



The NETHERLANDS

DVAN ADVOCATEN

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1. Relevant legislation

The Dutch Competition Law Act (DCA) includes a specific chapter (Chapter 5) on merger control. The legislation is based on the EU rules on merger control (Merger Regulation 139/2004) and the Dutch Competition Authority generally follows the EC's guidance provided in the consolidated jurisdictional notice.

2. Authority

The Dutch Competition Authority, the Authority for Consumers and Markets (ACM), is the competent authority to assess contemplated transactions that need to be notified. Its English website is www.acm.nl/en

Transactions in the healthcare sector may require prior approval of the Dutch Healthcare Authority (NZa) before they can be notified to the ACM.

3. Types of transactions caught

A transaction falls within the scope of Chapter 5 DCA in case it qualifies as a 'concentration'. Article 27 DCA stipulates that a concentration arises in case of:

- a merger between two or more undertakings (that were previously independent);
- the direct or indirect acquisition of control of one or more (parts of) undertakings by one or more individuals or legal persons or undertakings; and
- the establishment of a full-function joint venture.

Control is defined as the possibility to exercise decisive influence, based on factual or legal circumstances, on the activities of an undertaking (article 26 DCA).

4. Thresholds

Article 29 DCA stipulates a threshold based on turnover figures. A contemplated transaction has to be notified to the ACM if:

- The merging undertakings together have an aggregate worldwide (group) turnover of at least EUR 150 million; AND
- At least two of the undertakings involved each have a turnover in the Netherlands of at least EUR 30 million.

For financial institutions, pension funds and insurance companies specific calculation methods apply (article 31 DCA).

Note that for concentrations in the healthcare sector a lower turnover threshold applies (based on a decree which is in force until at least until 1 January 2023). Healthcare transactions have to be notified to ACM in case:

- At least two of the undertakings involved each have a turnover exceeding EUR 5.5 million achieved with the provision of healthcare services; AND
- The merging undertakings together have an aggregate worldwide (group) turnover of at least EUR 550 million; AND
- At least two of the undertakings involved each have a turnover in the Netherlands of at least EUR 10 million.

5. Exceptions

Notification of the contemplated transaction to the ACM is mandatory if the thresholds are met. There are no exceptions to the notification obligation. There are however two scenarios in which a notification may be submitted at a later stage:

- Based on article 39 DCA, in case of a public bid no prior approval is required provided that ACM is directly notified after the acquisition and no voting rights are exercised.
- Article 40 DCA stipulates that in case of compelling reasons and at the parties' request, the ACM may grant dispensation from the duty to obtain prior approval. This is generally considered to apply in case of a risk that prior notification and waiting for approval would lead to irreparable damage such as bankruptcy.

In both cases, the parties are still required to notify the transaction afterwards and obtain approval and ACM can still decide to not to grant a permit.

6. Notifying party(-ies)

The parties 'involved' in the transaction have the obligation to notify. From Dutch case law it follows that the party/parties acquiring control are 'involved' in the transaction.

7. Submission deadline

No specific deadlines apply for the submission. The notification in any case has to be submitted prior to consummation of the transaction. A contemplated transaction may be notified to the ACM when it can be presented with a reasonable degree of certainty how the transaction will be structured. A letter of intent normally suffices.

8. Filing fee

The following filing fees apply:

- EUR 17,450 for a 'Phase I' notification.
- In case the ACM does not clear the transaction in Phase I, parties may submit a separate request to obtain a permit (*vergunning*) to implement the transaction ('Phase II'). For Phase II a filing fee of EUR 34,900 applies.

9. Proceedings timetable

- The notification procedure starts once parties have submitted the template notification form (available on ACM's website). In Phase I, ACM has four weeks to decide whether to approve the transaction (i.e. decide that no permit is required) or require parties to submit a request to obtain a permit (and go to Phase II). In straightforward cases, the ACM can issue a short-form decision within this timeframe. The four week waiting period

can nevertheless be suspended in case the notification form is incomplete or if the ACM requires additional information from the parties, as well as upon the notifying parties' request (article 38 DCA). Parties are free to propose remedies in this phase (usually by amending the initial notification).

- Phase II commences after the parties have submitted a separate request for a permit via the template Phase II-form. The ACM has 13 weeks to decide whether to grant such permit. Also, this period may be suspended and in complex cases Phase II commonly takes longer than 13 weeks. In case the ACM's investigation leads to competition concerns, parties will be given the opportunity to propose remedies to take away such concerns.

Both in Phase I and II state-of-play meetings can be organised, especially in complex cases that may lead to competition concerns.

- Appeal proceedings are possible at the Court of Rotterdam and must be lodged within six weeks from the ACM's decision. Such appeal may be a formal appeal (*pro forma*) after which the court will provide a deadline to submit the substantive grounds. Further appeal proceedings against the court's judgment are possible at the Trade and Industry Appeals Court (*CBb*).

10. Availability of pre-notification/informal consultation

The ACM is generally open to pre-notification discussions in case of a contemplated transaction that potentially leads to competition concerns and/or where the market definition may pose difficulties. This is an informal process and the idea is that pre-notification talks increase the efficiency of the clearance procedure after the formal notification is submitted.

11. Test for clearance/prohibition

- In Phase I, the ACM will require parties to request a permit if it has reasons to assume that a transaction may lead to a significant impediment of competition on (part of) the Dutch market, especially as a result of the establishment or strengthening of a dominant position (article 37, paragraph 2 DCA).
- If parties submit such a request for a permit, the ACM will conduct a more in-depth investigation into the transaction. A permit is refused in case ACM's investigation leads to the conclusion that the transaction will lead to a significant impediment of competition in the Netherlands (article 41 DCA).

12. Conditional clearance – remedies

The ACM has provided guidance on remedies in its Remedies Guidelines 2007.

- In Phase I, the ACM may decide that no permit is required for the contemplated transaction and attach conditions and obligations to such decision. Parties are free to submit remedies in Phase I, in order to prevent a Phase II.
- In Phase II, if the ACM grants a permit for the transaction, it may also attach conditions and obligations to such decision. Parties may offer remedies in Phase II.
- Once parties have offered remedies, the ACM usually conducts a market test in order to verify the effectiveness of the remedies.
- From the Remedies Guidelines it follows that ACM prefers structural remedies over behavioral remedies.
- If parties do not comply with the conditions and obligations attached to the ACM's clearance decision, article 75 DCA stipulates that they may face fines up to 10% of the annual worldwide (group) turnover of EUR 900,000 (whichever is higher).

13. Stand-still obligation

A standstill obligation applies. Parties are not allowed to consummate the transaction prior to obtaining formal approval (please see the specific exceptions described above at pt. 5).

- In Phase I a waiting period of 4 weeks applies (article 34 DCA).
- In Phase II a 13 weeks waiting period applies (article 42 DCA). In both phases, the waiting period may be suspended in case the ACM requires additional information.

14. Failure to notify/obtain clearance

- A failure to notify the transaction may lead to a fine up to 10% of the annual worldwide (group) turnover or EUR 900,000, whichever is higher (article 74 DCA);
- Violation of the waiting period by implementing the transaction before obtaining clearance may lead to a fine up to 10% of the annual worldwide (group) turnover or EUR 900,000, whichever is higher (article 74 DCA).

For both violations, ACM may also impose an order subject to a penalty for non-compliance. In addition, fines may be doubled in case of recidivism (same or similar violation within five years).