

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Working Party No. 3 on Co-operation and Enforcement

PUBLIC INTEREST CONSIDERATIONS IN MERGER CONTROL

-- Note by the Netherlands --

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*More documents related to this discussion can be found at
<http://www.oecd.org/daf/competition/public-interest-considerations-in-merger-control.htm>*

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NETHERLANDS

1. Introduction

1. The role of public interests in the enforcement of competition law has been the subject of increased attention in recent years, and not only within the competition community. In addition to discussions centred on industrial policies, an important debate in the Netherlands relates to the increasing number of sustainability initiatives brought forward by private sector parties, which may contain elements that infringe competition law. This has given rise to questions on the interpretation of section 6(3) of the Dutch Competition Act (the Dutch equivalent of article 101(3) of the Treaty of the Functioning of the European Union). As a responsive authority, we see it as important to respond to these developments.

2. The discussion is broadening, and we are now also seeing a renewed interest in the role of public interest considerations in merger control in the Netherlands. ACM has observed an increase in public interest arguments put forward during merger procedures with the intention of positively influencing a decision of ACM. This happens mainly in relation to requests for an exemption from the obligations on the merging parties, when a merger is under assessment by ACM, but may also happen in relation to an efficiency defence. In the following submission, ACM puts forward its recent experiences. First the legal framework is set out, after which two examples from ACM's current practice are given where public interest arguments have been put forward. This is followed by a discussion on the challenges faced by competition agencies on this issue.

2. ACM's experience

2.1 Legislation

3. The merger control provisions in the Dutch Competition Act largely mirror those applicable at EU level. However, the provisions on the possibility of taking public interests into consideration are different from their EU equivalents. Dutch legislation states that the decision of ACM on a merger case should be based on arguments related to effective competition. In a situation where ACM blocks a merger, the legislation provides merging parties with the option to file a formal request with the Minister of Economic Affairs to clear the merger. This is based on section 47 of the Dutch Competition Act and should be done within 4 weeks after ACM has decided to block the merger. The Minister can clear the merger and grant a licence based on his assessment that certain public interests benefitted by the merger outweigh the impediment to competition. The Competition Act does not provide any specifications on what can be considered as a public interest nor how the assessment by the Minister should take place. While such requests have been made on occasion, the Minister has never reversed a decision of the authority.

4. Dutch legislation does not provide a possibility for the Minister of Economic Affairs, or any other public entity, to block a merger that has been cleared by ACM.¹ Debate is ongoing in the Netherlands in relation to the clearance of several hospital mergers by ACM, in the last few years, on whether such mergers are indeed in the interest of the general public. This debate focuses on several issues, but particularly on the efficiencies of scale: what is the optimal size of a hospital? Partially as a

¹ Decisions made by ACM can, of course, always be appealed. New legislation is being drafted that will transfer the enforcement of this specific legislation to ACM.

result of this debate, specific legislation has been put in place to ensure that the public interests of accessibility, affordability and quality of healthcare are taken into account when parties consider mergers. This specific legislation is enforced by the Dutch Health Authority. It does not bind or limit ACM in its assessment of the merger.²

2.2 *Assessment of a section 40 request*

5. As mentioned above, one of the areas where ACM is seeing an increase in public interest arguments, is where merging parties file a request for an exemption from the obligation to refrain from gaining any form of control over the target until ACM has decided on the merger. A recent example of such an argument relates to the desirability to prevent an interruption of domestic health care services as a result of a pending bankruptcy. Although these services are in general not critical health care services, the discomfort that such an interruption can cause can be very cumbersome for the patients involved.

6. A request for an exemption can be made based on section 40 of the Dutch Competition Act, which is equivalent to section 7(3) of the Merger Regulation of the European Commission. 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 upon a section 40 request is at the risk of the merging parties. During the last six months ACM has received four requests for an exemption and granted three.³

7. To be able to exempt the merging parties from their obligations they have to demonstrate that the period it takes for ACM to reach its decision⁴ will result in irreparable damage to the target which would make the whole transaction redundant. In general the starting point for such a request is that the target has filed for bankruptcy or has already been declared bankrupt. However, this is not enough to satisfy the test of irreparable damage, simply because many entrepreneurs have successfully restarted (their) businesses even after those same businesses had been declared bankrupt.

8. Arguments that have been accepted for an exemption include the loss of contracts on which the undertaking's business model is based, such as control of particular intellectual property rights, or the inability to restock a retail store on time for a new season or the loss of key personnel.

9. The loss of personnel is only accepted insofar as it relates to the economically successful continuation of the business, and not from a social or employment perspective. Effective competition is required for efficient, well-functioning markets, with inefficient firms leaving the market. Seen from an economic perspective disrupting such a process is undesirable, which supports not taking public arguments like employment into account in spite of the personal hardship this can bring to people who lose their job as a consequence. However, employment is often brought forward by the merging parties as a public interest argument. After all, several thousands of jobs can be at stake. An argument which is frequently brought forward in favour of taking public interest into account when deciding whether to grant an exemption is that granting the exemption does not affect the material merger assessment. However, granting an exemption too readily and allowing parties to implement a merger that ultimately will not be permitted may cause the parties serious problems afterwards: they would have to undo the consequences which may prove to be quite difficult.

² Healthcare Market Regulation Act, Section 49c (5).

³ The fourth was withdrawn.

⁴ ACM employs a two-tier system of merger analysis. All mergers, above a certain turnover threshold, must be notified to the authority. ACM reviews the merger in the notification phase (phase I) and decides within a period of four weeks whether the proposed merger ought to be challenged. If the merger is challenged, parties must then apply for a licence in phase II, which has a maximum length of thirteen weeks. In both phases, ACM possesses the right to put the deadlines on hold where crucial information from merging parties has not yet been received.

10. ACM has not (yet) needed to answer the question whether it should take public interests into account in its assessment of a section 40 request as the arguments relating to effective competition have been sufficiently convincing.

2.3 Assessment of an efficiency defence

11. Although efficiency defences are rare in the Netherlands, this is an area where ACM is expecting to see an increase in public interest arguments.⁵ This would concern efficiency claims that go beyond what one normally would expect to arise from a merger, such as a reduction in production costs as a result of an increase in scale. A hypothetical example of such a public interest argument is that the merger enables the possibility to develop a new program for juvenile delinquents. As a result they do not become 'professional criminals' and consequently there will be less crime - people will feel safer, the program has a positive effect on welfare. Other examples of potential public interest claims include an effect of the merger on the possibility to achieve certain sustainability objectives or, as discussed above, an effect on employment.

12. To assess efficiency claims, ACM applies the same analytical framework as the European Commission.⁶ This framework sets out three criteria that need to be satisfied before any efficiency claim can be taken into account: consumers should benefit from it, the efficiencies should be merger-specific and they should be verifiable. It is up to the merging parties to demonstrate that the competition concerns can be mitigated by the claimed efficiencies. These three criteria are not easy to satisfy, as can be deduced from the rather limited number of successful efficiency defences in Europe.

13. In the case where public interests are taken into account it is ACM's impression, from its (limited) experience, that this will be an even more complicated assessment than in the case of a 'normal' efficiency defence. The evaluation of the importance of the claimed effect of the merger on the public interest involved is especially difficult. In addition, the complexity of verification and determining merger specificity also applies to public interest claims and likely in a higher degree. ACM's experience is also that merging parties find it difficult to substantiate the public interest claims they make.

3. Discussion

14. Taking public interest into consideration is not straightforward. For example, article 21(4) of the Merger Regulation of the European Commission provides a Member State of the European Union with the option to take appropriate measures in a merger case under scrutiny of the European Commission, in order to protect certain public interests. These interests include public security, plurality of media and prudential rules. However, underlying mechanisms in Member States differ in the way legislation is drafted to take public interests into account, where such legislation is present, and in what is considered to be a legitimate public interest.

15. To aid the discussion on considering public interests in merger control, ACM has provided two examples of specific aspects of a merger notification procedure where public interest arguments have been brought forward. The first example raises the question whether public interests should be taken into account in a merger procedure at all. And if so, this raises the questions of whether it is the competition authority that should weigh the effects on effective competition against public interests or a whether a democratically elected public representative body would be more suitable. Either way, when public interests are taken into account these should be clearly defined and be addressed in an open and objective manner. The second example has focussed on the complexity of taking public interests into account.

⁵ ACM is currently assessing an efficiency defence.

⁶ Guidelines on the Assessment of Horizontal Mergers Under the Council Regulation on the Control of Concentrations Between Undertakings, 2004 O.J. (C 31).

16. It should be noted that broadening the options to include public interests in merger control also raises concerns on how this may affect the political influence on an agency's decision-making process. Public interests can be closely related to or even be political interests. The question is to what degree such issues should be part of a merger assessment. There can also be a strong public opinion on certain public interests putting even more stress on the decision-making process of an agency.

17. The way in which public interests are taken into account in merger control differs widely across jurisdictions globally. This could indicate that strategic questions and challenges that public interests bring forward differ between jurisdictions, or it may be that answers and solutions differ. The OECD roundtable is a welcome initiative to further share experiences and thoughts on this topic.