

Dutch Merger May Promote Behavioral Remedies Across EU

By **Robert Hardy** (August 30, 2022)

On July 12, the Dutch Trade and Industry Appeals Tribunal upheld the decision of the Netherlands Authority for Consumers and Markets, or ACM, to conditionally clear the acquisition by publisher Sanoma Learning BV of schoolbook distributor Iddink Holding BV.[1]

This judgment marks the end of lengthy proceedings involving Sonoma, the ACM and Noordhoff Uitgevers BV as a complainant that started back in 2019.

The ACM conditionally cleared the proposed transaction in August 2019, imposing its first ever merger control access to a platform and to data remedy. The behavioral remedy package as now vetted by the tribunal requires the merging parties to provide competing publishers with equal access to a digital learning platform, Magister, as well as to data from that platform.



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Facts

In January 2019, the ACM received notification of a proposed acquisition by which Sanoma would acquire sole control over Iddink. Sanoma is active through its subsidiary Malmberg as an educational publisher of books and digital learning materials in the Netherlands. Malmberg competes in this sector with Noordhoff and others. In secondary education, Iddink offers a student administration system with Magister, a digital platform.

In the decision dated April 16, 2019, the ACM determined that Sanoma and Iddink would require a permit — the Dutch equivalent to an in-depth or Phase II review — to proceed with the proposed transaction. Sanoma and Iddink subsequently applied for one on April 18, 2019.

In the decision dated Aug. 28 2019, the ACM granted a permit, subject to commitments — i.e., the ACM conditionally cleared the proposed transaction. As part of the remedy package, the ACM imposed a set of behavioral remedies — with independent monitoring and expedited dispute settlement mechanisms — including requiring the merging parties to:

- Provide access to the Magister application programming interface to publishers who request so under fair, reasonable and nondiscriminatory, or FRAND, conditions, including to the necessary information to enable the same link to Magister for all publishers;
- Provide to publishers who request so under FRAND conditions information from Magister in any case where the merging parties provide similar information to Malmberg; and

- Have in place internal measures — e.g., an ethical wall — to ensure that Malmberg does not have access to competitively sensitive information about other publishers.

The reason that the ACM considered there to be competition concerns *inter alia* is because Magister is used by many secondary schools in the Netherlands.

Noordhoff appealed the ACM's conditional clearance decision before the Rotterdam District Court. In March 2021, the Rotterdam District Court quashed the ACM's entire decision, with an instruction to the ACM to take a new decision, and without a so-called administrative loop.[2]

According to the Rotterdam District Court,[3] the ACM's decision contained a lack of reasoning in the area of the foreclosure of competitors through bundling.[4]

The ACM conducted additional research because of the Rotterdam District Court's judgment, and by its remedial decision of Aug. 26, 2021, cleared Sanoma's proposed acquisition of Iddink again, conditional upon the same remedy package as in the original ACM decision.

Each of the ACM, Noordhoff, and Sanoma individually appealed the judgment of the Rotterdam District Court before the tribunal.

Findings of the Tribunal

On appeal, the tribunal ruled that the ACM's original conditional clearance decision was sufficiently substantiated. The tribunal considered that, as part of the remedy package in the matter at hand, the merging parties at the time — later, the merged entity — were required to make its digital platform Magister available to educational publishers on FRAND terms.

The tribunal confirmed in this regard that behavioral remedies can be adequate to address competition concerns, especially in digital and dynamic markets.

Regarding the Rotterdam District Court's choice not to apply an administrative loop, the tribunal ruled that the judgment does not show that in making its choice the Rotterdam District Court weighed the advantage of avoiding delay in the proceedings against other relevant factors, such as the disadvantages of quashing the original conditional clearance decision.

The tribunal concluded that it would have been reasonable for the Rotterdam District Court to have done so for the sake of both due care and reasoning.

Commentary

One of the consequences of the judgment of the tribunal in the Sanoma-Iddink case might be that it further encourages merging parties in the EU to offer — and agencies such as the ACM to accept — behavioral remedies, which was rarer in the past when a stronger emphasis was put on divestments.

The reason for this is that divestments are typically more straightforward as a remedy, easier for an agency to check or monitor — especially when combined with an upfront buyer requirement — and can be considered a one-off solution to alleviate competition concerns.

With behavioral remedies, despite independent monitoring and expedited dispute settlement mechanisms, an agency will still have to continuously and closely check or monitor whether the company is abiding by the imposed rules and conditions.

A behavioral remedy that takes the form of granting access to a platform and to data is particularly unique. However, with an increasing number of transactions within the digital realm, antitrust or competition agencies in the EU have gradually been showing a trend toward accepting and imposing behavioral remedies to address concerns.

Often, access remedies draw inspiration from FRAND terms, also used in connection with licensing standard-essential patents, as was the case in the Sanoma-Iddink case. A notable recent example of an EU case where data access was included in the remedy package is the 2021 merger in which London Stock Exchange Group PLC acquired sole control of Refinitiv Business.[5]

For background, the ACM is an independent regulatory agency in the Netherlands charged with antitrust and competition law oversight, the sector-specific regulation of several industries and the enforcement of consumer protection laws.

The ACM is active in the full spectrum of antitrust and competition law, including in relation to alleged cartel behavior, dominance abuse and merger control review. There are multiple similarities between merger control review at the EU level and in the Netherlands.

For example, both procedures are mandatory where the respective merger control thresholds are met — with the EU applying a so-called one-stop shop principle — center around the concept of control, are preclosing and have suspensory effect.

The procedures diverge, e.g., in terms of the ACM — but not the European Commission — requiring the notifying party to pay filing fees for each of Phase I and Phase II, and prenotification with the commission de facto being mandatory, but not with the ACM — and depending on the circumstances of a proposed transaction, in some instances it might not even be advisable to engage in preconsultations with the ACM.

Since 2018, the policy of the ACM has changed from advocacy and settlement building to tougher tactics and more active antitrust law enforcement. For instance, the ACM has publicly announced that it will impose more fines.[6]

Perhaps therefore unsurprisingly, in July 2021, the ACM, for the first time in its existence, imposed a fine for excessive pricing,[7] thus showing a clear shift from past ACM practice. And in September 2021, the ACM imposed a fine on Samsung Electronics Benelux BV in relation to alleged resale price maintenance-like behavior.[8] Practice also shows that more Phase II merger investigations have been ordered for merging parties to receive clearance.

The ACM's increased intervention rate in connection with merger control corresponds in some ways to that of the commission. At the EU level, novel theories of harm have led to complexity and uncertainties that in turn have led to longer prenotification periods and longer Phase II reviews.

The duration of Phase II reviews has also been affected by a change in the commission's approach to evidence. Among other things, nowadays the commission shows an increased appetite for internal documents and issues data intensive requests at short notice combined with stop-the-clock decisions.

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[1] <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:CBB:2022:411> (in Dutch).

[2] Dutch administrative courts have a discretionary power to give administrative bodies the opportunity to correct errors during appeal proceedings. This is to prevent a court from quashing an administrative decision based on a formal defect, and the administrative body then having to "repeat" the decision-making process.

[3] <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBROT:2021:1766> (in Dutch).

[4] Bundling is when a company "packages" several of its products or services together and provides it as a single combined unit.

[5] Case M.9564 – London Stock Exchange Group / Refinitiv Business, available at: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_9564.

[6] <https://fd.nl/economie-politiek/1289036/voorzitter-kartelautoriteit-we-gaan-meer-boetes-uitdelen> (in Dutch).

[7] <https://www.acm.nl/en/publications/decision-fine-leadiant-excessive-price-cdca-drug>.

[8] <https://www.acm.nl/en/publications/acm-fines-samsung-for-influencing-the-online-prices-of-television-sets>.