

The International Comparative Legal Guide to: Merger Control 2010

A practical insight to cross-border merger control issues



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1 Relevant Authorities and Legislation

1.1 Who is/are the relevant merger authority(ies)?

The Dutch Competition Authority (*Nederlandse Mededingingsautoriteit* - "NMa") enforces the merger control provisions of the Competition Act (*Mededingingswet* - "Act") which entered into force on 1 January 1998. The NMa is, since 1 July 2005, an autonomous administrative body. It is headed by a board of three members ("Board"). The NMa investigates concentrations following notification or on its own initiative.

The Minister of economic affairs is responsible for competition policy in general and appoints the Board. The Minister may not be involved in specific cases. The only exception to this rule is the right to grant a licence for a proposed concentration when the Board refuses to do so (Article 47 of the Act). The Minister will only grant such licence if he is of the opinion that this is justified on grounds of public interest which outweigh the reduction in competition which is expected from the merger. The Minister has yet to exercise this power.

Decisions of the NMa are subject to challenge before the NMa. Subsequently, appeal is possible to a specialist court in Rotterdam and then to the Trade and Industry Appeals Tribunal (*College van Beroep voor het bedrijfsleven*) in the Hague.

1.2 What is the merger legislation?

Chapter 5 of the Competition Act provides for a system of merger control which is similar to that of the EU. Chapter 8 provides for sanctions for a breach of the merger control provisions. These include fines of up to EUR 450,000 on individuals responsible for the breach of the provisions.

The General Act on Administrative Law (*Algemene wet bestuursrecht*, the "Administrative Law Act") contains the relevant rules of procedure which apply in the enforcement of the Act.

1.3 Is there any other relevant legislation for foreign mergers?

There are no special rules for foreign mergers. The NMa attributes turnover to the Netherlands in accordance with the Commission Notice on the calculation of turnover.

1.4 Is there any other relevant legislation for mergers in particular sectors?

The Credit Institutions Supervision Act (*Wet toezicht kredietwezen* 1992) and the Insurance Industry Supervision Act (*Wet toezicht*

verzekeringsbedrijf 1993) both provide for additional supervision, by the Dutch Central Bank, of concentrations in these sectors. There is also a protocol (1999) between the NMa and the Dutch Central Bank with regard to insolvency-related concentrations.

Media concentrations are subject to a temporary act which came into force in June 2007 (*Tijdelijke wet mediaconcentraties*). This act provides that mergers between newspapers are subject to a combined 35% market share ceiling. Media concentrations relating to a combination of the user markets for newspapers, television programmes and/or radio programmes are subject to a market share threshold of 90%. This temporary act was due to lapse on 1 January 2010. It shall however remain in force at least until an ongoing investigation into its effects has been completed.

There is a protocol between the Dutch Healthcare Authority (*Nederlandse zorgautoriteit*, "NZa") and the NMa on the basis of which the NZa may give its views on concentrations in this sector.

2 Transactions Caught by Merger Control Legislation

2.1 Which types of transaction are caught - in particular, how is the concept of "control" defined?

The Act applies to concentrations, which are defined in Article 27 as mergers acquisitions and (full function) joint ventures.

Control

The concept of control is defined (in Article 26) and interpreted in line with the EC Merger Control Regulation and the Commission's Notice on the concept of a concentration. The relevant criterion is the ability to influence the long term commercial activities and strategy of the undertaking. Veto rights, for example on important investments or the appointment of the board, can lead to such decisive influence.

2.2 Can the acquisition of a minority shareholding amount to a "merger"?

The acquisition of a minority shareholding can give rise to control and comprise a merger if it enables the purchaser on the basis of legal rights (in addition to its rights as shareholder) or factual circumstances to exercise decisive influence.

2.3 Are joint ventures subject to merger control?

The creation of a joint venture will fall under the merger control

regime if the joint venture will perform, on a lasting basis, all the functions of an autonomous economic entity. In assessing whether this is the case, the NMA follows the Commission's Notice on full-function joint ventures.

2.4 What are the jurisdictional thresholds for application of merger control?

Turnover thresholds

A concentration triggers the notification requirements when:

- i. the combined worldwide turnover of the participating undertakings exceeded €13.45 million in the preceding calendar year; and
- ii. at least two of the undertakings had a Netherlands turnover of €30 million.

The following lower thresholds apply, since 1 January 2008, to concentrations where at least two of the undertakings concerned realise a turnover of €5 million or more from the provision of healthcare:

- i. the combined worldwide turnover of the undertakings concerned in the previous calendar year exceeds €5 million; and
- ii. at least two of the undertakings concerned each achieve a Netherlands turnover of at least €10 million.

These thresholds apply for a period of five years.

Media concentrations which do not meet the jurisdictional thresholds above will nevertheless be prohibited if they meet the market share thresholds set out in question 1.4.

The NMA does not have jurisdiction if the transaction meets the thresholds for notification to the European Commission.

Turnover calculation

The method for calculating turnover is similar to that adopted under the EC rules.

There are special rules for credit and financial institutions, which correspond to the turnover calculation as provided for in Article 5 of the EC Merger Regulation.

For insurance companies, turnover is replaced by the value of the gross premiums written in the preceding financial year, of which €4.54 million should have been received from Dutch residents.

2.5 Does merger control apply in the absence of a substantive overlap?

When the turnover thresholds are met, the merger control provisions apply even in the absence of an overlap. A short-form decision can be issued in simple cases.

2.6 In what circumstances is it likely that transactions between parties outside the Netherlands ("foreign to foreign" transactions) would be caught by your merger control legislation?

Foreign to foreign mergers are caught by the Act as soon as they meet the turnover thresholds.

2.7 Please describe any mechanisms whereby the operation of the jurisdictional thresholds may be overridden by other provisions.

A transaction which meets the Dutch thresholds may nevertheless be reviewed by the Commission instead of the NMA: (i) when the

transaction meets the EC thresholds; (ii) on request of the NMA; or (iii) in certain circumstances, on the request of the parties.

2.8 Where a merger takes place in stages, what principles are applied in order to identify whether the various stages constitute a single transaction or a series of transactions?

Article 30 allows the NMA to assess legally or economically related transactions as a single concentration. The acquisitions are legally interdependent if one acquisition would not take place without the other. For economic interdependence factors such as a physical or logistical connection between the undertakings or the combined use of the different undertakings for the production or distribution of products and services, are relevant. This provision does not specify a time period within which the related transactions must be carried out to be considered part of the same concentration.

3 Notification and its Impact on the Transaction Timetable

3.1 Where the jurisdictional thresholds are met, is notification compulsory and is there a deadline for notification?

When the turnover thresholds are met, notification is compulsory prior to the completion of the transaction.

3.2 Please describe any exceptions where, even though the jurisdictional thresholds are met, clearance is not required.

Clearance is not required for:

- temporary participation by financial institutions;
- control relating to administration in cases of a moratorium or insolvency or following a decision of the Dutch Central Bank or the Pensions and Insurance Regulator; or
- control by private equity companies to the extent that the voting rights are exercised only for the purposes of protecting the investment.

3.3 Where a merger technically requires notification and clearance, what are the risks of not filing? Are there any formal sanctions?

If a transaction is not notified, it may be declared void, irrespective of the outcome of the assessment by the NMA. In this respect the Dutch rules differ from the EU rules which provide that the validity of the transaction depends on the competition assessment of the European Commission.

Furthermore, the NMA can impose a fine of up to 10% of the turnover. The NMA can also impose periodic penalties to enforce notification.

3.4 Is it possible to carve out local completion of a merger to avoid delaying global completion?

The transaction cannot be completed before clearance. This prohibition applies to the whole concentration.

3.5 At what stage in the transaction timetable can the notification be filed?

Parties can file a notification as soon as there is a concrete intention to carry out a transaction, as evidenced, for example, by a letter of intent. Special rules apply to public bids (see question 3.7).

3.6 What is the timeframe for scrutiny of the merger by the merger authority? What are the main stages in the regulatory process? Can the timeframe be suspended by the authority?

The merger control investigation procedure can be divided into two phases: the “notification” phase (*melding*); and the “licence” phase (*vergunning*).

Phase I

The notification phase is limited to four weeks. In this period, the NMa assesses whether a licence is required. If the NMa formally requests more information, the four-week period will be extended by the period taken by the parties to provide the information requested. In practice, phase-I decisions are often issued after a longer period than four weeks. In simple cases, it is possible to get a “short-form” decision within two to three weeks. See also question 3.9.

Phase II

If the NMa finds that the concentration might lead to an appreciable impediment of effective competition on the Dutch market, the parties will require a licence to carry out the proposed concentration. The parties will have to file an application and the NMa will start a phase-II investigation. The licence phase is limited to thirteen weeks, subject to extension as a result of information requests.

3.7 Is there any prohibition on completing the transaction before clearance is received or any compulsory waiting period has ended? What are the risks in completing before clearance is received?

There is a prohibition on completion of the transaction before clearance.

Derogation from this “standstill” period can be requested by the notifying parties if delay would lead to bankruptcy or irreparable harm or the company has been granted a moratorium. Derogation may be subject to restrictions and conditions.

Special rules apply to public acquisitions or exchange bids, and allow the acquisition of shares on the condition that the acquiring party does not exercise its voting rights and the Board is notified immediately.

Completion prior to clearance can be sanctioned by a fine of up to €450,000 or 10% of turnover, whichever is higher. Individuals can also be fined up to €450,000. Furthermore, the NMa can impose periodic penalty payments.

Civil courts can declare the transaction void.

3.8 Where notification is required, is there a prescribed format?

The NMa has standard forms (in Dutch) for notification and, if required, the licence application. These forms and unofficial English versions are available on the website.

3.9 Is there a short form or accelerated procedure for any types of mergers?

The NMa follows a simplified procedure and issues a “short form” decision in simple cases where there are no objections from third parties and it is clear that the concentration does not raise any competition concerns. Parties are still required to complete the standard notification form. However, the decision is generally given within two or three weeks.

3.10 Who is responsible for making the notification and are there any filing fees?

All parties to a transaction are responsible for making the notification. In a full merger, the merging parties may notify. If a company acquires control of another company, either the seller or the purchaser or both may notify. In general, the purchaser notifies. Public bids have to be notified by the bidder. In the case of a joint venture, the parent companies may notify.

The filing fees are €15,000 for a notification and €30,000 for a licence request.

4 Substantive Assessment of the Merger and Outcome of the Process

4.1 What is the substantive test against which a merger will be assessed?

The relevant substantive test is whether the concentration “*appreciably impedes effective competition on the Dutch market, particularly as a result of the creation or strengthening of a dominant economic position*”. The NMa grants a licence if it concludes after a phase-II investigation, that this will not occur. The NMa considers the economic reality of the relevant merger and takes efficiencies into account.

For media concentrations, the NMa also has to take account of the cross-ownership thresholds (see question 1.4). Mergers that would in the view of the NMa not harm competition are nevertheless prohibited if they would lead to market shares above the specified maximum.

4.2 What is the scope for the involvement of third parties (or complainants) in the regulatory scrutiny process?

The merger control process is confidential. Third parties do not have a right of access to the files.

The NMa announces the receipt of a notification on its website and in the *Staatscourant* (the Dutch equivalent of the Official Journal). Third parties who are directly concerned by the transaction are requested to give their views within seven days. If the NMa receives relevant information after this date, it has a duty to take this information into account. Third parties have a limited right to be heard by the NMa in order to establish the necessary facts of the case. The NMa can also invite third parties for oral hearings during the phase-II investigation.

4.3 What information gathering powers does the regulator enjoy in relation to the scrutiny of a merger?

Parties have a duty to provide all information requested in the notification phase (phase I). The NMa will within five days of receipt of the notification inform the parties if the notification is incomplete. The day on which the NMa receives the missing information will be considered the first day of the investigation.

The NMa may request additional information in the four-week period. Such request extends the four-week “stand-still” period. The provision of insufficient or incorrect information can lead to a fine of up to €450,000 or 1% of the turnover, whichever is higher. The NMa imposed its first fine, of €468,000, for insufficient information in its recent *Refresco* decision of 5 August 2009 (decision 6687/61).

In phase II, the NMa can decide not to deal with an incomplete

licence application. Similar fines can be imposed. The NMa may also withdraw a licence once it becomes clear that it has been granted on the basis of incorrect information.

The NMa may also fine individuals similar amounts for failure to cooperate with an NMa investigation.

4.4 During the regulatory process, what provision is there for the protection of commercially sensitive information?

Parties are required to submit all information necessary for the assessment of the concentration. If the notification/licence request contains confidential information, these sections should be marked as such. If parties jointly notify, the confidential information can be submitted separately. Parties must substantiate their confidentiality claims.

The NMa may not publicly disclose confidential information. The staff of the NMa is bound by secrecy rules and the NMa in general has a duty of care with regard to the information.

Parties may request access to information on the basis of the Public Information Act (*Wet openbaarheid van bestuur*). The confidentiality of the information is a ground for denying such request.

Decisions of the NMa are publicised. Sensitive information is (at the request of the parties) omitted from the publication.

5 The End of the Process: Remedies, Appeals and Enforcement

5.1 How does the regulatory process end?

After the phase-I investigation, the NMa can:

- state that the proposed concentration does not fall within the scope of the merger control provisions of the Act;
- clear the concentration unconditionally and without requiring a licence;
- clear the concentration subject to conditions but without requiring a licence; or
- require a licence application.

A failure to adopt a decision within the legal deadline is deemed to comprise unconditional approval of the concentration without a licence.

After the phase-II investigation, the NMa can:

- grant a licence without imposing;
- grant a licence subject to conditions; or
- refuse to grant a licence.

A failure to adopt a decision within the legal deadline is deemed to comprise the grant of a licence.

5.2 Where competition problems are identified, is it possible to negotiate "remedies" which are acceptable to the parties?

The NMa has adopted Guidelines on Remedies. It follows EC practice in this respect. The parties should take the initiative to offer structural or behavioural remedies. Amendments to the original notification are only accepted in case of a structural remedy.

5.3 At what stage in the process can the negotiation of remedies be commenced?

If parties wish to offer remedies in phase I, they should do so no later than one week before the end of the four-week review period.

Since it is also possible to change the structure of a transaction in order to receive clearance in phase I, parties should consider restructuring the concentration in the pre-notification stage and discuss possible remedies with the NMa. They can then avoid a lengthening of phase I as well as the possible necessity to re-notify.

In phase II, remedies can be offered no later than three weeks before the end of the thirteen-week review period. It is advisable to discuss possible remedies with the NMa before applying for the licence.

5.4 If a divestment remedy is required, does the merger authority have a standard approach to the terms and conditions to be applied to the divestment?

The NMa Guidelines on Remedies follow the Commission notice. The divestment must be completed within a fixed time period. Until divestment the business must be held apart from other activities and the marketability, competitiveness and economic viability needs to be maintained. The management may need to be transferred to a separate board. Relevant administrative functions and sufficient capital should be provided for. The value of fixed-assets, know-how, commercial information and the customer base, and the commercial competence of the employees need to be maintained.

A phase I divestment, consists of selling the business to a party approved by the NMa before the completion of the transaction.

A phase II divestment involves the appointment of an independent hold-separate trustee, which meets the approval of the NMa. If the parties involved do not manage to sell the divestment business within the deadline set by the NMa, the NMa can appoint a trustee to sell the business (at any price).

5.5 Can the parties complete the merger before the remedies have been complied with?

Contrary to the Commission's Notice on Remedies, the Act does not permit completion before the remedies have been implemented. If parties do not have the time to await the fulfilment of their obligations under the remedies, the Guidelines offer the possibility for structural changes in the transaction. This leads to an amendment of the notification, which enables the parties to obtain clearance without the imposition and implementation of remedies.

5.6 How are any negotiated remedies enforced?

If parties do not comply with conditions required by the NMa, the NMa can impose a fine of up to 10% of the turnover or €450,000, whichever is higher. Such fines can also be imposed on individuals. Periodic payments can also be imposed.

5.7 Will a clearance decision cover ancillary restrictions?

The parties to a concentration must identify any ancillary restrictions in the notification form. Parties can request the NMa to advise them whether a restriction can be considered ancillary. The courts are not bound by the opinion of the NMa as to whether a restriction is ancillary.

5.8 Can a decision on merger clearance be appealed?

The parties to the concentration and any party whose interests are directly affected by a merger decision can challenge it. The appeal

has to be lodged with the specialist court in Rotterdam. The judgment of the court can be further appealed to the Trade and Industry Appeals Tribunal.

5.9 Is there a time limit for enforcement of merger control legislation?

In accordance with the Administrative Law Act the NMa may impose a fine for infringement of merger control provisions up to five years after the date of the infringement.

6 Miscellaneous

6.1 To what extent does the merger authority in the Netherlands liaise with those in other jurisdictions?

The NMa values consistency in merger control in Europe and often refers to precedents of the EC and (less regularly) other

international authorities. The NMa is an active member of the European Competition Network (ECN) in which the European Commission and the competition authorities of the EU Member States participate. Members inform each other of their policies and current caseloads and, if necessary, coordinate investigations.

The NMa also participates in the Organisation for Economic Co-operation and Development (OECD), the European Competition Authorities (ECA) and in the International Competition Network (ICN).

The NMa's approach to international co-operation in merger cases is set out in its "Best practice merger control procedures" (*Spelregels bij concentratiezaken*).

6.2 Please identify the date as at which your answers are up to date.

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Friederike van der Jagt obtained a masters degree in Dutch law and a masters degree in International and European Public Law at the University of Tilburg in 2006 and 2007, respectively. She joined Van Doorne's Intellectual Property & Information Technology practice in the same year. In May 2009 Friederike joined the practice group European and competition law in order to develop her focus in this field. Friederike's recent publications include articles on consumer protection and electronic commerce and participation in market research.

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