Consultation response

Consultation on amending the Competition Act to expand the concentration supervision

The Netherlands Authority for Consumers and Markets

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Executive summary

The below-threshold call-in regime proposed by the Netherlands Authority for Consumers and Markets (ACM) risks undermining legal certainty, investment attractiveness and innovation-led growth in the Dutch and wider EU economies. While intended to address potentially harmful mergers that fall below current thresholds, the mechanism introduces significant unpredictability into the merger review process, complicates exit opportunities for high-growth firms and raises compliance burdens. As demonstrated in both legal precedent and international best practices, like the International Competition Network's (ICN) Recommended Practices, merger control must remain predictable, nexus-based and proportionate. The ACM should continue to use ex-post antitrust tools to address anti-competitive effects.

Introduction

Predictability is central to effective merger control, as the Court of Justice of the European Union (CJEU) recently validated in its *Illumina/Grail* decision.

Clear and predictable rules and jurisdictional thresholds enable companies and authorities to define which transactions are subject to notification. This predictability vitally allows the parties to a transaction, their investors and financiers – but, crucially, also employees, customers and other stakeholders – to anticipate the jurisdictions involved, the scope and likely timing of regulatory reviews and when a transaction can be consummated. Clear and predictable thresholds ensure that the best placed authorities ultimately have jurisdiction over a case, contributing to effective enforcement of competition rules.

However, the increasing complexity of modern markets has led to the perception that there are below-threshold mergers that may escape traditional review mechanisms. To address this, competition authorities are considering complementing their mandatory notification regimes with the addition of 'residual jurisdiction', sometimes referred to as the ability of a competition authority to 'call in' a transaction if it does not meet the thresholds for mandatory notification.

The Netherlands Authority for Consumers and Markets (ACM) is the latest EU Member State to propose a call-in regime to address below-threshold mergers after the CJEU's *Illumina/Grail* decision, following proposals by France. In each case, call-in regimes are found to create significant uncertainty for industry, and face large legal challenges (as seen in the *Nvidia/Run:AI* case in Italy).

These initiatives run against to the pro-growth policy strategy that many governmental bodies in Europe are adopting to become competitive globally and attractive to investors. For the Netherlands, this approach would add significant costs and uncertainties to investing in high-growth Dutch companies and send the wrong signal at the international level.

In the context of greater strategies across the EU, these initiatives run counter to a crucial element of the EU's path to competitiveness as described in the Savings & Investment Union Communication. That is, increasing paths to exit opportunities. Along with initial public offerings (IPOs), acquisitions by established companies are a highly attractive exit option for high-growth companies. Exposing high-growth companies to significant uncertainty and compliance costs through merger control would severely undermine this ambition. Similar concerns were also found in the Draghi Report, which cited the use of Articles 101 and 102 TFEU for below-threshold mergers as a source of an 'increasingly complex and uncertain' merger control environment.

The ACM must carefully evaluate whether the significant economic ramifications of a call-in regime justify the potential benefits in addressing potentially problematic mergers with *ex ante* vs *ex post* (ie antitrust) tools. This paper provides some relevant considerations as well as direct comments on the proposed mechanism.

Best practices for merger control

The International Competition Network's (ICN) Recommended Practices (RPs) for merger notification and review procedures provide valuable guidance on how the ACM should design its jurisdictional framework.

The work of the ICN has been of tremendous importance to agencies and companies alike. The sharing of best practices, international convergence on jurisdictional and substantive rules and the expansion of effective and thoughtful competition law enforcement around the world have provided significant benefits to the business community and consumers.

Aligning with the ICN RPs is a powerful tool for international convergence which ensures that transactions are screened by the most relevant authority.

In fact, the ICN RPs advocate that jurisdiction should only be asserted over transactions that have a substantial connection to the reviewing jurisdiction (RP.II.A). The determination of a transaction's nexus to the reviewing jurisdiction should be based on activities in that jurisdiction, measured by reference to the activities of at least two parties to the transaction in the local territory and/or by reference to the activities of the acquired business in the jurisdiction (RP.II.C). The latter criteria are further explained (in Comment 1 to RP.II.C) as requiring 'significant local activities' by each of two parties or a target's 'significant presence in the local territory, such as significant local assets or sales in or into the reviewing jurisdiction'. Further, the ICN RPs (in Comment 3 to RP.II.A) recommends that residual jurisdiction may encompass transaction with 'a material nexus to the jurisdiction… that meet lower, non-mandatory notification thresholds'. As emphasised in the RPs, 'when a jurisdiction maintains residual jurisdiction, it should take steps to address the desire of the parties to the transaction for certainty… [including] restricting the competition authority's ability to exercise residual jurisdiction to a specified, limited period of time after the completion of a transaction'.

As can be seen from the above, mandatory as well as residual jurisdiction should therefore be exercised (i) when a competition authority intends to submit a transaction to its review, (ii) on the basis of a material local nexus with reference to significant local activities by each of the two parties or the target for an acquisition and based on objective and measurable criteria and (iii) for residual jurisdiction within a specified, limited period of time.

When addressing below-threshold transactions, competition authorities must consider these international best practices as well as wider implications for investment, innovation and growth.

Comments on the proposed below-threshold call-in regime

The proposed mechanism would introduce a call-in power for any transaction that the ACM considers possible of significantly impeding competition in the Dutch market or regionally. It attempts to minimise administrative burdens borne by companies by requiring the ACM to send a request for information (RFI) before issuing the formal call-in and by introducing certain time limits for the ACM to do so. A formal call-in comes with a standstill obligation, unless the parties have already completed the transaction, in which case there is a possibility to require the parties to unwind the transaction if the case is referred to Phase 2.

The memorandum makes clear that the mechanism intends to address high-value acquisitions as well as consolidations.

Concerns

Call-in powers, regardless of their design, carry significant ramifications on a country's attractiveness and the success of their businesses. In the context of high-value transactions – many of the below-threshold transactions caught by call-in regimes – they add stifling costs and standstills which can jeopardise deals and even the solvency of selling companies.

The proposal is based on the premise that there is an enforcement gap for mergers not meeting notification thresholds. This premise is highly debated by academics and economists[1].

Beyond this premise, there is a question of whether the uncertainty and added workload connected to imposing call-in powers is worth the potential economic benefits that it would bring. The recent *NVIDIA/Run:AI* case is a strong example of this. The Italian *Autorità Garante della Concorrenza e del Mercato* (AGCM) made the decision to call in the below-threshold acquisition of Run:ai by NVIDIA, which it then referred to the EU. However, despite the significant uncertainty and resources spent on this call-in and referral, the European Commission cleared the transaction after a Phase 1 investigation.

On top of the broader economic implications that a call-in regime would bring, the ACM must weigh whether they can afford to spend resources reviewing transactions on the basis of highly debated theories of harm given that they can easily be overturned in Phase 1.

Uncertain timelines

Even when coupled with quantitative and qualitative criteria, call-in powers introduce uncertainty. Transactions, particularly in high-growth industries, typically occur with quick and strict deal timelines. Unanticipated delays during the clearance phase can cause investors to abandon a transaction. The multiplication of new merger control thresholds in the EU, in particular sometimes based on unclear

[1] M. Ivadi, N. Petit, S. Uenekbas, "Killer acquisitions in digital markets may be more hype than reality", available at https://cepr.org/voxeu/columns/killer-acquisitions-digital-markets-may-be-more-hype-reality.

criteria and/or discretionary call-in powers, leads to regulatory fragmentation and increases complexity for companies contemplating international transactions. This approach raises costs, time and resources and can deter deal-making. Furthermore, if this increased complexity is litigated (as it was in *NVIDIA/Run:ai*) it can ultimately lead to years of uncertainty.

Subjecting below-threshold mergers, which lack an immediate impact on competition, to a call-in may disproportionately harm the smaller party. In many cases, start-ups lack the resources and means to comply with complex or unpredictable reviews. More fundamentally, such companies often have limited cash runways, the frequent need to get access to much needed resources to move to the next stage of their development, and protracted merger reviews combined with suspensory obligations can threaten the very solvency of these companies.[2] This disincentivises innovative M&A activity and prevents small companies from growing and innovative products and services from reaching the market.

While the ACM's proposed mechanism contains a RFI system which may alert investors to a potential call-in, this is not sufficient to mitigate the issues that a potential call-in may create. Indeed, even with the issuance of an RFI, the threat of a standstill obligation may be enough for investors to abandon a deal.

This is particularly problematic when coupled with the proliferation of call-in regimes around the EU with varying time limits for reviews. There is already a very extensive and heterogeneous set of call-in powers for mergers within the EU, which in and of itself generates legal uncertainty for companies. First, several countries apply lowered thresholds as part of their call-in powers (eg in Norway, a call-in is possible if the authority has reason to believe that the competition will be distorted by the transaction or if other 'special conditions' indicate that 'further investigation is necessary) while other countries apply totally different criteria (eg in Ireland it is sufficient that the transaction 'may, in the opinion of the Commission, have an effect on competition in markets for goods or services in the State', without any additional threshold criteria). Second, while some countries strict time limits (eg Italy, Denmark and Hungary), others set no time limit (eg Sweden and Cyprus). Adding yet another call-in regime with its own criteria and deadlines can only increase legal uncertainty within the EU.

Undefined jurisdictional and substantive thresholds

First, the substantive threshold (ie mergers that 'significantly harm competition') is not operational and should be specified. What is more, this substantive test makes approaching authorities self-incriminating. To maintain some level of legal certainty, the ACM should envisage defining further the types of transactions it will apprehend in priority and provide concrete examples as a benchmark. This could be done either in the legislation itself or through guidelines.

Second, the proposal as it currently stands does not require a sufficient nexus within the Dutch territory. Indeed, the proposed threshold could by definition be met by a transaction involving a target (or an acquirer) that has no activity at all on the Dutch territory. A clear nexus requirement is indispensable to provide some level of legal certainty in particular for companies active in global

[2] It is sometimes argued that this is an issue of moral hazard. However, this is not the case where the liquidity issues have resulted from the highly uncertain nature of a call-in regime rather than where a seller has selected an acquirer that: (i) triggers clear merger control review thresholds; and (ii) gives rise to substantive issues that need exploring in a protracted review.

markets. This would be achieved by requiring that the target is already active in The Netherlands or that it has concrete and realistic plans of entering the Dutch market segments in the short term.

Recommendation

Pursue antitrust enforcement first

As demonstrated above, any attempt to capture below-threshold mergers would introduce significant uncertainty to the detriment of The Netherlands' attractiveness as an investment destination.

Introducing this uncertainty is unnecessary given that the potential anti-competitive risks would be mitigated by the ACM and European Commission's ability to robustly enforce any potential anticompetitive aspects of a transaction when they become material under existing competition tools, such as Articles 101 and 102 TFEU and their Dutch equivalents (potentially combined with interim measures).

Focusing resources, instead, on enforcing substantiated concerns of anticompetitive practices after the implementation of the merger significantly reduces hesitations and, at worst, abandoned growth opportunities caused by an unpredictable call-in environment.

Anti-competitive effects from below-threshold transactions are best handled through antitrust proceedings. However, if proven that further thresholds are necessary to strengthen merger control enforcement in the Netherlands, the ACM could consider introducing a mandatory notification regime with a value-based threshold and local nexus requirements as a last resort.

Inspiration can be taken from Austria and Germany's recent changes based on transaction value combined with strong local nexus requirements. It is important to stress, however, that such rules must come with clear, measurable guardrails to create legal certainty and avoid burdensome consultation processes. This is particularly relevant when it comes to establishing a strong nexus to the Netherlands, so as to avoid uncertainty and over-enforcement.

Conclusion

Maintaining predictability and clarity in transaction screening is essential for attracting investment and bolstering competitiveness in the Netherlands and EU. The ACM's proposed below-threshold call-in powers introduce uncertainty and complexity at odds with the Netherlands' competitiveness and the EU's wider strategic ambitions, including those outlined in the Savings & Investment Union Communication. The ACM should not underestimate the risk of unintended consequences – including discouraged M&A activity and abandoned deals. These effects not only hinder innovation but also erode confidence in the Dutch market.

Rather than adopting open-ended and discretionary call-in powers, the ACM should prioritise the use of existing antitrust enforcement mechanisms to address genuinely problematic conduct post-transaction. This ex-post approach allows for effective competition oversight without imposing unnecessary burdens on all below-threshold transactions.

Ultimately, aligning the Dutch regime with international best practices and maintaining a balance between effective enforcement and investment predictability is crucial. The ACM should proceed with caution and adopt only those mechanisms that demonstrably enhance competition oversight without jeopardising the EU's broader competitiveness and growth objectives.