Netherlands merger control: recent developments

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Introduction

As of 1998, Dutch merger review is carried out under the Competition Act (*Mededingingswet*) by the Dutch Competition Authority (Nederlandse Mededingingsautoriteit, NMa). On 1 July 2005, the NMa became an independent agency. As a result of this, the Dutch minister of economic affairs may give the NMa general instructions but may no longer give the NMa instructions in specific cases. Although in the past the minister never used his authority to give instructions in specific cases, this change is made to safeguard the NMa's independency. The minister will remain responsible for competition policy in general.

Thresholds

Pursuant to the Competition Act ,notification of a concentration is mandatory if certain turnover thresholds are exceeded. Parties will need to notify their intention to implement a concentration if, in the preceding calendar year, the combined turnover of the participating undertakings exceeded €113.45 million and at least two of the undertakings involved realised a turnover of €30 million in the Netherlands. Concentrations between undertakings which are not established in the Netherlands will also fall under the scope of Dutch merger control in the event that the above-mentioned turnover thresholds are met.

Concentration and control

The following situations fall under the scope of the term 'concentration':

- mergers of one or more previously mutually independent undertakings;
- acquisitions of direct or indirect control by:
  - one or more natural persons who or legal entities which already control at least one undertaking; or
  - one or more undertakings or the whole or part of one or more undertakings, through the acquisition of a participating interest in the capital or assets, pursuant to an agreement or by any other means; or
- creations of a joint undertaking, which performs all the functions of an autonomous economic entity on a lasting basis and which does not give rise to coordination of the competitive behaviour of the founding undertakings.

The Competition Act defines control as the possibility to exercise decisive influence on the activities of an undertaking on the basis of actual or legal circumstances.

Filing procedure

After notification of an intention to implement a concentration, the NMa has to decide within four weeks whether a licence will be required. This phase of the filing procedure is generally referred to as the first phase. If the NMa decides that a licence is required, parties can initiate the second phase by submitting a licence application. The NMa is required to decide on the application within 13 weeks. During the second phase, the NMa will assess whether the concentration will give rise to or strengthen a dominant position which will significantly impede competition in the Netherlands (or any regional part of the Netherlands).

Conditions and remedies

The NMa may make the granting of a licence subject to conditions. At present, the Competition Act only provides for the NMa to attach conditions in the second phase of the filing procedure. Pursuant to a pending legislative proposal (which will be further described below) the NMa will also be able to attach conditions to its decisions in the first phase in the nearby future. Pursuant to the NMa Guidelines on remedies as published in 2002, parties (on their own initiative) may already offer remedies in the first phase by amending the submitted notification, which may save them from submitting a licence application. The remedies should, however, be effective and should completely solve the identified competition issues in a timely manner. Similar to the European Commission, the NMa distinguishes structural remedies and behavioural remedies. The NMa holds the view that behavioural remedies should be avoided as much as possible. At any rate, behavioural remedies will not be accepted during the first phase.

Legislative developments

Amendment of Competition Act

Further to a review of the Competition Act, a legislative proposal was lodged with the Dutch parliament in April 2005. Further to this proposal, the following amendments to the Competition Act (which are relevant for merger control) will be made:

- the substantive test will be adapted to the substantive test used in the EC Merger Regulation, which means that the NMa will prohibit a concentration that significantly impedes effective competition in the Dutch market, or part of it, in particular as a result of the creation or strengthening of a dominant position.
- in its assessment of a concentration, the NMa will take the economic reality into account. If the parties to the concentration can demonstrate that the concentration will further economical and technical development, the NMa may decide that no licence will be required.
- the conditions pursuant to which a joint venture will be regarded as a cooperative joint venture will be brought into line with the EC Merger Regulation. At present, such joint ventures only fall under the scope of cartel supervision. After the amendment, cooperative joint ventures will be subject to merger control as a result of which the supervision will be shifted from ex post to ex ante.
- the duration of the first phase may be extended upon request of all undertakings concerned.
- the NMa will be able to impose remedies during the first phase, where it can now only impose such remedies in the second phase.
- the turnover calculation of a financial institution will be amended to facilitate its application.
- the possibility for the NMa to accept efficiency defences in conformity with the application of efficiency defences in the EC Merger Regulation.

The legislative proposal is expected to enter into force in the course of 2007.

Developments in the health care sector

2006 has seen many developments in the health care sector. First, the Office of Health Regulation (Nederlandse Zorgautoriteit, NZa) was established on 1 October 2006. Second, as in 2005, the NMa selected the health care sector in its 2006 agenda as one of its focus areas. Owing to the new the Health Insurance Act (*Zorgverzekeringswet*), the health care sector is gradually developing into a more competitive market. As a result of this improvement of market forces, 2005 and 2006 showed a substantial increase in merger control decisions in the health care sector. Both developments will be further described below.

Office of Health Regulation.

As of 1 October 2006, the NZa was entered into force simultaneously with the of the Health care Market Organisation Act (*Wet Marktordening Gezondheidszorg*). The NZa is the result of a merger of the Medical Charges Board (College Tarieven Gezondheidszorg) and the Supervisory Board for Health Care Insurance (College Toezicht Zorgverzekeringen). The NMa will remain the responsible authority for enforcement of the Competition Act. The NZA will, among others, be responsible for the regulation of markets for health care provisions, health care insurance and health care procurement. With regard to enforcement, the NZa may impose obligations on parties with appreciable market power in advance (ex ante), whereas the NMa can correct and penalise parties after having abused a dominant position (ex post). The cooperation and division of tasks are set out in a cooperation protocol which was entered into by the NMa and the NZa (under incorporation) on 6 June 2006. The protocol includes agreements on the nature of cooperation where the powers of the regulators coincide.

NMa health care decisions in 2005 and 2006

As already mentioned, 2005 and 2006 showed a large increase in merger control decisions in the health care sector. The decisions concerned hospitals, care administration offices and health insurance companies. The NMa decided in a few cases that the concentration required a licence. It appears from the NMa decisions that the relevant geographical market is of particular relevance in the NMa's assessment of whether a licence will be required. Three second phase cases are described below.

Ziekenhuis Hilversum – Ziekenhuis Gooi Noord

Further to the NMa's decision in the first phase, the hospitals Stichting Ziekenhuis Hilversum and Stichting Ziekenhuis Gooi-Noord submitted a licence application to the NMa on 15 December 2004. Research and tests were carried out by the NMa and by the parties to the concentration in order to establish the scope of the relevant product and geographical markets. With regard to the relevant geographical market, the various research showed different results. The NMa, however, concluded that there was no need to make an exact assessment of the geographical market, as it turned out that other hospitals exercised sufficient competitive pressure on the parties, based on the travel time to these hospitals and the patients' willingness to travel.

On 8 June 2005, the NMa, therefore, decided that the concentration would not give rise to or strengthen a dominant position which would significantly impede competition, thereby allowing the parties to implement the concentration without imposing any remedies.

CZ-OZ

On 8 August 2005, the health insurance companies Stichting CZ groep Zorgverzekeringen Beheer and OZ Zorgverzekeringen NV submitted a licence application to the NMa. From the NMa's decision in the first phase, it appeared that the possible development of regional health insurance markets, caused by the so-called regional mechanism, was an important reason to set the licence requirement. The regional mechanism entails the following. While buying health care, insurers with a strong presence in the region are able to reach more favourable negotiation results in comparison with health care insurers with only a small presence in the particular region. The regional mechanism presupposes regional differentiation, which means that the obtained advantage is passed on to the insured in the region. Due to the low insurance costs, other insurers find it difficult to offer a competitive health insurance within the region.

Further to this competition issue, the parties to the concentration submitted an amended licence application in which remedies to prevent the occurrence of the regional mechanism were proposed. Based on the amended licence application, the NMa granted a licence to which the following conditions were attached:

- the parties will only offer health insurance based on policies offered in the whole of the Netherlands during five years;
- during five years, the parties are obliged to promote the basic and supplementary health insurance under which in the region the greatest number of people are insured in the whole of the Netherlands;

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- the parties will not enter into agreements with any regional health care provider imposing an obligation to provide health care on an exclusive basis nor will the parties enter into most favoured customer clauses with regional health care providers during five years;
- the parties agree that the NZa will supervise the parties' compliance with the obligation set out in the first bullet point above; and
- each year, the parties will provide the NMa with a declaration stating their compliance with the above-mentioned conditions during the 12 preceding months.

Ziekenhuis Walcheren – Stichting Oosterscheldeziekenhuizen

On 18 November 2005, the NMa decided that the intended concentration between the hospitals Stichting Ziekenhuis Walcheren and Stichting Oosterscheldeziekenhuizen required a licence. The parties had performed the so-called Elzinga-Hogarty test to determine the size of the geographical market. This test serves to assess (i) how many patients in a particular area used the services of a particular hospital in that area and (ii) to what extent the hospital's turnover was realised within that area. Based on this test the parties argued that the hospitals performed their services in separate geographical markets.

The NMa, however, concluded that the areas in which parties were active should not be regarded as two separate geographical markets, but rather as a single geographical market based on travel time to other hospitals, the natural geographical boundaries to the area and the fact that other hospitals did not regard the parties as their competitors. In addition, information provided by market parties indicated that the parties were in competition with each other.

In December 2005, the parties submitted a licence application. This application was, however, withdrawn in August 2006 just before the publication of the NMa's negative decision on the licence application.