

Pon/NS: applying behavioural remedies to digital platforms in the context of a merger

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Introduction

On 20 May 2020 the Dutch competition authority ("ACM") conditionally cleared a new joint venture between transport company Pon Netherlands B.V. ("Pon") and Dutch rail operator NS Groep N.V. ("NS") creating a Mobility as a Service ("MaaS") platform. The case was referred to the ACM by the European Commission ("Commission") under Article 9 of the EU Merger Regulation earlier this year.

This case is notable, because it shows a competition authority's approach to digital platforms in the context of a merger. Although no significant market power on the downstream market would be created with the joint venture, ACM required behavioural remedies in an attempt perceived as preventing the mobility platform from achieving a significant market position or even a so-called gatekeeper role.

This approach is especially interesting with a view to the European Commission's consultation on a proposal to introduce a [New Competition Tool](#) and a roadmap for an [ex-ante regulation for very large digital platforms acting as gatekeepers](#) which could make such a cautious approach potentially unnecessary. Also, ACM announced on 30 June 2020 that it will conduct a [market study](#) into the ability of new entrants to offer innovative mobility services.

In this blog, the background of the case, ACM's concerns on the relevant markets and the remedies eventually accepted by ACM are briefly discussed.

Background of the joint venture: creation of a MaaS platform

Concept of MaaS

First, for those not so familiar with the concept of MaaS: MaaS combines different mobility providers into one easily accessible service through so-called aggregator platforms that are available on smartphones as an app and establish a contact between consumers and mobility providers. MaaS solutions generally integrate all stages of the journey of a commuter, including trip planning, booking, e-tickets, and payments. They offer a commuter one, user-friendly application that allows them to travel via transport methods like train, bus, and taxi. An example of a MaaS platform is HERE Mobility in Amsterdam.

Joint venture: creation of a MaaS platform

The full-function joint venture to be created by Pon[1] and NS[2] will combine the companies' MaaS platforms, currently operated by a subsidiary of NS, Mobility Solutions and Services B.V. ("Hely"), and a subsidiary of Pon, Next Urban Mobility B.V. ("Next").

The new joint venture will operate a single app (the MaaS platform) that will allow users to plan, book and pay for their trips, combining different modes of transportation. The platform integrates various methods of shared transport provided by NS and Pon, and those of third-party operators. It will develop and manage multi-modal shared mobility concepts for both consumers and businesses initially focusing on offering (e-)bikes, (e-)cars and (e-)cargos bikes via hubs.

Relevant markets and potential competition concerns

Horizontal effects

According to ACM, the parties' activities overlap in (i) the local city markets for (e-)bike sharing services, (ii) the national or local city markets for (e-)car sharing services and (iii) the national market for retail distribution of integrated transport/mobility services through an app (which will be combined in the JV post-transaction)[3]. ACM believes the transaction would not significantly affect competition in those markets, due to e.g. the low market shares of the parties (0-5% on the market for retail distribution of MaaS transport/mobility services through an app), competitive pressure and the fact that it concerns nascent and dynamic markets.

Vertical effects

However, the transaction also gives rise to vertically affected markets in relation to NS's activities in (a) the rail transport of passengers, (b) the supply of (e-)bike sharing services (through OV-fiets) and (c) the supply of (e-)car sharing services. It is within that context that ACM believes the transaction could negatively affect competition. According to ACM, NS would both be able and have an incentive to restrict access of competitive transport/mobility apps to its rail transport services and (e-)bike sharing services. For example, by offering competitors the train services and (e-)bikes sharing services at higher prices or under more unfavourable conditions than to their own joint venture. As NS has a major (if not dominant) position on the rail market and shared bikes (OV-fiets), which both are important, if not essential, inputs for offering an integrated transport/mobility services through an app, such restrictive behaviour could negatively affect competition, ACM concluded.

The fact that the creation of the joint venture would not lead to a significant position on the downstream market, which generally prevents parties from pursuing a foreclosure strategy, did not alter ACM's conclusion. The guaranteed availability of those essential inputs for the development of the MaaS platform via NS and Pon, e.g. train services, (e-)bike sharing services (OV-fiets) and (e-)car sharing services, makes it likely that the joint venture will gain an important position on the market in short term. Therefore, the profitability - and thus the likelihood - of a foreclosure strategy will also increase, according to ACM.

Behavioural remedies

To mitigate ACM's concerns, and probably to avoid a phase II-procedure, parties proposed several remedies.

Access to API's

The most important one is the offer to provide NS' train and (e-) bikes services under at least the same conditions as to the joint venture to competing transport/mobility app providers. This means that competitors will get access to the *Application Programming Interfaces* ("API's") of those services of NS. This obligation, however, only comes into play once parties decide to offer those services via the app of their joint venture. This is currently not (yet) the case. A call from interested market parties to ensure that the conditions under which access to the API's is granted are FRAND (*fair, reasonable and non-discriminatory*) has not been adopted by the ACM.

The obligation to provide access to the relevant API's has been limited further in scope insofar that access should only be granted to Aggregator Platforms[4] who will use the API for purposes related to the facilitation/promotion of the use of rail transport and/or (e-)bikes sharing services. Aggregator Platforms who would like to use the API to collect data for the exploitation of other transport/mobility sharing services, marketing purposes or digital mapping services etc. do not have to be granted access.

Monitoring trustee and dispute resolution mechanism

A monitoring trustee will be appointed to ensure that competitors are granted access on equal terms. Also, in case of a dispute about the terms and conditions, competitors can have recourse to a dispute resolution mechanism to be put in place. The remedies have been offered for as long as the joint venture exists.

According to ACM, the proposed remedies ensure that other companies will also be able to create competitive integrated transport/mobility apps, and sufficient competition between those apps will continue to exist. ACM therefore cleared the joint venture under those conditions.

Final remarks

This case perfectly illustrates the difficulties which competition authorities currently face when dealing with digital platforms in rapidly changing markets. The market for mobility services is a digital, data-driven market, which is still young and dynamic. MaaS platforms are expected to help tremendously towards the realization of sustainability goals, and in mitigating the problem of traffic congestion. ACM clearly finds it important that room is given to innovation and that various providers get the opportunity to develop a product on this market, too.

One should not forget that the MaaS platform of the joint venture would **not** hold a significant position on the downstream market. However, lacking the possibility to impose behavioural remedies once the joint venture would actually have gained an important market position and thus would have been able to negatively affect competition, ACM seems to have taken its chance by requiring far-reaching behavioural remedies in the context of this merger notification procedure. In this manner, ACM might have prevented the creation of a so-called gatekeeper on the retail market for integrated transport/mobility services through an app.

That ACM sees potential competition problems in this sector became even more clear when it announced a couple of weeks later that it launched a study into the ability of new entrants to offer innovative mobility services (see introduction of this blog).

However, such a market study in itself does not provide ACM the power to remedy any significant competition problems afterwards. This is a problem which has been recognized on an EU (and global) level. The Commission therefore proposes to introduce a so-called New Competition Tool to tackle structural risks and market failures and ex-ante regulation for very large online platforms, as indicated in the introduction. Those proposals might - at least partially - take away the rationale for competition authorities to take a cautious approach in merger control proceedings.

For more information about the New Competition Tool and Ex-ante regulation, see also:

- "Commission seeks views on gatekeeper platforms and a new competition tool" by Francine Cunningham, Janneke Kohlen and Mariska van de Sanden (Bird & Bird), June 2020 [link](#)
- "The European Commission eyes the addition of a market investigation tool to its 60-year-old toolbox - but is it a chisel or a sledgehammer?" by Assimakis Komninos, Mark Powell, Marc Israel, James Killick, Jacquelyn MacLennan, Kate Kelliher (White & Case), June 2020 [link](#)

[1] Pon is a Dutch mobility service provider (also called transportation network companies) and part of the Pon group, active in more than 34 countries worldwide in the field of mobility products, services and solutions. Pon imports (e-)cars, manufactures (e-)bikes, and owns shares in Greenwheels, another car-sharing program. In addition, Pon owns which also operates a (e-)bike-sharing program, and a (e-)car-sharing program.

[2] NS is the largest public-transport company in the Netherlands holding the single concession for a large part of the train railway in the Netherlands and operates a public bike-rental system known as 'OV-fiets'. Through its subsidiary NS also operates a car-sharing program and a bike-sharing program.

[3] Interestingly, the European Commission came to the preliminary conclusion that the latter market would be broader and not include only integrated services, but all transport solutions provided to users through an app.

[4] Aggregated Platforms has been defined as (informal translation:) any multimodal platform available as an app on a mobile phone allowing consumers to use at least two different types of transport/mobility sharing

services (for example car- and bike sharing services).