The European Antitrust Review

2009

Published by Global Competition Review
in association with
Eversheds Faasen

GCR
GLOBAL COMPETITION REVIEW

www.globalcompetitionreview.com

Netherlands: Merger Control

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As of 1998, Dutch merger review is carried out under the Dutch Competition Act (DCA) 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. Though in the past the minister never used his or her 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.

In 2007, fewer merger notifications were filed compared to 2006. One hundred and eight concentrations were notified with the NMa, against 135 notifications in 2006. Of the 108 notifications made, the NMa decided that four concentrations required a licence. Five licence applications were filed with the NMa. The NMa granted three licences in 2007, and in three cases, the applying parties decided to withdraw the licence application.

Substantive provisions

Concentration and control

Pursuant to section 27(1) DCA, the following situations fall under the scope of the term 'concentration':

- mergers of one or more previously mutually independent undertakings; and
- 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.

The creation of a joint undertaking that performs all the functions of an autonomous economic entity on a lasting basis is a concentration within the meaning of section 27(1)(b).

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

Thresholds

Pursuant to section 29 DCA 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 that are not established in the Netherlands will also fall under the scope of Dutch merger control in the event that the abovementioned turnover thresholds are met.

Lower thresholds health-care sector

In 2006, section 29 DCA was amended. Due to this amendment, lower thresholds can be imposed for specific categories of undertakings for a period of five years. The minister of economic affairs imposed such lower thresholds for the health-care sector from 1 January 2008 until 31 December 2012. A concentration in the health-care sector will need to be notified if in the preceding calendar year:

- the aggregate turnover of the participating undertakings exceeded €50 million;
- at least two of the undertakings involved realised a turnover of €10 million in the Netherlands; and
- at least two of the participating undertakings realised a €5.5 million turnover with health-care activities.

Calculation method turnover financial institutions

As of 1 October 2007 the turnover calculation of financial institutions consists of an addition of the following revenues: (i) interest income and similar income, (ii) income from valuable papers, (iii) received commission, (iv) results from transactions and (v) other operating income, all after deduction of value added taxes and other taxes directly related to the revenues concerned.

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.

The NMa can ask the parties within five days after receipt of the notification for missing documents and information. In such cases, the four-week period will commence after all parties concerned have provided the missing documents or information. In addition, the NMa can ask parties to complement the notification. The four-week period will then be suspended until the day that all parties have submitted the requested information. If the information is not submitted within six months after the NMa's request, the concentration will be deemed not to have been notified. Upon request of all undertakings concerned, the four-week period can be suspended once, if (according to the NMa) such suspension is in the interest of the handling of the case.

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 apply the substantive test (similar to the substantive test used in the EC Merger Regulation) and assess whether the concentration 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. As of 1 October 2007, the NMa can accept efficiency defences. 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.

Conditions and remedies

The NMa may make the granting of a licence subject to conditions. As of 1 October 2007, the NMa is not only able to attach conditions to its decisions in the second phase, but also in the first phase.

Pre-notification, remedies proposed by parties

The NMa encourages parties to contact the NMa prior to a notification. In case of competition concerns, a pre-notification meeting could be used to discuss possible remedies. Pursuant to the NMa Guidelines on remedies published in 2007, the proposed remedies should be appropriate and effective. A remedy will be deemed to be appropriate and effective if it completely and undoubtedly solves the identified competition issue. To realise the aforementioned, the remedy should address the core of the identified competition issue. In addition, the proposed remedy should be detailed, and must be drafted in plain and intelligible language. Moreover, a remedy may not be open to several interpretations.

Structural, behavioural and quasi-structural remedies

Just as 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, as behavioural remedies require constant monitoring and enforcement. The NMa may, under certain circumstances, accept behavioural remedies, for example in case of vertical relations to avoid price squeezes or refusal to grant access. The behavioural remedies will in principle apply for an indefinite period of time. Behavioural remedies can only be limited in time if, up front, it is clear that the competition issue will not occur after a certain period of time has lapsed.

Besides structural and behavioural remedies, the NMa also distinguishes quasi-structural remedies. Quasi-structural remedies do not concern the divestment of business units, but do have a lasting (more or less structural) effect on the market. An example of a quasi-structural remedy is the granting of an exclusive and privative licence as a result of which the new undertaking will keep the ownership rights but cannot actually use certain assets. Just as behavioural remedies, quasi structural remedies will in principle apply indefinitely, but could be limited in time if up front, it is clear that the competition issue will not occur after a certain period of time has lapsed.

In practice, the granting of a licence is not often made subject to the implementation of remedies. In 2008, the merger between two home care and nursing organisations Amsterdam Thuiszorg and Cordaan Groep raised competition issues (case No. 6169 *Amsterdam Thuiszorg – Cordaan Groep*). The participating parties submitted a plan with the NMa proposing the divestment of 25 per cent of Amsterdam Thuiszorg's activities. As a result of this divestment, the participating parties' market share after the merger would be smaller compared to the parties' aggregate market shares before the merger. Subsequently, the NMa investigated whether the suggested buyers of the activities were suitable buyers and whether the divestment would not lead to new competition concerns. As no new competition concerns were found by the NMa, a licence to effect the concentration was granted.

Joint ventures

As of 1 October 2007, the conditions pursuant to which a joint venture is regarded as a cooperative joint venture are brought in line with the EC Merger Regulation. This means that cooperative joint ventures no longer only fall under the scope of cartel supervision, but are also subject to merger control. The supervision is, therefore, shifted from ex post to ex ante. In assessing whether a licence would be required for the realisation of the notified concentration, the NMa is required to check cooperative joint ventures against the cartel prohibition and rule of reason stated in section 6(1) and 6(3) DCA respectively.

Filing fee

As of 29 December 2006, the Costs framework decision is in force. Pursuant to this decision, the NMa will level fees to compensate costs incurred for issuing a number of different decisions. A decision following a merger notification will involve a fee of €15,000. A decision following a licence application will involve a fee of €30,000. For other decisions the fee will amount to €2,000. Fees are due at the moment a decision is issued.

Fines due to infringement of merger control provisions

If an undertaking infringes the prohibition to realise a concentration without the NMa's approval or if an undertaking realises a concentration which has been disapproved by the NMa, the NMa can impose fines or order to take action sanctioned by forfeiture of penalty payments serving to reverse the infringement.

In April 2008, the NMa imposed fines on three undertakings for realising a concentration without having obtained the NMa's prior approval. As the infringements were made prior to the implementation of the new NMa Fining Code 2007, the fines were relatively low and varied between €15,000 and €16,000.

Infringements made after October 2007 will come under the NMa Fining Code 2007. Further to this code, fines can amount to a maximum of €450,000 or, if this would exceed €450,000, a maximum of 10 per cent of the (worldwide) turnover of the undertaking in the year preceding the concentration.

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