



Netherlands

Global merger control handbook – update

APRIL 2020

Merger control legislation updates since 1 July 2018

There have been no changes to Dutch merger control legislation since 1 July 2018.

Landmark merger control cases since 1 July 2018

The following cases are of particular interest for the application of the Dutch merger control rules:

- PostNL/Sandd. By decision of 27 September 2019, published on 4 October 2019 ([link](#)) the Secretary of State for Economic Affairs and Climate made use of the possibility afforded by Article 47 of the Dutch Competition Act ('DCA') to allow a merger that had been finally prohibited by the ACM. This is the first time since the entry into force of the DCA in 1998 that an application under article 47 DCA was granted.

The transaction involved the acquisition of postal company Sandd by its main competitor PostNL. These were the only two postal companies that operated a nation-wide network in the Netherlands and together they accounted for a market share between 90% and 100%, only competing with much smaller regional postal companies in certain regions. After an in-depth Phase II investigation, the ACM had prohibited the merger by decision of 5 September 2019 ([link](#)). The ACM did not accept PostNL's submission that digital mail is a viable substitute for, and therefore part of the same relevant market as, physical mail and hence concluded that the parties had a very high combined market share. The ACM had calculated on the basis of a merger simulation that the acquisition would result in a price rise between 30% and 40% and it did not accept PostNL's arguments that the consolidation was necessary in view of the annually shrinking volume of physical post to guarantee the long-term continuation of its obligation to provide universal postal services.

Under Article 47 DCA, the Secretary of State can 'overrule' an ACM prohibition if there are "compelling reasons in the general interest" that are considered of greater significance than the expected impact on competition. Interestingly, the Secretary of State states that approving the acquisition is necessary to assure that postal services in the Netherlands will continue to be "affordable, available and reliable" despite the sharply shrinking volumes. This seems to contract the ACM's analysis that PostNL would be able to continue its universal service obligation independently. The second reason brought forward by the Secretary of State is to preserve employment – PostNL was prepared to offer employment to all Sandd employees under PostNL's better collective labour conditions – which is a factor the ACM is not able to take into account under the DCA.

A second interesting feature of the Secretary of State's decision is that it is conditional (an option not explicitly provided for by Article 47 DCA): for a period of 8 years following the completion of the acquisition of Sandd:

- (i) PostNL must provide access to other (regional) postal companies to its network;
- (ii) in order to prevent the price rise predicted by the ACM, PostNL's return on sales for its postal activities is maximized at 9%;
- and (iii) PostNL must honour its commitment to employ Sandd employees and it must include employee representatives in the Supervisory Board.

- SanomaLearning/Iddink. By decision of 28 August 2019 (link), the ACM approved, after a Phase II investigation, the acquisition of Iddink by SanomaLearning, subject to conditions. This decision is mainly interesting for two reasons: (i) the ACM's objections did not relate to horizontal or vertical relations between the two parties; and (ii) the

conditions imposed are behavioural and of unlimited duration. SanomaLearning is an important provider of course materials and tests for secondary education, while Iddink is a provider of student administration software and software for digital learning environments. In particular the latter software, called Magister, is very successful in Dutch secondary education with a market share of 70-80%. The ACM was concerned that after the acquisition, the interoperability between SanomaLearning's content and the Magister system might be improved to the detriment of competing providers of course materials. The ACM considered it likely that schools would in that case favour SanomaLearning's materials. A second concern was that through Iddink, SanomaLearning might be able to access commercially sensitive information of its competitors. For these reasons, the approval is conditional on the following behavioural remedies being observed: (i) all publishers of learning materials must be offered a connection to Magister under fair, reasonable and non-discriminatory (FRAND) conditions and must be given equal access to data from Magister; and (ii) Chinese walls and technical firewalls must be implemented between the commercial operations of Sanoma's learning materials division and Iddink. Both remedies are of undefined duration.

Web link to the national competition authority

Authority for Consumers and Market: <https://www.acm.nl/nl>

Page with information on merger control: <https://www.acm.nl/nl/onderwerpen/concurrentie-enmarktwerking/concentraties-van-bedrijven/fusies-overnames-en-joint-ventures>

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