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AGENCY DECISION-MAKING IN MERGER CASES: FROM A PROHIBITION DECISION TO A CONDITIONAL CLEARANCE

-- Note by the Netherlands --

28-29 November 2016

This document reproduces a written contribution from the Netherlands submitted for Item 4 of the 124th meeting of the OECD Working Party No. 3 on Co-operation and Enforcement on 28-29 November 2016.

More documents related to this discussion can be found at www.oecd.org/daf/competition/agency-decision-making-in-merger-cases.htm

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-- THE NETHERLANDS --

1. Introduction

1. To aid the discussion on ‘Agency decision-making in merger cases’ we set out in this contribution the legal framework applicable to remedies in merger cases in the Netherlands. In addition, we provide examples of two recent merger cases that have been prohibited by ACM. Finally, we briefly set out dilemmas we have encountered and lessons we have learned in designing, implementing and monitoring remedies, illustrating these with cases where mergers were cleared by ACM, conditional to remedies.

2. Legislation and guidelines

2.1 Merger control in the Netherlands

2. ACM’s merger control is governed by the Dutch Competition Act of 22 May 1997, which entered into force on 1 January 1998. The merger control provisions in the Dutch Competition Act largely mirror those applicable at EU level.

3. 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. A licence will be rejected if ACM finds that the merger will significantly impede effective competition on the Dutch market, or a part of it.

4. ACM (and its predecessor, the Netherlands Competition Authority) has had the possibility to accept remedies offered by the parties, in the licensing phase of the investigation, since 1998. Since 2007, the Dutch Competition Act also provides the possibility of offering remedies during phase I of the investigation. This possibility exists if the competition problem is clear and it is certain that the remedies will remove this problem.

2.2 Remedies guidelines

5. ACM’s 2007 guidelines set out both its procedural and substantive policy on remedies.¹ The guidelines are modelled closely on the European Commission notice on remedies and on ACM and Commission practice.²

¹ NMA (2007) Richtsnoeren Remedies 2007. *Staatscourant (Official Gazette)*, 27 September 2007, no. 187 / p. 30. (in Dutch).

² Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004.

2.2.1 *Conditions*

6. The undertakings concerned should take the initiative in proposing adequate remedies. Structural remedies are preferred to behavioural remedies and ACM is very reluctant to accept behavioural remedies in the notification phase. Proposals offered by the undertakings concerned must include an adequate, effective and proportional solution to the competition concerns identified by ACM. As is the case with the European Commission and ICN guidelines, the ACM guidelines express a preference for remedies that act quickly in addressing competitive concerns over remedies that are expected to have an effect only in the longer term, or where the timing of the effect is uncertain.³

7. The conditions that ACM includes in a first-phase decision must remove the identified competition concerns and be implemented before the transaction is closed. Conditions that ACM includes in a second phase decision must ensure that the concentration does not significantly impede effective competition. These conditions generally involve divestment of the businesses that give rise to the impediment of competition, or severance of links between the undertakings concerned and these businesses.

2.2.2 *Timing*

8. On timing, the guidelines clearly favour discussing remedies in the pre-notification meetings and state that submission of remedies should be made at least one week prior to the end of the phase I four-week time limit. As regards remedies in phase II, the guidelines state that, as a general practice, ACM will inform the parties of the competition problems it perceives in its preliminary assessment, typically after eight weeks. This gives parties the opportunity to submit remedies should they not have done so at an earlier stage. Remedies in the licence phase should be proposed at least three weeks prior to the deadline for the decision.

2.2.3 *Involvement of third parties*

9. ACM may request information from customers, suppliers and/or competitors on the envisaged transaction or relevant markets. Third parties may submit their comments on the proposed transaction to ACM and they may be invited by ACM to express their view on ACM's preliminary assessment (Statement of Objections) during phase II.

10. Remedies are market tested and subsequently third parties are invited to express their views on a remedy. The market test is initiated after parties have submitted a remedy which is sufficiently concrete. To assure that the market test among third parties is as effective as possible it is required that the competition concerns and the countervailing remedy are described in such a manner that these are easy to understand. Third parties involved in the market test have to sign a non-disclosure agreement. ACM decides who is consulted during the market test, for example competitors, (main) clients or experts may be consulted. Based on the comments received from these third parties a revision of the remedy may be required.

³ ICN (2005), Merger Remedies Review Project. Report for the fourth ICN Annual Conference, ICN Merger Working Group: Analytical Framework Subgroup.

2.2.4 *Publicity*

11. After a notification, and following the filing of an application for a licence, ACM publishes an announcement in the Official Gazette and on its website, inviting interested parties to submit their views on the proposed transaction. Decisions by the ACM, including a decision that a licence is required and decisions to end procedures, are also made public. Sensitive information (ie, business secrets) is omitted from these publications. ACM does not make public that it has issued statement of objections nor does it make public during its investigation the remedies offered by parties.

2.2.5 *International cooperation*

12. ACM cooperates formally and informally with foreign competition authorities. It may inform the relevant competition authorities if it requests information from foreign companies and may provide competition authorities in other jurisdictions with information it has collected. ACM contacts other competition authorities where a transaction is filed in several jurisdictions and may exchange information or coordinate its proceedings with these authorities, including remedies.

3. Prohibited mergers

13. In 2015, ACM adopted 88 decisions on merger notifications, which is about average. The vast majority of ACM's merger decisions are taken in phase I, without extensive, further investigation. In 2015, five merger cases were reviewed under the in-depth procedure, of which two related to notifications received in 2014. Of those five cases; one merger was granted a licence, one was approved with remedies and one was prohibited. Two merger analyses rolled on into 2016.⁴ The section below details two noteworthy cases from the past few years, where merger approval was refused. The following section provides examples of cases cleared with remedies and court decisions concerning several of these cases.

3.1 *Merger between two Dutch hospital groups*

14. In July 2015, ACM blocked a merger between hospitals for the very first time. ACM prohibited the proposed merger of two hospital groups in the southwestern part of the Netherlands: Albert Schweitzer Hospital and Rivas Zorggroep.⁵ ACM found these two hospital groups to be strong competitors of each other. This conclusion followed from, among other sources, ACM's investigation into patient flows, a survey among GPs, and information from health insurers. ACM explored the possibilities for patients and health insurers to discipline the merged hospital and has found that these options were insufficient. Patients had limited options to switch hospitals. ACM's investigation also revealed that, after the merger, health insurers would have insufficient alternatives to negotiate good prices and quality with the merged hospital.

15. Parties proposed a price cap as a remedy, which ACM declined. Price caps are purely behavioural and difficult to reconcile with structural merger review. In the prohibition decision, ACM explained that it does not want to be active as a price regulator and that it is difficult to predict how long such a measure would be required.

⁴ See Paragraph 4.2 on Concentration Control and Paragraph 9.2 on Concentrations in: <https://jaarverslag.acm.nl/sites/default/files/2015%20ACM%20Annual%20Report.pdf>

⁵ See <https://www.acm.nl/en/publications/publication/14503/ACM-prohibits-proposed-merger-between-two-Dutch-hospital-groups/>

3.1.1 *Appeal*

16. Albert Schweitzer and Rivas appealed ACM's decision. The District Court of Rotterdam upheld in September 2016 the decision of ACM to prohibit the merger of the two hospitals. Concerning the price cap, the court ruled that it is not the task of a competition authority to determine price and quality levels in a market, via remedies, and ACM therefore rightfully declined the price cap.

3.2 *Refused license for acquisition of Dutch baking company*

17. In 2012, the Netherlands Competition Authority (NMa), one of ACM's legal predecessors, refused to issue a license for the acquisition of Dutch baking company A.A. ter Beek (with its flagship brand Bolletje) by rival baking company Continental Bakeries.⁶ By blocking the acquisition, the competition authority prevented the possible rise of consumer price for rusks, a popular breakfast staple in the Netherlands.

18. The acquisition could have resulted in the creation of a very large producer with a market share of 70-80% that would have produced private-label rusks as well as the leading Dutch rusk brand Bolletje. According to the competition authority, there was little likelihood that a new rusks producer would enter the Dutch market. That meant only two producers would remain active in the market for the production of private-label rusks for supermarkets. The competition authority believed too little competition would remain after the acquisition. In order to take away that concern Continental Bakeries and A.A. ter Beek proposed to sell a rusks product line to a new competitor. The competition authority did not accept this proposal because it remained uncertain whether a new competitor would actually become active on this market, and stay active.

3.2.1 *Court decisions*

19. Continental Bakeries appealed the competition authority's decision not to grant a licence. In 2014 the Rotterdam District Court upheld ACM's decision, supporting ACM's market delineation and the rejection of the remedy proposal.⁷ The case was subsequently appealed before the Dutch Trade and Industry Appeals Tribunal (CBb), which, in February 2016, annulled the authority's initial decision as well as the District court's ruling. The CBb did not share ACM's conclusion that the market for branded rusks and private-label rusks were one and the same. As a consequence competition between the two companies was not sufficiently proven.⁸

3.3 *Comment on merger prohibition*

20. Without prejudice to the two merger prohibition decisions set out above, one of which is still open to appeal, there are factual scenarios that can arise that give an indication that a merger application may be subject to a prohibition agreement. One example of this could be where the remedies proposed by the parties to counteract the potential anti-competitive nature of the merger are so far-reaching that they amount to an unraveling of the very foundation of the merger. Another example could be where the remedies proposed in fact amount to a regulation of an otherwise liberalised sector.

⁶ See <https://www.acm.nl/en/publications/publication/11011/NMa-refuses-license-for-acquisition-of-Dutch-baking-company/>

⁷ See <https://www.acm.nl/nl/publicaties/publicatie/13677/Rechtbank-laat-besluit-in-stand-om-fusie-beschuitproducenten-niet-toe-te-staan/> (in Dutch).

⁸ See <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:CBB:2016:23> (in Dutch)

21. The vast majority of merger applications are cleared by ACM without remedies. Nevertheless, it should be noted that in addition to the (low) number of cases in which mergers are prohibited, there are also a number of mergers that are withdrawn by parties at the pre-notification stage (two applications withdrawn in 2015, 11 withdrawn in 2014, 8 withdrawn in 2013). Circumstances differ between these cases, however in several cases, the withdrawal seems to be linked to the parties' perception of the likelihood of a prohibition decision.

4. Remedy design: lessons learned

4.1 A general overview

22. ACM has been confronted with a vast variety of remedies ranging from structural to behavioural remedies or a combination of both. A special case is the above mentioned Albert Schweitzer-Rivas hospital merger which describes the complexity of finding a remedy in the health care sector, a major challenge. In this sector, structural remedies are hard to find due to the fact that treatments offered in a general hospital are extensively intertwined. In addition, a behavioural remedy quickly ends up as a proposal of caps on price and/or quality that have to be enforced by ACM. In ACM's opinion, such caps are in general not a desirable remedy and are therefore declined. For such problematic cases, only an efficiency defence or a failing firm defence remains as a possibility to get a clearance when competition concerns have been identified. ACM has no experience in combining an efficiency defence or a failing firm defence with remedies to counteract different competition concerns in a case, however is not eager to try it due to the complexity this would entail.

23. To be able to decide whether a remedy can be effective the first requirement is that the remedy should be easy to understand and described as clearly as possible. It cannot be subject to multiple interpretations. This approach not only supports the effectiveness of the remedy, but is also crucial for its enforceability.⁹ Experiences have shown that drafting such a 'clear and understandable' remedy takes time and could include several meetings/calls with parties. However, as explained, it is essential for the effectiveness of the remedy and as already discussed in paragraph 2.2.3 it is also important in order to ensure that the market test is effective.

24. In addition, to ensure an effective negotiating process from the ACM side several of its staff members have specializations in legal and/or economic aspects of remedies. These staff members advise or are added to a case team when remedies are proposed by parties.

25. To aid ACM in its decision whether a remedy is effective, ACM conducts market tests. ACM's experience is that such market tests are helpful in designing an effective remedy. Comments may lead to alterations of the remedy. In exceptional cases these alterations are market tested as well. Involving third parties always raises an issue of strategic behaviour, which is something a competition authority should be aware of and prepared to act upon.

26. To further ensure the effectiveness of a remedy ACM may rely on trustees, for example, monitoring, hold-separate and divestiture trustees, especially when certain experience with or knowledge of a sector is required. These trustees report to ACM, however all costs related to their task, including their fee, are paid for by the merging parties. Experiences have shown that appointing a trustee can be done in a short period of time and that parties are more than capable of making useful suggestions for candidates.

⁹ NMA (2007) Richtsnoeren Remedies 2007. *Staatscourant (Official Gazette)*, 27 September 2007, no. 187 / p.30. (in Dutch).

27. As already mentioned, ACM prefers structural remedies above behavioural remedies. In contrast to behavioural remedies, structural remedies change markets sustainably and generally do not require further oversight after their implementation. Behavioural remedies are more problematic, since the effectiveness of the remedy is harder to assess and they often bring extra oversight costs. In addition, behavioural remedies often leave room for multiple interpretations and are therefore more difficult to enforce. Specific issues surrounding structural and behavioural remedies are discussed below in more detail with recent cases as examples.

4.2 *Structural remedies*

28. Where divestments are involved, the purchaser must be independent of the undertakings concerned and should have sufficient expertise and financial resources to guarantee the continuity of the activities of the business.¹⁰

Box 1. Divestments: Supermarket mergers

Between 2009 and 2012, ACM resolved three supermarket mergers with remedies. The mergers involved hundreds of supermarket stores of three Dutch supermarket chains: Jumbo, C1000 and Super de Boer. The remedies in all three cases entailed that the chains had to sell stores in several cities or towns, in order to ensure that customers continued to have a choice between two or more supermarkets.

In 2015, ACM had a study carried out into the effects of these mergers. It turned out that the supermarket mergers had no effect on the prices that consumers paid for their products. It was also revealed that, after the mergers, product variety in virtually all supermarkets had increased. In several towns, the increase in product variety as a result of the merger was slightly less. The study confirms that ACM uses the right approach in its assessments of the effects of supermarket mergers on consumers. The conditions that ACM had imposed were effective.¹¹

29. As the divestment is intended to ensure that the market remains competitive, ACM has the right to approve the prospective purchaser. Generally, a monitoring/hold-separate trustee is appointed during the period that parties are responsible for the divestiture. Where parties are not able to divest the businesses concerned, ACM may require the appointment of a divestiture trustee who will ensure that this process is carried out.

30. The undertakings concerned must ensure that prior to the sale, the activities of the business to be divested remain intact and that their continuity and position on the market are not jeopardised. They also have to take measures to guarantee that independence from them will continue to exist in the future.

¹⁰ Idem.**Error! Bookmark not defined.**

¹¹ Laboratorio di economia, antitrust, regolamentazione (2015) *Mergers in the Dutch grocery sector: an ex-post evaluation - Assessing the effects on price and non-price dimensions of competition*. See <https://www.acm.nl/en/publications/publication/15084/Study-into-effects-of-three-supermarket-mergers-between-2009-2012/>

Box 2. Trustee: Acquisition of pharma company Mediq by Brocacef

In June 2016, ACM allowed Dutch company Brocacef Groep N.V. (Brocacef) to acquire Mediq Apotheken Nederland and Mediq Pharma Logistics (Mediq) under strict conditions.¹² Both Brocacef and Mediq run pharmacies and wholesale operations with pharmaceutical products such as prescription drugs.

Pharmacies

After the acquisition, Brocacef would own approximately 600 wholly-owned pharmacies and associated pharmacies (franchisees and partners) out of 2000 in total in the Netherlands. In order to make sure that consumers will have sufficient choice between competing pharmacies in their neighbourhoods, 89 pharmacies of Brocacef/Mediq must change hands. A trustee supported by a hold-separate manager has been appointed to ensure that the activities of pharmacies to be divested remain intact.

Drug wholesalers

At the moment, Brocacef and Mediq each own a wholesale company that is able to supply hospitals with a full range of drugs. Three such wholesale companies are active in the Netherlands. After the acquisition, that number would drop to two. In order to safeguard competition between wholesalers that supply hospitals, Mediq's wholesale company (Distrimed) will be sold to Pluripharm Groep B.V. With this sale, three wholesalers continue to be active in the market, thereby ensuring that hospitals will continue to have enough alternatives to choose from.

Appeal

Brocacef and third parties have appealed ACM's decision. In addition, Brocacef filed for a preliminary injunction concerning several aspects of the remedy. Particularly, the condition which prohibits Brocacef's wholesale company to supply the pharmacies which have to be hived off.¹³ The District Court of Rotterdam refused the preliminary injunction in September 2016, stating that Brocacef only has a financial interest to suspend this prohibition. Such an interest forms an insufficient reason to grant a preliminary injunction. Moreover, the judge considered that it is not possible to ask for a suspension of only one of the remedies offered. Brocacef should have challenged the whole decision and should possibly have requested a suspension. This statement relinquishes ACM from any obligation to look differently at remedy proposals, which it would have to do if parties with a licence to merge could easily get part of the remedies suspended. In addition, the judge considered that the decision in this case is not evidently illegal. With reference to the ACM Remedies Guidelines of 2007, the judge stipulated that where there is an ending of the relationship with franchisees and partners, any contractual relationship, for example, a wholesale relationship is out of the question. Brocacef will proceed with a full appeal.

Box 3. Trust foundation: Acquisition of media company conditionally approved

In 2011, ACM's predecessor, the NMa, conditionally approved the acquisition of the Dutch activities of media company SBS Netherlands by Sanoma and Talpa.¹⁴ With the acquisition, Talpa would have an interest in broadcaster SBS. Since 2007, Talpa also had a minority interest in broadcaster RTL, as well as a cooperation agreement with the RTL Group. That would be an undesirable situation, since Talpa, as a producer of TV content, would be able to exclude its competitors from access to SBS and RTL. In addition, this might have decreased competition between RTL and SBS, two of the Netherlands' biggest commercial broadcasters.

Therefore, the condition that the competition authority had set was that Talpa had to sell its minority interest in broadcaster RTL Netherlands within three years, and that it, until then, had to transfer its shares in RTL Netherlands to an independent trust foundation. The board of this trust foundation reported to the competition authority. This way, the NMa prevented Talpa from exerting substantial influence over both SBS and RTL's strategies, and thus from potentially gaining a competitive advantage.

¹² See <https://www.acm.nl/en/publications/publication/15916/Brocacef-to-acquire-parts-of-rival-Mediq-under-conditions/>

¹³ See <http://fd.nl/economie-politiek/1161627/brocacef-slept-acm-voor-de-rechter> (in Dutch).

¹⁴ See <https://www.acm.nl/en/publications/publication/6686/NMa-conditionally-approves-acquisition-of-SBS-Netherlands-by-Sanoma-and-Talpa/> .

4.3 Behavioural remedies

31. As recognised in the 2011 OECD roundtable on remedies, behavioural remedies are mostly useful in cases where the competition problem concerns exclusionary practices caused by a vertical relationship.¹⁵ For example, a vertically integrated entity can exclude competitors by limiting access or by creating a so-called price squeeze. A behavioural remedy aimed at guaranteeing access can in certain circumstances ensure that competition is unharmed.

Box 4. Guaranteed wholesale access: Dutch telecom company KPN is allowed to acquire fiber-optic company Reggefiber

In October 2014, ACM ruled that telecom company KPN was allowed to acquire fiber-optic company Reggefiber. With the acquisition, KPN acquired full control over Reggefiber's fiber-optic network. At the moment of the acquisition, Reggefiber was obliged to abide by conditions imposed by ACM's predecessor, the Netherlands competition authority, in 2008, concerning the management of its fiber-optic cable network. Reggefiber had to offer wholesale access to third parties.

The planned acquisition by KPN in 2014 would produce a shift in the balance of power in Reggefiber, thereby rendering the 2008 conditions inapplicable. ACM was worried that this might lead to restrictions for other companies on the use of KPN's fiber-optic cable network. This concern turned out to be unfounded. During the acquisition application for Reggefiber, ACM simultaneously worked on the market analysis of the telecom sector, which it conducts every three years.¹⁶ As a result of ACM's market analysis decision, KPN is obliged to continue to allow other businesses access to its network. Various providers are thus able to increase competition in the market for internet access, fixed telephony, and business network services. This case is a good example of the benefits that attach to having a multifunctional authority, such as ACM.

32. In principle, behavioural remedies apply for an unlimited period. The duration of the remedy can only be limited if an end to the competition problem after a certain period is assured beforehand. This is one of the reasons ACM prefers structural remedies.

Box 5. Remedy restricted to ten years: Acquisition of Mecom by rival De Persgroep cleared

The acquisition of British publishing company Mecom by Belgian rival De Persgroep was resolved with remedies in 2015. This new publishing company publishes national and regional newspapers, as well as free local papers, in almost the entire Netherlands. ACM looked into the merger's effects on advertising space in newspapers and free local papers, as well as on printing and delivery of newspapers. ACM came to the conclusion that, only in relation to the delivery of newspapers were additional arrangements needed in order to ensure sufficient continued competition.

Under the remedies accepted, De Persgroep has offered to continue the current delivery arrangements with the distribution business of Telegraaf Media Groep. Newspaper publishers that do not have their own distribution network, thus also benefit from this offer. This way, distribution of all newspapers against fair conditions has been guaranteed. These arrangements will be in place for at least ten years.

33. To ensure the effectiveness of a behavioural remedy a monitoring system is included in the remedy. ACM can fulfil this role, however in almost all cases a monitoring trustee is assigned for this task.

¹⁵ OECD (2011b), *Roundtable on Remedies in Merger Cases*, p.12.

¹⁶ In such analyses, ACM determines whether or not there is effective competition in the telecom sector, or whether a company enjoys significant market power. In the latter case, ACM will then impose rules on the telecom company with significant market power, for example, an obligation to provide access.

4.4 *Quasi-structural remedies*

34. In addition to structural and behavioural remedies, ACM can use quasi-structural remedies. These remedies are not of a structural nature, but do have a more or less structural effect on the market. One example of this type of remedy is the provision of exclusive licenses to third parties. In this case, even though an undertaking officially owns a product, this remedy de facto ensures that they cannot use this product because of the license provided to the third party.

35. This type of remedy is most suitable for competition problems which require a temporal, structural solution. If the expectation is that market circumstances will change, then a quasi-structural remedy might be most appropriate. However, this does not entail that this type of remedy is always limited in duration. The duration will only be limited when it is clear beforehand that the competition problem will cease to exist after a certain point in time.

Box 6. Licensing: Merger between Dutch manufacturers of frozen food snacks

In 2012, ACM's predecessor the Netherlands Competition Authority (NMa) received a merger notification from the two biggest convenience food manufacturers in the Netherlands, Buitenfood and Ad van Geloven. The product range of both manufacturers include popular, traditional Dutch frozen food snacks.¹⁷

An investigation carried out by the competition authority had revealed that the new undertaking would become too big in the supermarket segment for *bitterballen* and *kroketten*. The merger would eliminate competition between Buitenfood-produced branded kroketten and bitterballen and Ad van Geloven-produced branded and generic-brand kroketten and bitterballen. Furthermore, the competition authority was concerned about whether other competitors that produce these snacks for supermarkets would be sufficiently able to compete with the merged undertaking. Finally, there was a risk that supermarkets would not be able to do much if the new manufacturer decided to permanently and profitably raise the prices of these snacks.

In order to maintain effective competition in the market, the competition authority attached conditions to the merger. One of the conditions attached to this merger was that Buitenfood was required to transfer to a competitor for a period of six years the license for selling the brand Van Dobben for kroketten and bitterballen to supermarkets. That competitor had to change (rebrand) the Van Dobben brand for these two snacks. After the six-year period, the license holder and the merged undertaking could no longer use the brand Van Dobben when selling to Dutch supermarkets. In addition, the merged undertaking was not allowed to sell the abovementioned snacks to Dutch supermarkets that resemble the original Van Dobben products. These conditions would prevent a situation arising whereby too little competition remained after the merger with regard to the products available to supermarkets and consumers.

Merger called off

That same year, both manufacturers announced that the merger was off, quoting shareholder anxiety about the loss of the Van Dobben kroketten brand as one of the reasons.¹⁸

4.5 *Adjusting remedies after the clearance decision*

36. After the clearance decision, merging parties have the right to ask ACM to adjust or even abandon a remedy. Parties have to motivate why parts of, or the whole remedy, are no longer applicable.

¹⁷ See <https://www.acm.nl/en/publications/publication/10819/NMa-conditionally-clears-merger-between-Dutch-manufacturers-of-frozen-food-snacks/>

¹⁸ See <http://www.volkskrant.nl/archief/van-dobbenkroket-blijft-bestaan-door-mislukken-krokettenfusie~a3331098/> (in Dutch).

Box 7. Remedy lifted: Conditions attached to acquisition of mobility products manufacturer

In 2010, ACM's predecessor the Netherlands Competition Authority (NMa) attached conditions to the acquisition of mobility products manufacturer Handicare by private equity firm Nordic Capital.¹⁹ Handicare was a major player on the Dutch market. Once Nordic Capital, owner of Sweden-based Permobil, acquired Handicare, it would own the two biggest suppliers of powered wheelchairs in the Netherlands. This would create too big a player on the market, leaving too little competition. Nordic Capital proposed to hive off the production, distribution and sales of several of Handicare's models. These models accounted for approximately 20 to 30 percent of the Dutch market. By hiving off these models, the competition authority's objections to the acquisition were taken away.

Adjustments to the decision

In 2014, ACM changed its licensing decision at the request of Nordic Capital. The original decision contained a prohibition on buying back the hived off business. Nordic Capital argued that the market structure for electric wheelchairs no longer formed a problem for competition, since it no longer owned Permobil, another player on the market. ACM agreed and removed the prohibition.²⁰

5. Final remarks

37. On average, ACM adopts about 80-90 merger decisions each year. The vast majority of these decisions are taken in phase I, without extensive, further investigation (70-80). The remaining cases represent more complex cases of which a majority are cleared with remedies in phase I or, more likely, phase II.

38. As the cases discussed above demonstrate no remedy is the same. What is the same, is the analytical and procedural framework. ACM first identifies the competition issues raised by the merger that lead to a significant impediment of effective competition. It is subsequently up to the merging parties to address these competition concerns by offering a remedy (or by an efficiency/failing firm defence). The remedy should address all issues identified or else the merger will be prohibited.

39. A challenge with every remedy is to achieve an effective and enforceable remedy in the short time of a merger assessment. Both aspects require different skills and expertise on the part of staff members. A suitable remedy cannot always be found, as demonstrated by the Albert Schweitzer – Rivas case. This can put a lot of pressure on case teams.

40. ACM cooperates formally and informally with other competition authorities through ECN, ICN and within the OECD. We believe that there is much to be learned from other authorities' experiences in merger control and in ex post merger analysis, also in the field of remedies. We therefore look forward to the roundtable on 'Agency decision-making in merger cases'.

¹⁹ See <https://www.acm.nl/en/publications/publication/6285/NMa-attaches-conditions-to-acquisition-of-mobility-products-manufacturer-Handicare-by-Nordic-Capital/>.

²⁰ See <https://www.acm.nl/nl/publicaties/publicatie/13049/Verzoek-tot-wijziging-van-vergunningsbesluit-Nordic-Capital-eindmededeling/> (in Dutch).