specific industries

14. What industries (if any) are specifically regulated?

Specific merger notification thresholds and rules apply to the healthcare sector (*see Questions 2 and 3*).

With respect to the financial sector, the ACM and the Dutch Central Bank (DNB) drew up a protocol for the assessment of concentrations in emergency situations. The protocol governs situations in which a financial institution faces an acute threat of failure, which would have a significant impact on the entire financial sector and the DNB regards a concentration as necessary to avert this threat.

In addition, there are various industries for which additional legal rules apply in case of mergers, such as:

- **Energy.** Any change in control as referred to in Article 26 of the DCA in an LNG facility or an LNG company (as defined in Article 1h and 1i of the Gas Act) must be notified to the Minister of Economic Affairs and Climate Policy. The Minister can prohibit the transaction on public safety and security of supply grounds (*Article 66e, Gas Act*).
- **Public housing.** Article 53 of the Housing Act regulates mergers of housing corporations.

- **Water.** Article 18 of the Drinking Water Act 2009 stipulates that water companies are not allowed to merge without prior permission of the Minister of Infrastructure and Environment.

15. Has the regulatory authority in your jurisdiction issued guidelines or policy on its approach in analysing mergers in a specific industry?

Guidelines have been issued for mergers in the healthcare sector. The guidelines offer hospitals and other healthcare organisations more certainty about what they can expect from the ACM when merging or collaborating.

Joint ventures

16. How are joint ventures analysed under competition law?

Full-function joint ventures are caught by the merger control provisions of the DCA. The concept of full-function joint ventures is the same as under the EU Merger Regulation, that is, a joint venture that performs on a lasting basis all the functions of an autonomous economic entity.

Co-operative joint ventures (that is, not full-function) are not subject to the merger control rules of the DCA, but they can fall under Article 6 of the DCA and/or Article 101 of the Treaty on the Functioning of the EU.

Inter-agency co-operation

17. Does the regulatory authority in your jurisdiction co-operate with regulatory authorities in other jurisdictions in relation to merger investigations? If so, what is the legal basis for and extent of co-operation (in particular, in relation to the exchange of information, remedies/settlements)?

The ACM works closely together with other European competition authorities and the European Commission in the European Competition Network (ECN). This collaboration is not only aimed at sharing knowledge, but also

at realising a consistent application of European competition rules. The ACM is also a member of the European Competition Authorities Association (ECA) and the International Competition Network (ICN).

As an exception to the general rule that information collected about companies under the DCA should remain confidential and can be used only for the purposes of the DCA, the ACM can share information with foreign competition authorities. Such information can only be shared where:

- The confidentiality of the information is sufficiently protected.
- Adequate assurances are given that the information will not be used for purposes other than the enforcement of (foreign) competition law.
- The provision of such data is in the interests of the Dutch economy.

Recent mergers, cases, trends and statistics

18. What notable recent developments, trends or notable recent mergers or proposed mergers have been reviewed by the regulatory authority in your jurisdiction and why is it notable? Are there any statistics published on annual merger reviews conducted in the jurisdiction?

In 2017, the ACM took a total of 105 decisions on proposed concentrations. Only one merger (the proposed merger between the Catharina hospital and Sint Anna Hospital) was referred to Phase 2. The hospitals decided not to apply for a licence, they abandoned their merger plans.

Notable is the clearance in September 2017 of the merger between Amsterdam-based Academic Medical Center (AMC) and the VU University Medical Center (VUmc). ACM launched a Phase 2 investigation into the merger's consequences for competition, especially with regard to high-complexity care or complex hospital care. From the decision follows that ACM does not foresee any significant consequences for competition as a result of the merger. ACM concluded that sufficient options remain for patients and health insurers after the merger. This applies to both basic care and complex hospital care. In high-complexity care, ACM has observed that both hospitals offer unique care that is not offered elsewhere. The merger will not change this. For the remaining high-complexity care, AMC and VUmc compete with other hospitals in the region. Based on an extensive investigation, ACM has found that these hospitals have a limited combined market share (between 30% and 40%) on this market, and that other hospitals in the region act as alternatives for insurers and patients.

Also in 2018, mergers in the healthcare sector continue to gain interest from the ACM. In December 2017, the ACM announced it will intensify its attention for anticompetitive risks of hospital mergers. A study into the effects of hospital mergers on prices and volumes has shown that prices increase post-merger. An earlier study already showed that healthcare quality does not demonstrably improve after mergers. These are critical competition parameters against which ACM tests planned hospital mergers.

Following the announcement of intensified reviews of hospital merger, the ACM decided in July 2018 that the proposed merger of NL Healthcare Clinics and Bergman Clinics requires a licence. Both clinics are independent

treatment centres, focusing on specialist medical care that is plannable and less complex. Following its investigation, ACM has come to the provisional conclusion that there are indications that, after the concentration, the bargaining position of health insurers may deteriorate in relation to that of the merger parties. That could result in the merger parties being able to charge health insurers higher prices after the concentration, so raising the possibility that the insured could face higher premiums.

Proposals for reform

19. Are there any proposals for reform concerning merger control?

See *Question 3* in relation to the transfer of tasks from the NZa to the ACM.

Online resources

Authority for Consumers and Markets (ACM)
W *www.acm.nl*

Description. This is the official website of the ACM, which contains all published information from the ACM (including decisions, market studies as well as the law, regulations, official forms and guidance. The website is available both in Dutch and English, but very few documents are available in English and the search function of the website is sub-optimal.

Dutch government website for legislation
W *http://wetten.overheid.nl/BWBR0008691/geldigheidsdatum_15-05-2014*

Description. This website is the official website from the Dutch government on which all Dutch legislation is published.

The regulatory authority

Authority for Consumers and Markets (ACM)
Head. From 1 September 2018 Martijn Snoep is chairman of the board.

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Outline structure. The ACM is an independent agency. The board of the ACM is an autonomous administrative authority under Dutch law and consists of three members. The board has final say over all decisions issued by the ACM. The Minister of Economic Affairs remains responsible for competition policy and can give the ACM general policy instructions, but cannot instruct on specific cases.

Responsibilities. The ACM enforces the Competition Act and as such can, among other things, initiate proceedings, order parties to cease behaviour that infringes the Competition Act and take administrative measures.

Procedure for obtaining documents. Documents in the public domain can be found on the ACM's website. Any other documents (not already in the public domain) may be accessible for third parties under the Government Information (Public Access) Act.

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Publications. Distributieoveernkomsten. EU – België – Nederland (2018).

Recent transactions Banning's merger control team handles all aspects of EU and national merger control, from initial analysis through to Phase II investigations. The team regularly assists clients with making filings to competition authorities. Recent experience include filings in the following sectors: agricultural markets, animal foods, automotive, international transport, building materials, supermarkets, franchising and recruitment and outplacement services.

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