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The real deal: rulings against M&A deals show need for the right merger control strategy

The Dutch competition authority (ACM) recently ruled against the takeover by PostNL, the Dutch universal postal service provider, of Sandd, its main competitor. Although merger control prohibitions are rare, 2019 has seen several negative decisions. Where significant competitive overlaps arise, merger control rules may make it impossible to escape being heavily scrutinised. However, a well thought out merger control strategy can help prevent unexpected surprises, especially where competitors want to merge. That said: the outcome for PostNL was probably no surprise. Following the announcement of the Dutch postal merger, press coverage immediately predicted that a prohibition was the most likely outcome. The Dutch competition authority strictly focused on competition-related aspects and was not influenced by political pressure.

The Dutch State Secretary of Economic Affairs has the authority to set aside the ACM's decision if there is an overriding public interest.

After a second-phase merger control procedure, the ACM ruled against the acquisition of Sandd by PostNL, reasoning that PostNL would face little competitive pressure in the postal delivery sector, as Sandd is practically its only competitor. Digital mail is not part of the same market and only provides minor amounts of competitive pressure on post, according to the ACM.

The ACM acknowledged that a merger would have led to efficiency gains, because only one postal delivery network would have remained and that would translate to lower costs. Notwithstanding these benefits, the ACM decided that the efficiency gains did not outweigh the limitation of competition. PostNL had argued that the transaction was necessary for it to be able to live up to its universal postal service obligation. In response, the ACM stated that while postal markets are shrinking, the decrease will eventually flatten out and the market will remain profitable in both the short and long term. The ACM decided that PostNL could still fulfil its obligations without the transaction.

More prohibitions in 2019

Although it is still quite rare for competition authorities to rule against mergers, this year has seen a rise in prohibitions. The European Commission has already ruled against two mergers in the course of the year: Alstom/Siemens and Wieland/Aurubis. The UK Competition & Markets Authority also ruled against the Sainsbury's/Asda supermarket

merger. The German Federal Cartel Office (FCO) has the longest track-record - it has, so far, denied three mergers this year: Remondis/DSD, Heidelberger Druckmaschinen/MBO and Miba/Zollern. In four other cases, IBM, Total, the publisher of National Geographic and two hospitals withdrew their merger notifications to the FCO after the latter expressed concerns about the mergers. The PONS/Langenscheidt merger would have been denied if it were not for the German “minor market clause”. According to German competition law, mergers on minor markets cannot be denied. A minor market is one with less than EUR 15 million turnover in the last calendar year.

Although prohibitions are rare, recent decisions from competition authorities demonstrate the need for a clear and thorough merger control strategy; this will help companies prepare well in circumstances where market consolidation will materialise. If Plan A is likely to fail, companies should ask themselves if there are any back-up options which could save the deal, or at least a critical part of it.