Kluwer Competition Law Blog

Dutch competition authority widens powers to call in M&A transactions

Bart de Rijke, Helen Gornall, Stephanie The, Wessel Geursen (De Brauw Blackstone Westbroek) · Friday, March 28th, 2025

Competition authorities around the world are closing loopholes and asserting jurisdiction over mergers that have potentially harmful effects but that fall below quantitative merger-control thresholds. Some of the activities that give them cause for concern include anti-competitive effects in local markets, roll-up strategies, killing potential competition, and the stifling of future innovation. Authorities are increasingly taking the view that the size of an undertaking's revenue does not necessarily reflect that undertaking's effect on competition.

Some examples include online platforms offering zero-price services to consumers with a view to generating revenues at a later stage, or pharmaceutical companies developing vaccines with future value in pipeline blockbuster jabs. Taking overt these types of activities often fall outside merger control because they do not meet classical turnover thresholds. Authorities are nevertheless concerned that these transactions may pose a competitive risk when they concern: (a) a buy-and-build strategy, which allows players to become dominant over time by acquiring many small market players; (b) acquisitions that target low revenue-generating, yet disruptive, entrants/emerging rivals; or (c) "killer acquisitions" of nascent companies by entrenched players. For this reason, several competition authorities are trying to stretch the boundaries of their jurisdiction under existing legislation. Some legislatures have even changed the law to that effect by introducing powers for their competition authorities to call in below-threshold mergers.

No call-in power at EU level after loss of Illumina case

In 2021, the European Commission tried to be creative by establishing a call-in system for below-threshold mergers based on the existing referral system of Article 22 EU Merger Regulation (EUMR) in the Illumina/GRAIL case (see our initial analysis **here**). After a saga that included several Commission decisions and judgments, the European Court of Justice **held** in 2024 that the Commission could not construe this call-in option based on existing legislation. The current provisions of the EUMR limit the length of the Commission's control procedures by establishing clearly defined deadlines to ensure legal certainty and to balance administrative efficiency with business needs. The ECJ added that only the EU legislature can review these thresholds or establish a safeguarding mechanism for the Commission to scrutinise transactions.

Increasing national call-in powers and widening existing powers

As the EU legislature has not yet changed the EUMR, the Commission has to rely on the call-in powers of national competition authorities in member states, who can refer a case to the Commission based on Article 22 EUMR. This was done in the recent Nvidia/Run:AI merger, with the Italian competition authority calling in this below-threshold merger and referring the case for further merger control review at the EU level. Despite the Commission's unconditional approval in the first phase of its merger control procedure, Nvidia has **challenged** the Commission's decision to accept the Article 22 referral. Nvidia is arguing that this combined system of a "loosely defined, ex post, discretionary call-in power" at the national level with Article 22 EUMR does not live up to the principle of legal certainty as defined by the ECJ in the Illumina/Grail judgment.

In the wake of the Illumina/Grail case, 12 national legislatures in the European Economic Area introduced call-in powers for their competition authorities (Cyprus, Denmark, Germany, Hungary, Iceland, Ireland, Italy, Latvia, Lithuania, Norway, Slovenia and Sweden). In addition, gatekeepers under the Digital Markets Act have to inform the European Commission of below-the-threshold acquisitions. This same reporting requirement is increasingly becoming a part of the remedies needed to conditionally approve mergers.

As for buy-and-build strategies, competition authorities in the EU already treat consecutive transactions as parts of a single concentration under merger control rules, provided certain criteria are met ("salami tactics"). The Italian competition authority even **admitted** to interpreting this rule broadly to enable it to widen its jurisdiction as far as possible. In addition, national competition authorities have tried to examine acquisitions under general antitrust rules as abuse of dominance or anti-competitive agreements. This possibility was confirmed by the ECJ in its **Towercast** judgment. For the Belgian Competition Authority, the opening of two separate proceedings under Article 101 TFEU in the **Dossche Mills/Ceres** case and under Article 102 TFEU in the **Proximus/EDPnet** case even led to the parties abandoning their planned acquisition; it proved to be a successful preventive measure.

Situation in the Netherlands

Developments in the Netherlands mirror those in the EU. While the Netherlands Authority for Consumers and Markets (ACM) was part of the coalition of willing authorities **referring** the Illumina/GRAIL case to the Commission under Article 22 EUMR, it changed its position after the Commission losing the case at the ECJ. As of 1 January 2025, the ACM will only refer cases to the Commission based on Article 22 EUMR if they are notifiable under Dutch merger control rules. This means that the merger needs to meet Dutch turnover thresholds, but that may change if a call-in power is introduced in Dutch competition law.

The ACM has been advocating for a call-in power, with its chairman stating "**small mergers, big problems**" and pushing for this power since the end of 2023, with an even **louder call** after the Illumina judgment. While in its recent government programme the Dutch government stated that it is still considering introducing such a new power, two members of parliament have now acted on the ACM's call by proposing a draft bill for a call-in power (see further, below).

At the same time, the ACM is expanding its existing powers. It recently opened an investigation into the Brink's/Ziemann case to investigate whether the acquisition constitutes an abuse of dominance, among other things. Additionally, the ACM believes it can review both past and future acquisitions of a buy-and-build strategy if one of these acquisitions meets the Dutch notification thresholds. The ACM applied this broad interpretation of the current merger control rules in the recent Foresco case.

Acquisition of competitor may constitute abuse of dominance

In the Brink's/Ziemann case (concerning cash transport), the ACM issued a **press release** stating that it would investigate whether Brink's violated the prohibition of abuse of dominant position in the Ziemann acquisition. Paradoxically, the ACM cannot review this merger under the Dutch abuse prohibition because the Dutch Competition Act exempts mergers from this prohibition. When the Competition Act was introduced in 1998, the size of turnover was assumed to reflect an undertaking's economic importance. Below-threshold mergers were therefore not considered important enough, and it was deemed consistent policy *not* to review these mergers for abuse of dominance. This means that the ACM is left only with the assessment under Article 102 TFEU in cases like this.

In response to the ECJ's Towercast judgment, a bill allowing the ACM to review below-threshold mergers under the Dutch prohibition of abuse of dominance is now pending in parliament.

Buy-and-build-strategy

The ACM is taking a more critical stance towards a buy-and-build strategy under its merger control mandate. Although the ACM acknowledges the positive effects of economies of scale and other efficiencies, it does not give buy-and-build strategies the benefit of the doubt. Instead, it prioritises these mergers by dedicating larger case teams to scrutinise them. As of 1 January 2025, it has even introduced a one-week advance notice of a notification, before the actual notification can be made. In this advance notice, the parties to the transaction concerned must report other recent transactions, even if these were not notified before.

The first case subject to the ACM's critical approach to buy-and-build strategies was the Foresco case, where the ACM's **decision** set out its criteria for assessing the competitive risks of a buy-and-build strategy. The ACM is widening its jurisdiction by interpreting quite broadly what it can review, as demonstrated by stating that the buy-and-build strategy is part of the "context" that it can review. This is novel and quite controversial, as a merger control investigation should generally be limited to the effects of the notified transaction.

Some of the criteria will remain the same, as the ACM continues to assess if by making the acquisition the buyer acquires a dominant position or strengthens its dominant position. As a new element in its assessment of buy-and-build strategies, the ACM will analyse whether:

- sufficiently concrete future acquisitions identified in the buy-and-build strategy will allow the buyer to obtain a dominant position; and
- previous below-threshold acquisitions have led to higher prices, taking into account the effects of

those previous acquisitions that have not yet fully materialised due to their recent conclusion.

The practical implications for transactions that are part of a buy-and-build strategy are that

- more time is needed to obtain approval (the Foresco case shows that the ACM took its time and even referred the case to a second phase); and
- the ACM may request internal strategic documents on past or future potential acquisitions to ensure a comprehensive investigation.

Ultimately, the ACM unconditionally cleared the Foresco transaction. While this is a positive outcome for the merging parties, it means that the ACM's decision is unlikely to be challenged, leaving the legal and business communities with uncertainty as to whether this unprecedented approach by the ACM is legally sound.

Call-in power for ACM in two-step procedure

The **draft bill** introduced by two MPs (as mentioned above) proposes to introduce the following call-in power for mergers that do not meet the turnover thresholds of the Dutch Competition Act:

1. The ACM first has to send a request for information (RFI) to the parties concerned, asking for information and documents that are reasonably necessary to assess whether the below-threshold merger is likely to significantly impede effective competition (SIEC test) in the Dutch market or in a part of it.
2. If based on this information, the ACM concludes that the concentration may meet the SIEC test – in particular by creating or strengthening an economic dominant position – the ACM has the power to call in the concentration. In that event, it will impose the following obligations on the undertakings involved in the concentration:
   a) Notification: an obligation to notify the concentration to the ACM (by the regular form CO); and
   b) Standstill obligation: a prohibition on implementing the concentration unless the transaction had already been completed before the ACM decided to call in the merger (so either during the initial RFI period, or even before). When the standstill obligation is breached, a gun-jumping fine may be imposed.

Timing of call-in procedure and standstill obligation

The ACM can send an RFI within four weeks of the following dates, whichever comes first:

- When one of the undertakings involved in the merger publicly announces the intended merger;
- When the ACM becomes aware of the intention to implement the concentration (for example, parties can voluntarily disclose the concentration to the ACM);
- Six months after the agreement implementing the concentration enters into force.

After receiving all necessary information, the ACM must decide within four weeks whether to call in the concentration, although it can still stop the clock by requesting additional information or documents. The obligation to notify and the standstill obligation can only be imposed by this call-

in decision. The standstill obligation does not apply during the initial period in which the ACM has issued an RFI. During this initial period, the transaction can be completed (with the risk that the ACM may call in the transaction and decide against it, which triggers the obligation to undo the transaction). After the call-in decision, the normal notification regime applies.

Planning M&A deals

All these developments show that whether a deal will be reviewed by a competition authority is more difficult to predict. Where competition authorities were even reluctant to review below-threshold mergers in the past, they are now using their existing powers to bring these acquisitions under their merger control mandate. They do this by opening antitrust proceedings with the possible threat of heavy fines, which has proven to be an effective way of blocking mergers.

When an above-the-threshold buy-and-build merger triggers a notification, the ACM has demonstrated its willingness to use its review to consider all past and future below-threshold mergers in the buy-and-build strategy.

Finally, the introduction of call-in powers continues to make the landscape for below-threshold mergers even more opaque. As a result, acquisitions of targets with little or no turnover require careful consideration, both in terms of potential effects on the market that could attract regulatory attention, and in terms of timing.

This article was first published on: https://www.debrauw.com/articles/dutch-competition-authority-widens-powers-to-call-in-m-a-transactions

---

This entry was posted on Friday, March 28th, 2025 at 10:00 am and is filed under Killer acquisitions, Merger notification, Merger Thresholds, Netherlands
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.