

all Member States agree before an amendment of the Treaty enters into force, as article 48 TEU requires. It is imaginable – for example – that the chapter on fundamental rights be amended by a referendum of the citizens of the EU, on a joint proposal of the Council of the European Union and the European Parliament. Such a system would correspond to a certain degree with the actual constitutional provisions of several Member States, where various amendment procedures exist for the national Constitution,

It would not be necessary to alter the relationship of a basic treaty with the Netherlands Constitution. As is the case now, the basic treaty would be superior to the Netherlands Constitution. The author realises, however, that many Member States of the EU disagree on this issue and continue to consider the national Constitution as the basis of all other law in force on the national territory.

### *3. Merging the constitutional process and enlargement: how to involve the candidates?*

This last question of the questionnaire is a little obscure for the author of this report. If it means to ask if the (12) candidates for the EU should be formally involved in the ICT of 2004, the (my) answer would be negative. The actual – constitutional – problems of the EU seem to be already sufficiently complicated for the existing institutions of the EU and

its Member States. Moreover, the lack of a long (democratic) constitutional tradition on the part of several candidates would probably hamper the progress of constitutional and institutional reforms. On the other hand, it is clear that the existing institutional framework of the EU is insufficiently tailored to a number of 25 or more Member States. The Nice Treaty appears to be insufficient on this point.<sup>29</sup>

Some defects may be mentioned: the composition of the European Commission (too many members), the complicated voting system of the Council of the European Union, the overload of the judicial institutions, the complicated three-pillar-structure.

To avoid further complications concerning the institutions of the EU, it seems wise and practical to involve representatives of the candidate Member States in the discussions on the future of the EU. Therefore, the 'Declaration of Laken' of 25 December 2001 rightly states that the candidate Member States will wholly and under the same conditions as the Member States, participate in the discussions of the Convention on the future of the Union, presided over by Valérie Giscard d'Estaing. But they are – also rightly – not entitled to obstruct an apparent consensus between the existing Member States.

29. See *Ars Aequi*-special, o.c., p. 312 ff.

---

# Cross-Border Mergers in Company Law and Competition Law: Removing the Final Barriers

---

*R. Snelders and M. Dolmans\**

*This article is a contribution to the XX Congress of the Fédération Internationale pour le Droit Européen ('FIDE') that will be held in London from October 30, 2002, through November 2, 2002. It takes the form of responses to a series of questions from the Congress' General Rapporteurs. These questions aim to explore remaining barriers to takeovers in the various Member States of the European Union. The article is organized as follows. Section A examines possible obstacles to cross-border M&A activity from the perspective of Dutch merger control law. Section B examines any such obstacles inherent in Dutch company and/or capital markets (or other) laws. Finally, Section C offers a brief conclusion.*

## **A. The Competition Regime**

*1. What is the view of your country on the functioning of the threshold levels in Article 1(2) as well as the 2/3 rule in the Merger Regulation, and the proposal in the Commission's Green Paper for amendment of Article 1(3) to deal with the problems of multiple filings?*

There are few legal commentators who address the functioning of the thresholds levels of Council Regulation 4064/89/EEC (the 'EC Merger Regulation'), other than to support the principle of one-stop-shopping and the apparent failure of Article 1(3) to achieve its objective of subjecting multiple national filings to EC jurisdiction.<sup>1</sup> The European Commission's recent proposals to reform Article 1 of the EC Merger Regulation, however, have been subject to criticism. Jurisdictional thresholds based on objective, clear-cut turnover tests are the most capable of providing the clear legal certainty that the business community requires. The frustrations sometimes associated with multi-country filings should not be addressed by creating a more complex and less objective system for case allocation. The revised thresholds proposed by the Commission may create more problems than they would

\*Cleary, Gottlieb, Steen & Hamilton, Brussels. The authors are enormously indebted to their colleagues P. Werdmuller, A. van Hooft, J. Meyers, A. Koch, R. Groen, R. O'Donoghue, T. Cox, C. Cook, H. Cohen and D. Ballegeer. The authors bear sole responsibility for any errors.

resolve. A better step toward reducing the burdens associated with multi-jurisdictional filings would be to harmonize Member States' notification thresholds, information requirements, and substantive review standards.

**The Commission's proposal to expand its jurisdiction.** The Commission takes the position that Article 1(3) of the EC Merger Regulation has not achieved its objective of conferring Commission competence over transactions that require notification in multiple Member States. In the Commission's view, Article 1(3) should be amended to ensure 'effective application of Community competition rules to cases with a cross-border interest, while, in a balanced way, reducing the administrative burden for the involved companies.' The Green Paper suggests amending Article 1 of the EC Merger Regulation to grant automatic Community competence over cases subject to notification in three or more Member States. The proposal also envisages that the relevant Member States would confirm the parties' conclusions on the application of the national thresholds on the basis of which Commission jurisdiction would be conferred.

The Commission is the body best suited to review transactions that raise predominantly cross-border issues, and the Commission's 'one-stop-shopping' procedure often offers companies significant advantages over multi-country filings.<sup>2</sup> In particular, multiple national filings may involve higher transactional costs and can create difficulties of timing and legal certainty. These burdens are likely to become much more acute as candidate countries join the Community. Support exists for changes that would allow more companies to voluntarily take advantage of a single European merger review procedure.<sup>3</sup>

However, it is not obvious that the Green Paper's multiple filing proposal would necessarily result in more transactions that have a genuine Community interest being notified to the Commission. Many Member States have low thresholds for merger review that do not depend on meaningful effects on competition within their national territory, still less on any cross-border effects. This situation would likely be compounded by further accessions to the EU, since several candidate countries have very low thresholds based on worldwide (e.g., the Czech Republic and the Slovak Republic) or national (e.g., Bulgaria and Romania) turnover that are satisfied by many transactions. Further, it is also questionable whether establishing Community jurisdiction should be done on the basis of national thresholds.

While there may be some justification for presuming Community interest under the current Member State turnover thresholds listed in Article 1(3)(a)-(b) of the EC Merger Regulation, the mere fact that a transaction would need to be notified in three Member States is almost certainly a less reliable indicator of Community interest. This means that, under the proposal, the Commission would have to be prepared to deal with many more notifications, a large portion of which would raise no material competition issues. This would not be a useful deployment of Commission resources. Thus, it would be better if the Commission were to foster consensus among the Member States and candidate countries on the need to:

- (i) apply reasonable monetary threshold requirements,
- (ii) repeal current thresholds based on market shares, and
- (iii) base competence only on demonstrable effects on competition within the jurisdiction.

More fundamentally, there are practical difficulties associated with the Green Paper's proposal that may severely limit its

usefulness and could even create greater uncertainty than presently exists. First, as the Green Paper acknowledges, certain Member States' merger control rules are based on criteria that are neither objective nor readily ascertainable. For example, market share thresholds for notification currently exist in Greece, Portugal, Spain, and the United Kingdom, as well as in several candidate countries (i.e., Bulgaria, Cyprus, Latvia, Poland, the Slovak Republic, and Slovenia). Many of these jurisdictions have widely differing policies on the issue of market definition, ranging from the sophisticated to the very rudimentary. The prospect of having mandatory jurisdictional alternatives determined on the basis of separate market definition assessments by the merging parties, national competition authorities, and the Commission is not attractive. The following three examples illustrate some of the potential difficulties.

(i) Consider a case where the merging parties took the view that Commission notification was required based on their assessment that their shares in the relevant markets triggered at least three Member State reporting thresholds. Following the Commission's review, a subsequent Commission decision finding that the relevant markets or shares were different could affect the parties' initial jurisdictional assessment, potentially removing the Commission's competence to review the transaction and resulting in severe delay.

(ii) Consider a case where the parties conclude that filing is required in two Member States, but not in a third Member State that relies on market share thresholds as a basis for jurisdiction. Based on this assessment, they would file in the two Member States only. If later, however, the third Member State concludes that its thresholds were satisfied and that the transaction should have been reported, the parties could find themselves both (a) exposed to fines for a failure to notify under the EC Merger Regulation, and (b) having expended unnecessary time and effort in two national proceedings, presumably pre-empted by the Commission's mandatory jurisdiction triggered by the third Member State's market definition determination.

(iii) Given Member States' propensity to define geographic markets along national lines, a concentration may fall under the Commission's jurisdiction based on the assessment of national market shares. If the Commission's review finds, however, that the relevant geographic market is wider than national and that market shares as a result would be lower, the basis for the Commission's jurisdiction would be voided.

In most such cases, the Green Paper's proposed procedure for confirmation of the parties' jurisdictional assessment would not remove the potential for confusion and delay. Amending the proposal to give merging parties the option (but not the obligation) to notify the transaction to the Commission under this multiple filing threshold would solve the second problem identified above, because a contrary market definition finding by the third Member State would not affect the jurisdiction of the two Member States in which notifications had been filed (i.e., the situation would be no different than at present). However, non-exclusive Commission jurisdiction under a multiple filing threshold would not resolve the first problem identified above; Commission findings on market definition

1. See the official Dutch response to the Green Paper by the Minister of Economic Affairs (*Minister van Economische Zaken*) in a letter to Commissioner Monti, p. 1-2.

2. *Ibid.*

3. *Ibid.*

contrary to the merging parties' position could still eliminate Commission jurisdiction (as the proposed threshold would not be met) and could force the parties to re-start the review process before the national authorities.

Second, a further problem arises from voluntary notification regimes such as currently applicable in the United Kingdom. In our view, in cases where a transaction meets the reporting thresholds in two Member States having mandatory notification regimes and in a third Member State with a voluntary regime, the parties should remain free to choose whether they would have notified in that third Member State or not (and thus whether the Commission's jurisdictional threshold is satisfied or not). The Commission should explicitly address this issue in order to eliminate any possible doubt.

**Other approaches may be more effective.** If the Commission is minded to adopt the Green Paper's multiple filing proposal, a number of potential areas of uncertainty need to be addressed. For example, some confusion could arise as to when a transaction that is reportable to the Commission under the 'three Member States' test would become reportable. Most Member States either have no specific triggering event, the only condition being that a notifiable transaction cannot be closed without prior approval, or have triggering events that correspond to those in Article 4(1) of the EC Merger Regulation. We assume that the triggering event for concentrations reportable under this threshold would be the same as for any other transaction reportable under the EC Merger Regulation. For the avoidance of doubt, however, the Commission should clarify that the new threshold would be satisfied if the transaction is in theory reportable to three different national competition authorities (*i.e.*, without the need for the respective national triggering events, if any, to have occurred). It should also be made clear that any applicable deadlines for filing at the national or EU level and any sanctions in this regard would not apply until it was clear in which jurisdiction(s) the notifying parties should file.

**Conclusion.** In sum, there are a number of practical and legal difficulties associated with the Green Paper's proposal that could ultimately jeopardize its effectiveness. Some of these problems could be mitigated if the parties to transactions otherwise subject to notification in three or more Member States retained discretion to choose either a single Commission notification or multiple Member State notifications. Nonetheless, significant difficulties would remain. On balance, the procedural difficulties associated with the proposed reform make it likely to create more problems than it solves. A better step toward reducing the burdens associated with multi-jurisdictional filings would be for the Commission to advocate greater harmonization of Member States' notification thresholds, information requirements, and substantive review standards.

*2. In light of experiences in your country, do member states have sufficient flexibility to call for mergers to be referred back under Article 9 of the Merger Regulation? In light of the proposal in the Commission's Green Paper, what is your view on the circumstances in which this power should be exercised?*

Under the procedure in the Netherlands, the Minister of Economic Affairs, as the representative of the Government, is competent to request a referral to the Dutch Competition Authority (*Nederlandse Mededingingsautoriteit*, the 'NMa').

To date, experience remains limited in the Netherlands in respect of referrals under Article 9 of the EC Merger Regulation, as the Netherlands has only requested and been granted an Article 9 referral on a single occasion.<sup>4</sup> Moreover, little has been published concerning the Netherlands' ability and exercise of the ability to request such referrals. Some criticism has been expressed, however, in connection with a perceived lack of transparency in the Commission's decisional practice to refer cases back to Member States, also querying whether the increased use of the referral will diminish the EC Merger Regulation's principle of one-stop-shopping.<sup>5</sup>

The Commission believes that the referral mechanism of Article 9 of the EC Merger Regulation should be simplified. It proposes to maintain only Article 9(2)(b), but to facilitate its use by disjoining the referral request from evidence of a threat of creation or strengthening of dominance and/or by eliminating the need to establish that the relevant market is not a substantial part of the common market. Instead, it would be sufficient that the request establishes that the alleged effect on competition does not extend to significant effects in terms of foreclosure, spill-over on related markets of greater geographic scope, or similar cross-border effects. The Green Paper further proposes that the Commission should be able to make a referral of its own initiative under analogous criteria, *i.e.*, without a request from the Member State(s). There is also general discussion of the possibility that referrals to Member States would be dealt with under the same deadlines and procedure as cases handled at Commission level only. Each of these points is addressed below.

**(i) Simplification of the referral criteria.** Simplification of the current referral criteria in Article 9(2)(a) of the EC Merger Regulation would be welcome.<sup>6</sup> This could be done by disjoining the criterion that there should be evidence of a threat of creation or strengthening of dominance and by eliminating the need to establish that the relevant market is not a substantial part of the common market. Both of these criteria have placed an unduly onerous burden on Member States requesting a referral. In particular, it seems unfair to require a Member State in possession of only a notification to produce within three weeks evidence of a conclusion that the Commission would take considerably longer to reach with more information in its possession. Likewise, the effect on various local or national markets has become unnecessarily complicated; it should be sufficient that there are no cross-border or spill-over effects.

**(ii) Referrals by the Commission at its own initiative.** Little support exists for this proposal.<sup>7</sup> Legal certainty and speed of process require that referrals back to Member States occur only rarely and in situations where it is clear that the Member States' authorities want to review a particular transaction and have good reasons for doing so.

**(iii) Timing.** Were the current referral criteria to be simplified, the deadline should still enable national authorities to verify

4. See *Vendex/KBB*, Case IV/1060. The case involved a significant proposed concentration related to a number of markets within the non-food retail sector in the Netherlands.

5. See E.H. Pijnacker Hordijk, 'Towards the tenth anniversary of the EC merger regulation; and interim report', *SEW* 1999/4, p. 125-127; also, S.E.M. Hooijman, *Verslag van de vergadering van de Nederlandse Vereniging voor Europees Recht, 10 jaar fusiecontrole in de Europese Gemeenschap*, May 28, 1999.

6. See the official Dutch response to the Green Paper by the Minister of Economic Affairs in a letter to Commissioner Monti, p. 3.

whether the (amended) criteria for referral are met and would also help reduce delays to the notifying parties caused by such requests.

**(iv) Harmonization of procedural rules and deadlines.** Broad agreement exists with the comment in the Green Paper that notifying parties should not be made worse off by the fact that their transaction has been referred to a national competition authority ('NCA'). However, the reality is that the divergence in national procedural and substantive rules and deadlines for the assessment of transactions means that they frequently are, in particular where only part of a transaction is referred to an NCA. This may raise concerns under the non-discrimination principle.

*3. Is the system of consultation between the European Commission and the national competition authorities (NCAs) working adequately? Does there need to be a better formalised system for consultation between NCAs directly involved either in the case of multiple filings outside the merger control regulation or in cases where more than one member state exercises the Article 9 request?*

**Cooperation between the Commission and the NCAs.**<sup>8</sup> In general, cooperation between the Commission and the NCAs appears to perform adequately. However, the level of cooperation between the Commission and the NCAs could still be strengthened. In particular, the Commission could involve the Member States to a greater extent in its decision-making process; and the Commission has recently failed to accord the Member States sufficient time and attention in considering increasingly complex second-phase cases. As the Green Paper readily acknowledges, the Commission must work under strict deadlines in a second-phase investigation, which can become a constraint in complex cases where the Commission is only able to produce a statement of objections well after the initiation of the second-phase proceedings. This pressure has the result that the role of the Member States has come under increasing pressure. In that regard, recent experience in Brussels in second-phase cases has shown that the Commission has already concluded its position before consulting the Member States, thus preempting any meaningful dialogue between the Member States and the Commission.

**Cooperation among NCAs.** Cooperation among NCAs has been significantly expanded recently. Following an initiative by the NMa in April 2001, the NCAs established the association of European Competition Authorities (the 'ECA').<sup>9</sup> The ECA is an informal association that serves as a forum where competition authorities operating within the EEA (European Economic Area) meet to discuss the application and enforcement of competition rules and the improvement of working relations amongst them. Since the establishment of the ECA network, the NCAs have in particular cooperated with regard to multi-jurisdictional concentrations. In response to comments from the business community, a network was created within the ECA dealing specifically with issues related to multi-jurisdictional merger notifications. The ECA multi-jurisdictional mergers network has focused on reducing the burden of multiple filings by improving cooperation among competition authorities. As a first step, the network has issued a Procedures Guide concerning multi-jurisdictional mergers. If an ECA member receives a merger notification that was also notified to one or more other ECA authorities, that authority will notify the other ECA authori-

ties. Such notification includes, among other things, information on the transaction,<sup>10</sup> the parties/sectors involved, and the deadline by which a decision must be taken. This way the different competition authorities will strive to coordinate from an early stage, and where possible will try to avoid inconsistent results.

The ECA multi-jurisdictional merger network has also facilitated the coordination of joint requests under Article 22 of the EC Merger Regulation. For the first time since its introduction in 1998, a joint Article 22 request was made in two recent EU merger cases.<sup>11</sup> The first case was recently approved following a detailed (second-phase) investigation and subject to divestitures, while the Commission unconditionally approved the second case after a first-phase investigation. A joint referral had never occurred before the ECA network was set up, apparently due to practical problems including difficulties related to a lack of transparency regarding the countries where the concentration had been notified and the coordination of the responses of the NCAs involved.

Finally, the network has facilitated coordination among the NCAs with regard to other merger control-related issues, including advisory committee meetings. Overall, the informal cooperation of the ECA multi-jurisdictional merger network seems to have worked well and there would seem to be no need, at this particular time, for a formalized structure. To the contrary, it is felt that the informal structure may contribute to the effectiveness of the network.

*4. How does the test under the law of your country compare to that under the Merger Regulation? Should all member states adopt the same test as under the Merger Regulation, and should this EU test be the (US) 'significant lessening of competition' test rather than the present EU 'dominance' test?*

The substantive test under the Dutch Competition Act (*Mededingingswet*, the 'Competition Act') follows the dominance test of Article 2 of the EC Merger Regulation, *i.e.*, the NMa assesses whether a concentration 'will create or strengthen a dominant position that would significantly impede effective competition on the Dutch market or a part thereof'.<sup>12</sup> Its application by the NMa also closely follows EC practice. In both concept and application, the Dutch substantive test thus conforms to EC law.

Harmonization of the substantive tests to assess concentrations within the Member States is important to provide sufficient and clear legal certainty for cross-border transactions subject to multiple filing requirements. Accordingly, the Commission should strongly advocate harmonization of Member States' notification thresholds, information requirements, and substantive review standards. As to the latter, the

7. *Ibid.*

8. See P.M.A.L. Plompen, 'Samenwerking van de D-G NMa met andere mededingingsautoriteiten', *Markt en Mededinging* 1998/2, p. 49-54.

9. See S. Plas, *Actualiteiten Mededingingsrecht* 2002, p. 84; the NMa's website ([www.nma-org.nl](http://www.nma-org.nl)); and the NMa's 2001 Annual Report, p. 13.

10. The information exchanged for this purpose is mainly non-confidential information. Exchange of confidential information will only occur where it is possible under the relevant national legislation, and if not, only with a confidentiality waiver by the parties involved.

11. See *Promatech-Sulzer Textil*, Case COMP/M.2698; *GEES-Unison*, Case COMP/M.2738.

Green Paper discusses the possibility that the Commission would replace the current dominance test for the assessment of concentrations under Article 2 of the EC Merger Regulation with the concept of 'substantial lessening of competition', which is the substantive standard in several major jurisdictions including the United States, Canada, and Australia.

Before analyzing whether it would be desirable to adopt the substantial lessening of competition ('SLC') test, an important threshold issue is to establish what benefits might be expected if the SLC test replaced the dominance test.

#### *Possible benefits of adopting the SLC test over the dominance test*

Two principal arguments have been advanced in favor of adopting the SLC test for EC merger review. First, it would help eliminate the potentially damaging consequences of divergence between major jurisdictions in the review of international mergers. Although jurisdictions are of course entitled to enact and enforce their own rules, when one jurisdiction blocks a merger on the basis of theories that other jurisdictions do not endorse, there is a risk that important efficiencies may be sacrificed and benefits denied to consumers worldwide. Divergent substantive standards also increase the transaction costs associated with the merger clearance process and may deter mergers that would have been pro-competitive and efficiency-enhancing. It should also be remembered that substantive divergence ultimately undermines the political consensus supporting antitrust enforcement, and thereby, the integrity of the enforcement system. If the aim is for a convergence of outcomes, then beginning from the same substantive test would seem to be a significant step in the right direction.

Second, a number of economists have expressed the view that dominance has important limitations as a substantive test for the review of mergers and acquisitions. The SLC test is a more appropriate, economics-based tool to assess the competitive effect of mergers and acquisitions, since it allows greater emphasis to be placed on inter-firm competitive dynamics, empirical evidence, and economic analysis, permits greater identification of the competition problems and associated remedies, and allows greater scope for the use of efficiency analysis. It has also been argued that the SLC test would impel the Commission to focus less on whether (potentially less efficient) competitors could be marginalized by a merger and more on whether the effects on competition are good or bad from a consumer perspective in the form of lower prices. These considerations, *inter alia*, led the Director-General of Fair Trading with the Office of Fair Trading to state as follows:<sup>13</sup>

*'Dominance is not an ideal test for considering the impact of a merger on competition. Narrowly interpreted it would be far too permissive. The Commission has therefore been creative in applying the dominance test, particularly when looking at oligopolistic markets. But the concept of joint or collective dominance is not without difficulties.'*

The outcome of the appeal against the Commission's *Airtours/First Choice*<sup>14</sup> decision also shows that there may be lacunae in the current *collective dominance* test applied by the Commission. The EC Merger Regulation only prohibits transactions that create or strengthen a collective dominant position, and not merely transactions that would lead to less competition between oligopolists. From an analytical point of view, the SLC test may be more suitable to capture the competition concerns in such cases.

In addition to possible limitations in the assessment of joint or collective dominance, the SLC test may also have discernible advantages over the dominance test in regard to certain issues of *single-firm dominance*. Two examples help to illustrate the issue.

(i) First, consider a proposed merger between the #two and #three firms in a three-firm market where the shares are 60%/20%/20%. Since the combined entity would remain much smaller than the market leader, it would be difficult to argue that it would become individually dominant. Moreover, if market conditions are not conducive to oligopoly behavior (e.g., there is 'lumpy' demand or a lack of price transparency), it may be impossible to apply a convincing collective dominance analysis. Nevertheless, based on the high level of market concentration, significant competitive concerns could arise. A similar fact-pattern arose in the recent *Heinz/Beech-Nut* baby food transaction that the U.S. Federal Trade Commission ('FTC') challenged successfully.<sup>15</sup> In that case, there was a clear market leader and vigorous competition between merging #two and #three parties to be the second baby food producer on supermarket shelves. (For various reasons, there are seldom more than two baby food brands on supermarket shelves.) In this situation, the merger of #two and #three was bound to lessen competition, and was, accordingly, challenged by the FTC. This fact-pattern would not be caught by any reasonable concept of dominance.

(ii) Second, consider a proposed merger between two competitors in a differentiated product market whose products are particularly close substitutes for each other. As a result of the elimination of direct competition between the merging parties, such a transaction could enable the parties to raise prices, even if the combined entity would not be the largest player or have a market share indicative of individual dominance. To deal with such 'unilateral effects' considerations, it might be possible to define narrower markets, to treat a low market share and other factors as evidence of dominance, or to argue that there would be collective dominance post-transaction. However, none of these approaches properly captures the economically objectionable feature of the transaction.

The Green Paper postulates a similar example, but adds that the Commission '*has not so far encountered a situation of this kind*' (Green Paper, ¶ 166). This may be true, but, as explained above, the situation is far from implausible, and it should be clear that the concept of dominance has, properly applied, limited utility in this context.

SLC may also have advantages over the current dominance test in the context of certain *vertical concentrations*. The focus of the Commission's analysis of vertical mergers has, rightly, been on the possibilities for the vertically integrated merged entity to foreclose rivals by raising their costs or denying them access to some input also used by the vertically integrated entity's downstream operations. However, the Commission's decisional practice suggests that, even where a firm acquires a dominant position in an upstream market that

12. See Article 41(2) of the Competition Act.

13. J. Vickers, *International Mergers: The View From A National Authority*, speech at 28th Annual Conference on International Antitrust Law and Policy, Fordham University School of Law, New York, October 25, 2001.

14. Case IV/M.1524.

15. *FTC v H.J. Heinz & Co.*, D.C. Circuit Docket No. 00-5362 (decided April 27, 2001); see also P.J. Slot, 'Over Herfindahl-Hirschman-Index en Efficiency', *Markt en Mededinging* 2001/4, p. 127-128.

would allow it to impose discriminatory conditions on its horizontal competitors in a downstream market, the Commission will not find the creation of a dominant position in the downstream market unless the firm's market share (along with other factors) in the downstream market itself indicates a dominant position.<sup>16</sup> While, as a general matter, it is correct to identify vertical concerns only where the merged entity has market power on both the upstream and downstream markets, it is also clear that a threshold that requires dominance in both the upstream and downstream markets may not fully capture the economically injurious features of vertical concentrations. The U.S. Department of Justice's ('DOJ') Non-Horizontal Merger Guidelines explain that competitive concerns may arise in situations that fall short of dominance:

*'Entry through the acquisition of a relatively small firm in the market may have a competitive effect comparable to new entry. Small firms frequently play peripheral roles in collusive interactions, and the particular advantages of the acquiring firm may convert a fringe firm into a significant factor in the market. The Department is unlikely to challenge a potential competition merger when the acquired firm has a market share of five percent or less. Other things being equal, the Department is increasingly likely to challenge a merger as the market share of the acquired firm increases above the threshold.'*<sup>17</sup>

Thus, an SLC test may be more apt to analyze issues of foreclosure and the other effects of a vertical concentration on the structure of distinct, but related, markets, than one based on dominance.

In conclusion, in certain cases there are material differences between the dominance and SLC tests, and the SLC test may be a more appropriate, economics-based tool to assess mergers and acquisitions.

***The benefits of the SLC test do not outweigh the considerable uncertainty and other disadvantages associated with a change***

Notwithstanding the fact that the SLC test would generally appear to be a more suitable standard by which to review mergers and acquisitions, the prevailing view questions whether the benefits of replacing the current dominance test with an SLC test are sufficient to counterbalance the adverse results that would follow such a change.<sup>18</sup> In particular, it is debated whether there are material differences between the fundamental economic principles applied by the Commission using the dominance test and the major jurisdictions using the SLC test. It is also clear that both the SLC and dominance tests are not static concepts, but have evolved, and will continue to evolve, over time. More fundamentally, it is postulated that whatever advantages the SLC test may have over the current dominance test are far outweighed by the uncertainty and other disadvantages that would be created were the substantive test under the EC Merger Regulation to be changed at this stage. These issues are developed in greater detail below.

***The substantial degree of de facto convergence that already exists between the EU and other major jurisdictions is unlikely to materially increase if the EU adopted the SLC test.*** The principal argument in favor of adopting the SLC test is that it would facilitate substantive convergence with other major merger review jurisdictions, increase legal certainty, reduce the burden on notifying parties, and make it clearer how and why regulators differ in their treatment of the same transaction. However, this argument overstates the practical

impact that changing the wording of the substantive test for clearance would have. It also ignores the fact that several factors have contributed to the EU's achieving a substantial degree of *de facto* convergence with other major jurisdictions. In particular:

(i) **Market definition.** The Commission's Notice on the definition of the relevant market is very similar to the DOJ and FTC Horizontal Merger Guidelines (the 'U.S. Guidelines'),<sup>19</sup> as numerous commentators have noted.<sup>20</sup> As a result, differences in market definition between the EU and the United States and Canada have been rare.

(ii) **Principles of substantive analysis.** The unilateral effects and coordinated interaction tests described under the U.S. Guidelines are very similar to the single firm dominance and collective dominance tests applied under the EC Merger Regulation. Indeed, the U.S. Guidelines define a 'substantial lessening of competition' as 'creating or enhancing market power', which is very similar to 'creating or strengthening a dominant position'. Thus, the EU's view is similar to other major jurisdictions' analyses of international mergers in all but a few exceptional cases. Where differences have arisen, these have been primarily attributable to differences in the application of common underlying principles to a given transaction. For example, in the *GE/Honeywell* transaction, the fact that the EU and the United States reached opposing conclusions was almost certainly not a function of the wording of their respective substantive tests for merger review, but more likely reflected different philosophies on the application of the underlying principles and their assessment of the future effects of the transaction on the market.<sup>21</sup> Convergence is not necessary for its own sake and, if there are differences in the underlying economic approach between the EU and other jurisdictions, these will not be resolved by their adopting substantive tests with similar wording.

(iii) **Bilateral cooperation.** Under the Cooperation Agreements signed between the EU and the United States, and Canada, the agencies share, on a regular and continuing basis, views and information about particular transactions, coordinate the timing of the review process to the extent feasible, and generally achieve consistent or complementary remedies. In addition, both the U.S. agencies and the Commission are devoting substantial resources to using their Joint Merger Working Group to facilitate even greater convergence on issues such as conglomerate mergers, process and timing, and

16. See *Nordic Satellite Distribution*, Case IV/M.490, ¶ 164.

17. See Section 4.134.

18. See the official Dutch response to the Green Paper by the Minister of Economic Affairs in a letter to Commissioner Monti, p. 4.

19. U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines, 4 Trade Reg. Rep. (CCH), ¶ 13,104 (1992) (with April 8, 1997 revision to § 4).

20. See, e.g., S. Baker & L. Wu, 'Applying the Market Definition Guidelines of the European Commission', *E.C.L.R.* 1998/273.

21. The EU and the United States reached opposing conclusions on five key issues: (i) whether GE could be said to have a 'dominant' position on the global market for aircraft engines; (ii) whether bundling of avionics and non-avionics systems with aircraft engines was likely, and likely to be a successful exclusionary strategy; (iii) whether GE's vertical integration into aircraft leasing could give rise to realistic foreclosure concerns; (iv) whether cross-subsidization through GE's overall financial strength would harm competition by enabling Honeywell to invest more in R&D and offer its customers lower prices than its rivals could; and (v) whether these price cuts would harm competition by forcing rivals to exit the market. On all of these issues, the EU said 'yes' and the United States said 'no'.

principles of assessment, including several issues raised by the Green Paper.<sup>22</sup>

***It is not obvious that there are major lacunae in the current dominance test.*** Experience under the EC Merger Regulation has shown that the current dominance test is a sufficiently flexible tool to capture a wide range of potentially anti-competitive effects of mergers and acquisitions. There is general support for the Green Paper's statement that '*experience in applying the dominance test has not revealed major loopholes in the scope of the test*'. For example, when the EC Merger Regulation was adopted, there was considerable debate as to whether an increase in concentration, and the threat of coordinated action, could be challenged. The Community Courts have now made it clear in the *Kali und Salz* and *Gencor* cases that collective dominance can be challenged under the EC Merger Regulation. Thus, the Commission has brought cases based on an oligopoly theory where concentration involves reduction of a three-firm market to two (*Gencor*) and a four-firm market to three (*Airtours*). Likewise, the dominance test has proved capable of capturing conglomerate issues and vertical foreclosure concerns in circumstances where the market shares may not themselves have been indicative of dominance.<sup>23</sup>

***Dominance has a long antecedent in Community competition law and uncertainty would be created by the adoption of the SLC test.*** Dominance has a long antecedent in Community competition law (e.g., Article 82 of the EC Treaty, Article 66(2) of the ECSC Treaty), and a substantial body of jurisprudence has developed in the last decade under the EC Merger Regulation. There would be legal uncertainty if the relevance of the jurisprudence created by the Commission under the EC Merger Regulation were to be called into question by the adoption of the SLC test. Were the existing body of Commission decisional practice and the jurisprudence of the Community Courts to be discarded at this stage, it may take a further decade or more before an equally settled replacement body of jurisprudence under the SLC test would evolve. That would be unsatisfactory. *A contrario*, if the existing jurisprudence were deemed still to be applicable, it is difficult to see any convincing reason for switching to the SLC test at all.

Uncertainty could in part be remedied by the adoption of clear guidelines on the Commission's application of the SLC test. However, notifying parties and their legal advisers attach importance to the predictability and transparency of the principles by which the Commission assesses notified operations, and would therefore be troubled by any short- to medium-term uncertainty in the process. Finally, there are concerns that the concept of dominance under the EC Merger Regulation has resulted in a cross-contamination of the jurisprudence under Article 82 EC. Even if these concerns were valid – and we believe that they are – they are not a reason to change the current dominance test under the EC Merger Regulation. That assessment should be guided only by what test is the most suitable for merger review, and not by ancillary considerations. Finally, many Member States have enshrined the dominance test in their national competition laws. While we do not believe that this is a reason in itself against adoption of the SLC test, the risk that an increasing number of referrals by national authorities to the Commission, and by the Commission to national authorities, would be assessed according to

different substantive principles is tangible and is perhaps a further reason for maintaining the current position.

***Conclusion.*** Regarding the *dominance vs. substantial lessening of competition test*, the SLC test may have some advantages over the current dominance standard. In particular, the SLC test may be better suited to deal with: (i) certain cases involving oligopolies (e.g., there may be reasonable objections to certain transactions that would lead to less competition between oligopolists, even if no collective dominant position could be established); (ii) certain transactions that could lead to price increases as a result of elimination of direct competition between the parties, even if no dominant position is created or strengthened (e.g., a merger between the second- and third-largest firms in a market not conducive to oligopoly behavior); and (iii) certain vertical transactions. Nevertheless, the benefits of amending the EC Merger Regulation to incorporate an SLC test are probably outweighed by the uncertainty and other disadvantages that would follow from such a change. Moreover, the fundamental economic concepts upon which appropriate merger analysis should be based are common to both the dominance and SLC tests. The current wording of the EC Merger Regulation's substantive test leaves ample scope for incorporating a robust analysis of whether appropriately substantiated efficiencies are likely to counterbalance any potential anti-competitive effects that might otherwise follow from a reportable transaction. However, Article 2(1)(b) and/or Article 2(3) might benefit from more specific wording on this issue, not least because the Commission has not rigorously applied these provisions in the context of efficiencies. Furthermore, there is sufficient scope within the tests as now written in the EC Merger Regulation to incorporate the central elements of the SLC test into the Commission's analysis. Whatever test is applied, however, the Commission's and NCAs' retention of more economists to help ensure that their decisions are underpinned by rigorous economic analysis would be welcome.

22. See W.J. Kolasky, Deputy Assistant Attorney-General of the Antitrust Division of the U.S. Department of Justice, *U.S. and EU competition policy: cartels, mergers, and beyond*, speech at Council for the United States and Italy Bi-Annual Conference, January 25, 2002.

23. See *General Electric/Honeywell*, Case COMP/M.2220; and *Neste/IVO*, Case IV/M.931. In the latter case, there was a proposed merger between Finland's only supplier of natural gas and its leading provider of electricity (with 60-70% of the wholesale market). Approximately 10% of Finland's electricity production uses natural gas. Despite this low figure, the Commission found that '*the merged entity would as a result of the vertical links between natural gas and electricity production be in a position to successfully adopt market strategies that would not have been possible prior to the concentration*'. First, by raising the price of gas (thereby increasing the costs for competing electricity producers), the firm could successfully increase electricity prices. Second, the firm could control future investment in electricity generation because any potential new entrant would effectively be '*dependent on his largest competitor for supplies of fuel*'. Accordingly, the Commission found that the transaction would create or strengthen a dominant position on the Finnish market for wholesale sales of electricity.

5. Are the procedural and judicial safeguards adequate to protect parties from abuse of power by the competition authorities? How do the laws of your country compare to EC law in this respect?

As discussed under 6(i) below, the Competition Act provides for a two-phase filing procedure similar to the EC Merger Regulation. As in the EC procedure, and in particular, the second phase of the merger review process, there are some fundamental shortcomings in the current administrative procedure that encroach on the due process rights of the notifying undertakings.<sup>24</sup> The principal due process concern in the current system is that the NMa states the case against a notified concentration and decides how far it is proved. There is no independent assessment of the case's merits and the strength of the evidence.

The lack of independent review contrasts with the position in a number of other Member States' merger control regimes.<sup>25</sup> In short, the same body should not act as investigator, prosecutor, and judge in reviewing concentrations that may have considerable implications for the Dutch (or even international) economy.

The second concern is the judicial review by the District Court of Rotterdam (Chamber of Administrative Law) (*Rechtbank Rotterdam, Sector Bestuursrecht*) and, on appeal, by the Court of Appeal for Trade and Industry in the Hague (*College van Beroep voor het Bedrijfsleven*). Delays in judicial review of NMa merger control decisions can be a significant issue, since the courts will rarely be in a position to rule within a period that would allow the parties to reconstitute the transaction.

There would be distinct benefits in switching to a system whereby the NMa would be required to convince an independent tribunal of the merits of its case. This would most likely mean that, if it wished to oppose a transaction, the NMa would initially bring proceedings against the merging parties in the District Court of Rotterdam or before a newly created administrative tribunal within the NMa (similar to the administrative law judge system within the FTC). Either reform would likely involve an amendment of the Competition Act, which could be done as part of the revisions following from the current consultation period.

Under the U.S. system, for instance, competition authorities must initiate proceedings before a Federal Court in order to block a merger. The prospect of independent judicial review exerts discipline on agency decision-making at all stages, irrespective of whether the transaction is ultimately challenged or abandoned. A number of senior officials within the DOJ and FTC have confirmed this, including the current Deputy Assistant Attorney-General of the Antitrust Division of the DOJ:

*'If we decide in the U.S. to challenge a merger, we know we may have to go to court to convince a federal judge, by the preponderance of the evidence after an evidentiary hearing, that the merger may substantially lessen competition. This means that we know our witnesses will be exposed to the crucible of cross-examination before an independent fact-finder... After just six weeks at the agency, I cannot overstate how much knowing we may have to prove our case to an independent fact-finder disciplines our decision-making.'*<sup>26</sup> (Emphasis added)

There are many desirable elements of the current Dutch system that have worked well, and the majority of these could be successfully retained in a reformed system along the lines outlined above. Only exceptionally would the NMa be required under a reformed system to bring the matter before an inde-

pendent tribunal, since experience has shown that it is only likely to challenge a transaction in rare cases.

In the absence of institutional and judicial reform, we believe that the following measures could help improve the safeguards in the existing system, without fully remedying, however, the defects identified above:

(i) **Role for an independent adviser.** There would be benefits in allowing an independent adviser to publicly review the substance of the NMa's case. If the NMa's conclusions are different than those of the independent adviser, there would be value in requiring the NMa to state clearly why its conclusions differ. As a practical matter, such a change would require that the independent adviser not be notionally attached to the NMa and that he or she have sufficient resources to perform the tasks allocated.

(ii) **Formal deadline or best practice guidelines for issuance of the 'preliminary assessment'.** A problem in second-phase proceedings tends to be that the parties have little time to engage the NMa in substantive discussion concerning its findings. At the same time, the parties need to decide to offer undertakings to meet the concerns identified. It is therefore important that the NMa has a meaningful period to assess parties' submissions and to have further discussions with the parties, before the issue of remedies needs to be addressed. We would favor a clear deadline for the NMa to identify competitive concerns, or, at a very minimum, best practice guidelines.

(iii) **Greater transparency on the role of third parties.** In response to increasing concerns as to the level of third-party access, we consider it critical that all information provided by third parties be made available to the notifying parties. At present, there is no consistent practice with regard to recording emails, telephone conversations, and other informal meetings or communications between third parties and the NMa out of respect for the rights of defense.

6. Below are a number of questions relating to domestic law which may assist in a comparative analysis.

a. Please provide an overview of the structure of and main features of the relevant domestic legislation and the institutional framework (who enforces it)? It may be helpful to include some information about the role of private rights of action.

**The principal legislation.** The relevant domestic legislation is the Competition Act of May 22, 1997. The Competition Act entered into force on January 1, 1998. It is closely modeled

24. Compare the official Dutch response to the Green Paper by the Minister of Economic Affairs in a letter to Commissioner Monti, p. 5-6.

25. The following Member States' merger control regimes have a two-stage decision-making process or independent evaluation of the initial objections to a merger or acquisition: Belgium, Finland, Germany, Spain, Sweden, and the United Kingdom. Other jurisdictions make a distinction between the fact-gathering and decisional stages (e.g., Ireland), but decisions are typically taken by political institutions such as the Ministry of Economics, which would not receive substantial support.

26. See W.J. Kolasky, Deputy Assistant Attorney-General of the Antitrust Division of the U.S. Department of Justice, *Conglomerate mergers and range effects: it's a long way from Chicago to Brussels*, speech at George Mason University Symposium, November 9, 2001.

on EC competition law, and EC rules and precedent serve to interpret the Competition Act.<sup>27</sup> The Competition Act covers behavioral conduct (identical to Articles 81 and 82 EC); merger control rules (modeled on the EC Merger Regulation); and provides for certain enforcement powers. The general rules on administrative procedure in the General Act on Administrative Law (*Algemene Wet Bestuursrecht*) of June 4, 1992, also cover enforcement of the Competition Act.<sup>28</sup>

**Competent authority.** The authority responsible for merger review is the NMa.<sup>29</sup> The NMa operates as a department within the Ministry of Economic Affairs and its Minister has the power to overrule the NMa's decisions in individual cases. On January 31, 2002, the Lower House of Parliament (*Tweede Kamer*) adopted a bill that would convert the NMa into an independent administrative agency (*zelfstandig bestuursorgaan*). The (amended) bill is currently pending before the Upper House of Parliament (*Eerste Kamer*).<sup>30</sup>

*b. What kinds of transactions are caught? Are joint ventures caught? What are the jurisdictional thresholds? Is it difficult to identify with sufficient certainty whether a filing is in fact required under national law? Are foreign-to-foreign mergers caught?*

**Jurisdiction.** The Competition Act applies to 'concentrations'. A concentration arises in the following circumstances: (i) two or more undertakings merge (*i.e.*, a statutory merger); (ii) one or more undertakings acquire direct or indirect 'control' of the whole or parts of one or more other undertakings; or (iii) a joint venture is established which performs on a lasting basis all the functions of an autonomous economic entity and which does not give rise to a coordination of the competitive behavior of the parent companies.

As under EC law, 'control' is defined as the ability to exercise a decisive influence on the activities of an undertaking on the basis of actual or legal circumstances. This does not refer to day-to-day management, but to decisions concerning an undertaking's strategic commercial interests in the longer term. Minority shareholdings, contractual rights, and other means that give rise to 'control' also give rise to a concentration. Also in this regard, the NMa closely follows EC precedent, in particular the Commission Notice on the concept of control under the EC Merger Regulation. If an undertaking is governed by the 'large company' regime (*structuurregime*),<sup>31</sup> the NMa does not consider this to imply that the majority shareholders cannot have decisive influence within the meaning of the Competition Act.

**Thresholds.** A concentration must be notified to the NMa if certain objective, easily assessable turnover criteria are met: (i) the combined aggregate worldwide turnover of all participating undertakings exceeded € 113,450,000 in the last calendar year; and (ii) the aggregate Dutch turnover of each of at least two of the undertakings concerned exceeded € 30 million in the last calendar year.<sup>32</sup>

As under EC law, where the acquisition consists of the acquisition of parts of a business, only the turnover relating to the acquisition of these parts must be taken into account. Turnover is calculated based on the provisions set forth by the Competition Act and Book 2 of the Dutch Civil Code, which again largely mimic EC law.<sup>33</sup> Foreign-to-foreign transactions

require notification in the Netherlands if a concentration satisfies the above thresholds. No physical presence in the Netherlands of the undertakings concerned is required; meeting the thresholds equates the concentration having an effect on competition in the Netherlands.

**Joint ventures.** Dutch merger control law still incorporates the pre-1998 treatment of joint ventures under the EC Merger Regulation.<sup>34</sup> Accordingly, a distinction is made between concentrative and cooperative joint ventures. The former are joint ventures performing on a lasting basis all the functions of an autonomous economic entity which do not give rise to the coordination of the competitive behavior of the parent companies. Full-function joint ventures require notification if the thresholds are satisfied. Cooperative joint ventures, on the other hand, are not subject to the merger notification rules. Other joint venture operations, such as structural cooperative joint ventures, are governed by the provisions of Article 6 of the Competition Act, which closely follows Article 81 EC. A recent review of the Competition Act identified that the treatment of joint ventures under Dutch merger control law should be brought into line with EC law, *i.e.*, subjecting cooperative joint ventures to merger control instead of behavioral competition review.

27. See, generally, P.J. Slot, *De Europeesrechtelijke achtergronden van de mededingingswet*, Mededingingsmonografieën Deel 1 De Nederlandse Mededingingswet in perspectief, p. 17-34.

28. On differences in procedure between the Competition Act and the EC Merger Regulation, see M. van der Woude, 'De procedure voor de NMa: 'zeker geen Europese kloof'', *Markt & Mededinging* 1998/3, p. 84-90.

29. Within the NMa's structure, certain sector-specific supervisory bodies are also organized, including the electricity watchdog (*Dienst toezicht en uitvoering Energie*, 'Dte'). It is intended that the currently independent supervisory authority for the telecommunications sector (*Onafhankelijke Post en Telecommunicatie Autoriteit*, 'OPTA'), be reorganized as a separate chamber within the NMa by 2005, or possibly earlier, following a recent joint proposal by the NMa and OPTA. See the joint NMa and OPTA press release 02-24, July 10, 2002, available in English at [www.nma-org.nl/english](http://www.nma-org.nl/english), under 'press releases'. See also A.T. Ottow & I.M. Spong, 'De sector specifieke toezicht-houders en het kamermodel NMa', *Markt & Mededinging* 2002/4, p. 128-134, for a critique of the positions of OPTA and DTe following the adoption of the proposal.

30. For commentaries on the reform of the NMa, see, *e.g.*, S.E. Zijlstra, 'Moet de NMa een zelfstandig bestuursorgaan worden?', *Markt & Mededinging* 2000/4, p. 154-157; Y.E. de Muynck, 'Verzelfstandiging van de NMa: kritiek onterecht', *Actualiteiten Mededingingsrecht* 2001, p. 75-77; J. van Leerdam, 'Bij verzelfstandiging past rechtspersoonlijkheid Nma', *Markt & Mededinging* 2001/6; E.H. Pijnacker Hordijk, 'Noodzaak voor duidelijke en sterke ministeriële verantwoordelijkheid voor de Mededingingsbeleid (redactioneel)', *Markt & Mededinging* 2001/6; P.J.M. Koning & N.U.N. van den Euvel-Kien, *Formeel mededingingsrecht* 2000, p. 289; and J.K. de Pree, *Het Financieele Dagblad*, August 16, 2001.

31. The 'large company' regime is discussed in Section B of this report.

32. This second limb of the turnover thresholds was raised in 2001 from NLG 30 million to € 30 million, *inter alia*, to free capacity at the NMa to focus on more complex cases and to relieve the burden on medium and small undertakings.

33. See, *e.g.*, G. Leuverink, 'Omzetberekening bij concentratiecontroles', *Actualiteiten Mededingingsrecht* 2002/2, p. 24-25.

34. See F.O.W. Vogelaar, 'Van Joint Ventures, mededinging en de nieuwe eeuw', *Markt en Mededinging* 2001/4, p. 129-144, for a discussion of the NMa's approach to cooperative joint ventures.

c. Is the filing mandatory or voluntary? Who is responsible for filing? What is involved in the preparation of a filing? What are the deadlines for filing? What are the waiting periods and does implementation of the transaction have to be suspended?

**Mandatory pre-merger control.** The Competition Act requires notification where the thresholds, as described above, are met. In the case of a (statutory) merger, the merging undertakings have to notify the transaction. Where an undertaking acquires control of (part of) another undertaking, the obligation to notify applies both to the acquiring undertaking and the seller (although, in practice, the acquirer will typically submit the notification). In the case of a public bid, the bidder must notify the concentration. There are currently no filing fees. The signing of an agreement or the acquisition of a controlling interest is not necessary for notification; a concrete intention to undertake a transaction is sufficient.

**Procedure.** The Competition Act provides for a two-phase filing procedure. In the first phase, the NMa must decide whether a license (*vergunning*) authorizing the concentration is required within four weeks starting from the day after the receipt of the notification (provided that day is not a Saturday, a Sunday, or a public holiday). Accordingly, the parties are prohibited from closing their transaction for four weeks pending the NMa's review.<sup>35</sup> If the NMa decides that a license is required, an in-depth investigation is required. To begin the second phase, the parties (or party) concerned will have to submit a separate application. The NMa must decide on the license application within 13 weeks following receipt of that notification.<sup>36</sup>

A breach of the obligation not to implement a transaction without prior approval may void the concentration in respect of the Netherlands. Under Dutch civil law, this entails that the concentration and all its effects must be reversed. In addition, the NMa can impose administrative sanctions.

**Information required.** Implementing Royal Decrees (*Koninklijke Besluiten*) provide, *inter alia*, for the notification forms that must be used for the first-phase notification and the second-phase license application. The first-phase notification form is loosely modelled on Form CO (the EC notification form) and requests information on the undertakings concerned, including their business activities and the relevant sectors, information on the corporate groups, financial information, a description of the concentration and supporting documentation, the most recent documents showing the intent to effect the concentration, and the powers of attorney from the undertakings concerned to the designated representative(s). With respect to substantive information, the form requests a description of and market data for any relevant market where the products or services of the undertakings concerned overlap. Parties must also submit market research reports, and, if there is an overlap between the parties' activities, information on the major competitors and customers and trade organizations. Moreover, parties must indicate whether there are any ancillary restraints. If there are affected markets, parties should provide both value and volume based market share data. The second-phase license application form mirrors the detail required by Form CO.

d. What are the issues and possible sanctions involved in closing before clearance? What is the timetable for clearance and can it be sped up?

As noted above, implementing a concentration before the NMa has been notified of, and cleared, a transaction may result in the nullity of the transaction under Dutch law. In addition, the NMa can impose administrative penalties, including fines of up to a maximum of € 22,500, on each party responsible for filing, as well as order, backed by periodic penalty agreements, to cease or reverse the infringement.

Upon receipt of the notification, the NMa must decide within four weeks to clear the transaction or refer the notification to an in-depth second-stage license investigation. The period for review is suspended while the NMa requests further information from the parties to the concentration. There is, in general, no possibility of speeding up the process other than by discussing the envisaged transaction in pre-notification meetings because the NMa requires some time to market test the proposed concentration. Suspension of the 4-week and 13-week periods can be minimized by providing the requested information as soon as possible and by anticipating additional questions.

The NMa has issued a decision with policy rules setting out a simplified procedure.<sup>37</sup> If a notification fulfils the requirements of the simplified procedure notice, the NMa may issue a short-form decision. The NMa will normally issue such a decision if (i) there are no objections from third parties, (ii) it is clear that Dutch merger control is applicable, and (iii) it is clear that the concentration does give not rise to any competitive issues. Qualifying for simplified procedure treatment may speed up the notification process, and as a result, the notifying party could obtain a decision within two or three weeks. The requirements concerning the provision of data and information for such concentrations, however, remain the same.

e. Are there any special rules applicable to public takeover bids?

The treatment of public takeover bids under the Competition Act mimics that under the EC Merger Regulation. The implementation of a public bid is exempted from the prohibition against implementing an intended concentration before notification and a subsequent period of four weeks has passed, provided that the NMa is notified immediately and the acquiring party does not exercise its voting rights.

f. What is the substantive test for clearance?

A proposed concentration requires a license where the NMa considers it likely that it 'will give rise to or strengthen a dom-

35. See R.J. van Dam, '“Als elke dag telt”, fatale beslistermijnen in de Mededingingswet', *Markt en Mededinging* 2001/7, p. 259-264. There are two exceptions to this rule. First, implementing a public bid is allowed, provided that (i) the NMa is notified immediately, and (ii) the acquirer does not exercise its voting rights. Second, the NMa may for serious reasons, such as irreparable harm, grant a dispensation from the prohibition at the request of one of the notifying parties. Such dispensation is, however, rarely granted.

36. The 4-week and 13-week periods will be suspended from the day on which the NMa requires further information from the notifying parties until the day on which such information is provided. In practice, additional information is frequently requested.

37. Decision of August 4, 2000, available on the NMa's website.

inant position which significantly impedes competition in the Netherlands or in any part of it'. A license will be granted if the NMa concludes, following a second-phase investigation, that such a threat will not materialize. In practice, the NMa's interpretation of the dominance test closely follows that established in EC precedent. Accordingly, the substantive assessment is, in concept and application, similar to that undertaken by the Commission under the EC Merger Regulation.

*g. To what extent are non-competition issues relevant to the review process?*

The relevance of non-competition issues in Dutch competition law, be it merger control or behavioral conduct, is much debated. The general opinion holds that Dutch competition law, following in the footsteps of EC law, is unclear on this point, but that it provides for at least a certain margin for the NMa to weigh non-competition interests as long as these interests increase consumer welfare. Moreover, Dutch legal commentators consider that 'economic interest' is an expansive concept that can include, for example, public health and employment. At the same time, these commentators are cautious that such an approach should not open the door to all sorts of social interests.<sup>38</sup> In any event, the Minister of Economic Affairs may, upon request, overrule the NMa and allow a transaction on general interest grounds. Such grounds may be economic or non-economic, but must outweigh the expected detriment to competition. The Minister of Economic Affairs has, to date, not exercised this power.

*h. Is it possible to remedy competition issues?*

The Competition Act does not provide for the possibility of remedies during the first-phase investigation.<sup>39</sup> However, in practice parties can try to satisfy the requirements of the NMa by amending the concentration and re-notifying it, similar to the practice under the EC Merger Regulation prior to its amendment in 1998 to incorporate the opportunity for notifying parties to offer undertakings during the first phase.<sup>40</sup> A recent review of the Competition Act concluded that it should be amended to include the possibility of remedies in the first phase.

The NMa may attach conditions to the granting of a license following the second-phase investigation, including the amendment of a transaction. Similar to the EC procedure, it is up to the parties to offer and determine the scope of any remedies during the license application procedure. Contrary to the EC procedure, there are no legal deadlines to offer undertakings. The NMa has announced that it will issue (draft) guidelines concerning remedies in the course of 2002.<sup>41</sup>

*i. What are the typical steps during the investigation? What rights do complainants have? What publicity is given to the process? What are the opportunities for judicial review?*

In practice, similar to the Commission, the NMa attaches significant importance to observations made by third parties. In its market testing of an notified transaction, the NMa requests information from customers, suppliers, and competitors concerning the relevant markets and the transaction. After notification, and after the filing of an application for a license, the NMa publishes an announcement in the Dutch Official Journal (*Staatscourant*). Accordingly, third parties with direct interests may submit comments on the proposed transaction

to the NMa. Although not obliged to do so, eight weeks after the application for a license is filed in the second phase, the NMa will communicate its preliminary assessment in writing to the undertakings concerned and to affected third parties (similar to the Statement of Objections under EC procedure). The undertakings involved are invited to respond to the preliminary assessment. Approximately two weeks after the NMa's assessment is communicated to the parties, an oral hearing will be arranged and may be attended by third parties. The NMa is required under the Competition Act to publish a notice of its merger control decisions in the Dutch Official Journal, and the full text of the decisions (after revision for business confidential information) is available on the NMa's website.

*j. What are the enforcement powers? How does administrative and civil sanctions compare with the EC regime? And what are the criminal sanctions, and are they used?*

The NMa's enforcement powers are largely similar to that of the Commission, although the maximum fines are generally lower. (The head of the NMa has suggested that maximum fines should be increased to ensure sufficient deterrence.)<sup>42</sup> The Competition Act does not provide for criminal sanctions, nor are there any current legislative proposals to introduce criminal sanctions.<sup>43</sup>

**Enforcement powers.** If a concentration is implemented in breach of the standstill obligation, it is null and void and the NMa may require the concentration to be reversed within a specified time-limit. The NMa may also impose administrative sanctions, including fines and periodic penalty payments. A maximum fine of € 4,500 may be imposed for non-compliance with regulations or a failure to comply with the information requirements in relation to a request for a license. The NMa may impose fines of up to € 22,500 for providing inaccurate or incomplete information, non-compliance with the regulations for a concentration license, and a number of other infringements. In addition to the imposition of administrative fines, the NMa may impose interim measures sanctioned by penalties. If the NMa concludes that a concentration would create or strengthen a dominant position, it will prohibit the concentration or approve it following undertakings to remedy the identified concerns.

38. See, generally, K.J.M. Mortelmans & J.W. van de Gronden, *Mededinging en niet-economische belangen*, in *Mededingingsmonografieën Deel 4*; and the NMa's 2001 Annual Report, at p. 13.

39. As discussed below, a recent review has concluded that the Competition Act should be amended in this respect to explicitly allow the offering of undertakings during the first phase. See Berenschot, *Syntheserapport Evaluatie Mededingingswet*, May 30, 2002, p. 40-41.

40. See Y.E. de Muynck, 'Remedies' in de vorm van gewijzigde meldingen', *Actualiteiten Mededingingsrecht* 2001/3, p. 61-65; and the NMa's 2001 Annual Report, p. 36. For case law see, e.g., *Remy Cointreau/Bols*, Case No. 2124; and *Grand Dorado/Center Parcs*, Case 2209.

41. See the NMa's 2001 Annual Report, p. 36.

42. A.W. Kist, 'De NMa in haar vierde jaar', *Markt & Mededinging* 2001/1.

43. A contrary view that criminal sanctions should be considered was expressed by M.R. Mok, 'Het voorstel-Mededingingswet', *TVVS* 1996, p. 157.

**Judicial review.** Appeals against NMa decisions are to be brought before the District Court of Rotterdam within 6 weeks of the decision.<sup>44</sup> The judgment of the District Court may be further appealed to the Court of Appeal for Trade and Industry. Any person whose interests are directly affected may appeal against a decision. The Minister of Economic Affairs may, on request, grant a license for an envisaged concentration even though the NMa has refused to grant one. Decisions of the Minister are also subject to judicial review.

*k. Do the authorities cooperate with other antitrust authorities?*

The NMa cooperates with other EU antitrust authorities through the ECA network, as well as the Advisory Committee. The NMa also has regular contacts with the U.S. antitrust agencies, among others, and with the OESO.

*l. Are there also rules on foreign investment, special sectors or other relevant approvals?*

As discussed in more detail in our responses to Questions 7 and 9 below, there are no rules on foreign investment, and Dutch law in principle does not discriminate against foreign investors. However, residency or EU nationality requirements apply to the shipping and aviation industries. In addition, certain businesses need to be conducted in a specific legal form and certain formalities need to be complied with. In the areas of banking, insurance, and investment services, the competent authority must give its prior approval before a 'qualified interest' (*gekwalificeerde deelneming*) may be obtained in, or sometimes by, a credit institution, insurance company, securities intermediary, or stock exchange. Such approval may be refused only on a limited number of grounds and is subject to legal review.

*m. Are there current proposals to change the legislation?*

There are no current defined proposals to amend the Competition Act (other than the amendments corresponding to the proposed reform of the NMa). The Ministry of Economic Affairs recently commissioned an independent evaluation of the experience under the Competition Act, which concluded that Dutch merger control functions well.<sup>45</sup>

The review identified three areas of improvement that essentially would harmonize certain aspects of Dutch merger control to the standard of the EC Merger Regulation. As such, these amendments, if adopted, will increase transparency for business. The areas are:

- (i) subjecting cooperative joint ventures to merger control review, *i.e.*, conforming the treatment of joint ventures to the EC Merger Regulation following its 1998 amendment;
- (ii) the possibility to offer undertakings to remedy competitive concerns identified following a first-phase investigation, *i.e.*, implementing the same amendment concerning the use of undertakings to conclude a first-phase investigation as under the EC Merger Regulation in its 1998 amendment; and
- (iii) the strengthening of certain aspects of procedure, including the use of oral hearings, adopting legal deadlines to offer remedies, the imposition of remedies, and the NMa's exercise of the ability to request supplemental information.

## **B. Company Law and Financial Market Regulatory Regime**

### **Introduction**

This Section addresses Dutch company and securities (and other) laws relevant to cross-border acquisitions of widely held Dutch public limited liability companies (*naamloze vennootschappen*, or 'NVs') with a primary listing on the stock exchange of Euronext Amsterdam N.V. ('Euronext'). It is organized as follows. First, it summarizes certain key aspects of Dutch company law, in particular as they affect anti-takeover measures. Second, it identifies several proposed changes to Dutch company law that would have implications for domestic and cross-border M&A. Finally, it responds to a series of questions from the Congress' General Rapporteurs. Dutch company law – traditionally characterized by the so-called 'stakeholder model' – is in the midst of change. Global competition for capital, the rise of the institutional investor, and international debate on corporate governance standards have focused attention on shareholder value. Two resulting trends can be identified. First, shareholders in Dutch companies are more aggressively asserting their rights in Dutch courts. Second, recently proposed legislative changes, if adopted, would increase shareholder influence over management and move the Netherlands from one side of the 'corporate governance continuum' – the consensus-driven 'stakeholder model' – to a more Anglo-American-style 'shareholder model'.

These developments may be expected to reduce some of the existing obstacles to domestic and cross-border acquisitions of NVs – and may foreshadow greater changes to the regulation of M&A activity in the Netherlands, such as those proposed in the Report of the High Level Group of Company Law Experts on Issues Related to Takeover Bids (named after its chairman Mr. Jaap Winter, the 'Winter Report').

### **Overview of Dutch Company Law Affecting Cross-Border M&A**

Two key characteristics of Dutch company law are relevant in assessing possible obstacles to cross-border acquisitions of NVs. The first is the so-called 'large company' regime (*structuurregime*), which is mandatory for NVs meeting certain size thresholds but may also be adopted by smaller NVs. The second is a traditional tolerance of a variety of anti-takeover measures. Both characteristics find their roots in a 'stakeholder model' of the company, which seeks to protect the interests not only of the company's shareholders but also of a variety of other stakeholders (including, *e.g.*, employees and creditors).

#### **a. The 'large company' regime**

Since 1971, every 'large company' (*structuurvennootschap*) in the Netherlands has been subject to a special company law

44. See, *e.g.*, *Wegener e.a. v D-g NMa* (District Court of Rotterdam, September 20, 2000), and the note of P.P.J. van Ginneken in *Markt & Mededinging* 2001/1.

45. See, for more detail, Berenschot, *Syntheserapport Evaluatie Mededingingswet*, May 30, 2002, p. 40-41.

regime. Subject to certain exceptions,<sup>46</sup> an NV is subject to the 'large company' regime if it meets the following three criteria for three consecutive years:

(i) the NV's issued capital (plus reserves) equals at least € 13 million;

(ii) the NV (or another company in the NV's corporate group) has established a works council (*ondernemingsraad*) pursuant to mandatory Dutch law;<sup>47</sup> and

(iii) the NV, together with other companies in the NV's corporate group, employs at least 100 people in the Netherlands. 'Large companies' are required to have a two-tier board structure: (i) a management board, which is responsible for day-to-day management, and (ii) a supervisory board, which oversees and advises the management board.

The supervisory board of a 'large company' has the following key powers:

(i) to appoint, suspend, or dismiss any member of the management board;

(ii) to adopt the annual accounts;

(iii) to approve certain management resolutions (*e.g.*, concerning corporate structure, the issuance of additional shares, the approval of material corporate transactions, or management resolutions with significant consequences for employees); and

(iv) to appoint supervisory board members through a system of co-optation (*i.e.*, a system in which the supervisory board members are appointed by the supervisory board).

The 'large company' regime has in practice shielded NVs from takeovers, since the supervisory board holds key powers typically reserved for shareholders, and shareholders cannot dismiss the supervisory board. The supervisory board's power of co-optation, in particular, has enabled supervisory (and management) boards to 'weather' shareholder opposition. Even though the 'large company' regime does not stop a bidder from acquiring a significant part or all of the shares of a target NV, it does prevent a bidder from exercising control over the target NV. It makes an NV a less attractive target and may, therefore, dissuade takeovers. For this reason, many NVs that are excepted from the 'large company' regime have voluntarily elected to be governed by this regime (so that they are insulated from shareholder pressures).

#### **b. Tolerance of anti-takeover measures**

Dutch company and securities laws – including Exhibit X to the Euronext Listing and Issuing Rules (*Fondsenreglement*) – allow NVs to adopt a wide range of anti-takeover measures. Next to the voluntary adoption of the 'large company' regime, the following three anti-takeover measures are the most commonly employed:<sup>48</sup>

**(i) Issuance of depositary receipts.** Approximately 20% of all NVs at Euronext are listed through so-called depositary receipts (*certificaten van aandelen*).<sup>49</sup> Depositary receipts are listed instruments issued by a special-purpose foundation (*administratiekantoor*), which carry rights to the beneficial ownership of underlying shares in an NV held by the foundation. They are either fully exchangeable for the underlying shares or, as is more common, exchangeable for a certain maximum percentage of the underlying shares, as prescribed in the NV's Articles of Association, usually 1% (the 'X%-rule'). Crucially, it is the foundation and not the holders of the depositary receipts that exercises the voting rights associated with the underlying shares.<sup>50</sup>

The foundation's Articles of Association typically instruct the

foundation's board to vote the shares in the best interests of the NV, its business, and all those involved therein. In practice, the foundation's board often includes current and/or former members of the NV's management – which has created a general perception that foundation boards are 'management friendly'. In recent years, foundations have shown an increased willingness to allow the holders of depositary receipts to exercise voting rights through powers of attorney. Nonetheless, few holders of depositary receipts actually exercise voting rights (mostly they are as inactive as shareholders and do not attend shareholder meetings), so the foundation's aggregate voting power remains largely with its board.

**(ii) Issuance of preference shares.** Preference shares (*preferente aandelen*) are shares carrying normal voting rights that an NV issues to a special-purpose foundation to dilute the voting power of other shareholders. Dutch law permits NVs to issue preference shares against payment of only 25% of their nominal value. The power to issue preference shares is often delegated to the management or supervisory board for a period of up to 18 months, thus allowing it to fend off any unwelcome bidder for the NV.<sup>51</sup> Some NVs have issued (or granted a call option on) up to 50% of the total voting rights in the NV to such a foundation. In practice, the mere threat of a management or supervisory board being able to issue such shares can be sufficient to successfully fend off a hostile bid. In many instances, the device is structured in such a way that the actual issuance of the preference shares is outside the control of the NV, *i.e.*, through a grant to a foundation of a call option over the shares.

**(iii) Issuance of priority shares.** Priority shares (*prioriteitsaandelen*) carry certain exclusive rights concerning the NV's business. These may include the exclusive power: (a) to propose an amendment to the NV's Articles of Association, (b) to approve the issuance of additional shares, and (c) to make binding nominations for the NV's management and supervi-

46. For example, there is an exception for NVs that operate as holding companies of corporate groups that employ a majority of their personnel outside the Netherlands.

47. A works council, which is generally required if a business employs 50 or more people on a regular basis, consists of a chairman and a number of members elected by and among the NV's employees. It represents the employees *vis-à-vis* the NV's management. The works council must be consulted on certain decisions intended to be taken by the NV's management (*e.g.*, decisions relating to the transfer of control over, the cessation of or a significant change in the NV's business or any part of it, any substantial change in the organization of the NV's business, and the entering into or termination of, for example, joint ventures), the intended appointment or dismissal of a member of the management board, and must provide its prior approval for any decision relating to the determination, modification, or revocation of the employment conditions and employee benefits. In case of disputes, both the NV's management and the works council can initiate court proceedings to have certain 'corporate action' approved or blocked.

48. Exhibit X places certain restrictions on the use and combination of these three anti-takeover measures. An NV can only implement two of the three measures, and the composition of the boards of the special-purpose foundations need to meet a certain level of independence *vis-à-vis* the board of the NV.

49. See D.F.M.M. Zaman & W.J. Oostwouder, 'Over certificaten mét en aandelen zonder stemrecht', *Ondernemingsrecht* 2001/15, p. 442.

50. Holders of depositary receipts may, however, attend and take part in general meetings of shareholders.

51. This delegation to a board of the power to issue preference shares is usually renewed at each annual general meeting of shareholders.

sory boards (in the event that the 'large company' regime does not apply). As an anti-takeover device, priority shares are commonly issued to special-purpose foundations or to former or current members of the NV's management.

In recent years, shareholders have increasingly challenged management boards that they felt did not deliver sufficient value for shareholders. Shareholders have sued NVs for alleged corporate mismanagement (*wanbeleid*), and recent court judgments in the *Gucci*<sup>52</sup> and *Rodamco*<sup>53</sup> cases have shown an increased willingness by the courts to scrutinize the deployment of anti-takeover measures (in particular, the issuance of preference shares) by an NV's management board. These cases show a reassessment of the discretion traditionally permitted to management to adopt and maintain anti-takeover measures and a growing recognition that such measures, if abused, allow management to act in its own interests rather than the interests of the NV's shareholders and other stakeholders.

### *Proposed Legislative Changes*

The increasing focus on management accountability to shareholders has led to a number of legislative proposals that seek to increase the rights of shareholders and holders of depositary receipts. The major proposals are discussed below.

#### *a. Changes to the 'large company' regime*

On January 8, 2002, the Government presented Parliament with a proposal to amend the 'large company' regime (*Wet tot wijziging van boek 2 van het Burgerlijk Wetboek in verband met de aanpassing van de structuurregeling*).<sup>54</sup> The proposed changes cover the following matters:

**(i) Appointment and removal of supervisory board members.** The supervisory board would be required to (a) notify the general meeting of shareholders and the works council of any vacancy on that board at least two months before such vacancy must be filled, and (b) provide the general meeting of shareholders with a nominee for each vacancy. The works council would have the right to present to the supervisory board candidates for nomination for at least one-third of the vacancies, which the supervisory board could only reject on limited grounds, and any objection must be approved by the Enterprise Chamber of the Amsterdam Court of Appeal (*Ondernemingskamer van het gerechtshof te Amsterdam*, the 'Enterprise Chamber'). The general meeting of shareholders (with a two-thirds majority of the votes cast, representing at least one-third of the issued share capital) would be empowered to reject candidates proposed by the supervisory board for the vacant supervisory board seats (including any nominee proposed by the supervisory board at the works council's request).<sup>55</sup> Most importantly, the general meeting of shareholders by the same qualified majority would be able to dismiss the entire supervisory board<sup>56</sup> – but not any of its individual members<sup>57</sup> – with immediate effect. In that circumstance, the Enterprise Chamber would have to appoint a temporary supervisory board that would select and present new supervisory board candidates.

**(ii) Increased powers for the general meeting of shareholders.**<sup>58</sup> The general meeting of shareholders would have the right (a) to approve certain management board resolutions which affect the identity or the character of the NV or its business (e.g., formation or termination of material joint ventures, transfer of all or substantially all of the NV's business, or the

acquisition or disposition of an interest in another legal entity representing at least one-third of the net equity value of the NV),<sup>59</sup> and (b) to adopt the annual accounts. In addition, share-holders representing at least 1% of the issued share capital (instead of the current statutory threshold of 10%) or holding an interest in the NV with a market value in excess of € 50 million would be entitled to put certain issues on the agenda of the general meeting of shareholders.

**(iii) Voting rights for holders of depositary receipts.** Holders of depositary receipts would be given the right to demand an exclusive (*privatieve*) power of attorney to exercise the voting rights associated with the underlying shares. The issuing foundation could refuse to provide or if provided could subsequently revoke such power of attorney only if (a) a public offer for the underlying shares has been made, (b) the depositary receipt holder, acting alone or in concert with others, represents 25% or more of the NV's issued share capital, or (c) the issuing foundation believes that the holder of the depositary receipt would cast a vote that would seriously prejudice the best interests of the NV or the NV's business. The foundation could not refuse to provide a power of attorney and could not revoke one, however, if a majority of the foundation's board is comprised of current or former members of the NV's

52. LVMH Moët Hennessy Louis Vuitton SA, *et al/Gucci Group N.V.*, Stichting Belangen Werknemers, Pinault-Printemps-Redoute S.A., *et al*, Hof Amsterdam (Ondernemingskamer), March 8, 2001, *NJ* 2001, p. 224.

53. Vereniging van Effectenbezitters/Rodamco North America N.V. and Westfield European Investments Pty Ltd, Hof Amsterdam (Ondernemingskamer), March 22, 2002, *JOR* 2002, nr. 82, p. 681.

54. See *Kamerstukken II* 2001/02, 28 179 (a copy of the proposal, in Dutch, can be downloaded from [www.overheid.nl/op](http://www.overheid.nl/op)).

55. In light of the proposed amendments to the 'large company' regime, several NVs and, in particular, a number of multinationals (including Ahold N.V., Getronics N.V., Numico N.V. and Wolters-Kluwer N.V.) that had voluntarily adopted the 'large company' regime, have dismantled the regime and amended their Articles of Association to the effect that members of the supervisory board are no longer appointed through co-optation. Instead, the Articles of Association include a system of binding nominations by the supervisory board. The general meeting of shareholders may overrule a binding nomination of the supervisory board by a two-thirds majority of the votes cast, representing at least one-half (instead of one-third) of the issued share capital. Neither the works council nor the general meeting of shareholders has a right to present candidates for nomination to the supervisory board. These multinationals defend the dismantling on the argument that a majority of their employees are based outside the Netherlands and that they find it problematic that a works council, which, in practice, solely comprises Dutch employees, has such a large influence over the composition of the supervisory board. See also L. Timmerman, 'De politieke haalbaarheid van het Wetsvoorstel aanpassing structuurregeling', *Ondernemingsrecht* 2002/3-4, p. 106.

56. Any resolution to that effect must be properly reasoned and may only be adopted if the intended dismissal has been put on the agenda of the general meeting of shareholders, and both the management board and the works council have been duly notified.

57. Although the shareholders at the general meeting of shareholders cannot dismiss an individual member, shareholders may ask the competent court to dismiss an individual member, which request can only be granted on a limited number of grounds.

58. See, for a critique of this proposal, M.W. Josephus Jitta, 'Schuitje varen, theeje drinken, varen wij door het polderland', *Ondernemingsrecht* 2002/3-4, p. 74-82.

59. Failure to obtain prior approval will not render the transaction null and void, but may result in the liability of members of the management board, and in certain cases also members of the supervisory board, *vis-à-vis* the NV.

management or supervisory boards, employees of the NV and/or its group companies, and/or regular advisors of the NV.

### **b. Changes to anti-takeover measures**

The use of anti-takeover measures has been the subject of discussion in the Netherlands for over 15 years. In 1989, the Association for the Securities Trade (*Vereniging voor de Effectenhandel*), a predecessor of Euronext, and the Listed Companies Association (*Vereniging van Effecten Uitgevende Ondernemingen*) reached agreement on the permissible use of anti-takeover measures (*i.e.*, Exhibit X) but agreed to commence more thorough discussions about their use. After many years of intense negotiation and lobbying, in 1997, the Government presented Parliament with the draft Act on Break-Through Measures (*Wetsvoorstel tot invoering van de mogelijkheid tot het treffen van bijzondere maatregelen door de ondernemingskamer over de zeggenschap in de naamloze vennootschap*).<sup>60</sup> Criticism of the draft Act and developments in the general corporate governance debate in the Netherlands led to a delay in its adoption. To date, the draft Act has not been adopted and its content remains the subject of debate. Under the proposed break-through rule, a shareholder of an NV may request the Enterprise Chamber to remove certain anti-takeover measures if the shareholder:

- (i) holds at least 70% of the NV's issued capital;<sup>61</sup>
- (ii) notified the NV of its shareholding; and
- (iii) has held such shares for 12 consecutive months.

In making the break-through request, the shareholder would be required to state its intentions concerning the NV, its proposed composition of the management and supervisory boards, and the measures it considers necessary to remove any relevant takeover defenses. The Enterprise Chamber would then have to appoint a panel of three experts, who must report on the shareholder's intentions and the consequences of revoking the anti-takeover measures. The Enterprise Chamber could refuse to grant relief or make any relief subject to additional conditions, such as requiring the requesting shareholder to launch a bid for all remaining outstanding shares. The proposed break-through rule before the Parliament is broader in scope than the break-through rule proposed in the Winter Report, as further discussed in our responses to Questions 12 and 13. It would allow, for example, the cancellation of shares, the annulment of board resolutions and resolutions of the general meeting of shareholders, and the dismissal of members of the management and supervisory boards. The principal difference, however, is the one-year waiting period in the Dutch proposal, which has been subject to fierce criticism. It would force a bidder/majority shareholder to maintain his investment for 12 months, thus giving the NV's management ample opportunity to frustrate the majority shareholder's attempt to obtain full control over the NV. More generally, as discussed in our response to Question 12, we believe that there are considerable problems associated with the introduction of a break-through rule, either as proposed by the Government or in the Winter Report.

### **c. Introduction of a mandatory bid**

There is currently no statutory obligation to launch a bid after acquiring a certain percentage of the issued securities of an NV. The Netherlands is, to our knowledge, the only Member State whose laws do not provide for a mandatory bid.<sup>62</sup> However, this may change in the near future. On January 30, 2002,

the Minister of Finance published a consultation document regarding the introduction of a mandatory bid rule in the Netherlands and the relationship between such a rule and the break-through measures proposed in the draft Act on Break-Through Measures.<sup>63</sup>

### **Response to specific questions**

*7. What would you identify as the main obstacles to takeovers where a company from your jurisdiction is either bidder or target and the other company is from another EU jurisdiction?*

In considering the main obstacles to takeovers in the Netherlands,<sup>64</sup> a useful distinction may be made between general obstacles under company law, securities laws and other government rules and regulations, and specific obstacles in the form of anti-takeover measures.

**Obstacles under company and securities laws.** The completion of the acquisition of shares in the capital of an NV for cash consideration requires – at a minimum – the completion of the following steps:<sup>65</sup>

**(i) Corporate approvals.** A distinction may be made between the acquisition of newly issued shares from an NV and the acquisition of previously issued shares from its shareholders. An acquisition of newly issued shares requires the approval of the NV's general meeting of shareholders (unless the power to issue shares has been delegated to the management or supervisory board). In addition, approval of the management and supervisory boards may be important in case preference

60. See *Kamerstukken II 1997/2002*, 25 732 (a copy of the proposal, in Dutch, can be downloaded from [www.overheid.nl/op](http://www.overheid.nl/op)).

61. In calculating compliance with the 70% threshold, any shares that the NV issued after it received a notification from the shareholder that it acquired 70% of the NV's issued capital, are excluded. Likewise, certain kinds of shares such as preference shares and fully paid-up shares that were mainly issued to protect the NV, such as priority shares, whenever issued, are not taken into account.

62. In the introduction to the consultation document released by the Minister of Finance on January 30, 2002, the Government states that Greece and the Netherlands are the only two remaining Member States without a mandatory bid rule. In fact, the Greek Capital Market Commission, the Greek securities regulator, already introduced a mandatory bid rule in 2000 requiring a shareholder holding an interest of 50% or more in a Greek listed entity to launch a bid for the remaining outstanding voting securities (see *Public Offer for the Purchase of Transferable Securities*, Greek Capital Market Commission Decision 1/195 of July 19, 2000, which entered into force on August 22, 2000).

63. A copy of the consultation document and the reactions, all in Dutch, can be downloaded from the website of the Ministry of Finance ([www.minfin.nl](http://www.minfin.nl)).

64. We do not consider possible obstacles if a Dutch NV intends to acquire a non-Dutch target, since those will largely be a function of foreign law. Under Dutch law, an NV wishing to make a foreign acquisition must obtain the necessary corporate approvals and consult with the trade unions and works council (see below). There is no trade union consultation obligation if the takeover does not affect the bidder's Dutch employees.

65. Although filings under the 1996 Act on the Disclosure of Major Holdings (*Wet melding zeggenschap in ter beurze genoteerde vennootschappen 1996*) may be considered an obstacle to creeping acquisitions, they are not included in this list.

66. The Merger Code is issued by the Social and Economic Council (*Sociaal-Economische Raad*; the 'SER'), a tripartite body comprised of representatives of the Government, trade unions, and employers.

shares, priority shares, or depositary receipts for shares have been issued to special-purpose foundations, as these foundations tend to support the proposals of the boards.

**(ii) Offering memorandum.** Under the 1995 Act on the Supervision of Securities Trade (*Wet toezicht effectenverkeer 1995*, the 'Securities Act'), the bidder must make available to the NV's shareholders an offering memorandum (*biedingsbericht*) in accordance with the 1995 Decree on the Supervision of Securities Trade (*Besluit toezicht effectenverkeer 1995*, the 'Decree'). In addition, both the bidder and the NV have obligations to disclose certain information to the public.

**(iii) Trade union consultation.** Under the 2000 Merger Code for the Protection of the Interests of Employees (*SER-besluit Fusiegedragsregels 2000 ter bescherming van de belangen van werknemers*, the 'Merger Code'),<sup>66</sup> the NV's management board must inform relevant trade unions of any proposed takeover before it makes any public announcements.<sup>67</sup> In addition, the NV's management board must discuss the proposed merger and its consequences with the trade unions at a time when the trade unions' opinion can still have a substantial influence on the NV's decision whether to consummate the merger (in any event, before the bidder and the NV enter into any definitive agreement (in a friendly takeover) or before the bidder may announce any bid (in a hostile takeover)).<sup>68</sup> If the trade unions consider that the NV has violated the Merger Code, they may petition the Merger Code Adjudication Committee (*geschillencommissie*) established under the Merger Code.<sup>69</sup> The only remedy, however, that the Merger Code Adjudication Committee offers if it concludes that an NV has violated the Merger Code, is the publication of its findings.

**(iv) Works council consultation.** Under the Works Council Act (*Wet op de ondernemingsraden*), the NV's management board must consult the works council and obtain its advice concerning any proposed takeover. The management board must consult the works council at a time when the opinion of the works council can still have a substantial influence on the NV's decision on the takeover (in any event, before the bidder and the NV enter into any definitive agreement). If the works council opposes the takeover, the NV may not proceed with the execution of any final decision on the takeover for a period of one month, during which time the works council may petition the Enterprise Chamber. If the Enterprise Chamber finds that, taking into account all interests concerned, the NV could not reasonably have come to the decision it took, the Enterprise Chamber may, on request of the works council, order the NV to cancel its decision (in whole or in part) or to mitigate certain of the consequences resulting from the takeover. Such orders, however, may not interfere with the rights of any third party.

The above steps differ depending on whether the bidder opts to offer shares instead of cash<sup>70</sup> or opts for an assets deal<sup>71</sup> or a statutory merger.<sup>72</sup>

**Regulatory obstacles.** Regulatory obstacles include, *inter alia*:

**(i) Nationality and residency requirements.** As discussed in more detail in our response to Question 9, there are Dutch or EU nationality and residency requirements set forth in the statutes governing the shipping and aviation sectors, which affect acquisitions of control by non-EU persons over NVs with operations in these sectors.

**(ii) Antitrust approvals.** If the target and the bidder reach certain turnover thresholds, prior NMA approval is required. (For

an extensive discussion of these thresholds, see our response to Question 6 (b)).

**(iii) Other approval requirements.** As discussed in more detail in our response to Question 9, there are governmental or regulatory approval requirements in the finance, insurance, and utilities sectors.

**Specific anti-takeover measures.** Anti-takeover measures that may be employed by NVs include, among others:

- (i) voluntary adoption of the 'large company' regime;
- (ii) issuance of depositary receipts, often in combination with the X%-rule;
- (iii) granting of a call option over preference share to a special purpose foundation;
- (iv) issuance of priority shares, including golden shares, or shares that give special nomination rights for the appointment of members of the management and/or supervisory boards;
- (v) quorum and supermajority requirements in the NV's Articles of Association;
- (vi) 'pyramid structures';<sup>73</sup>

67. The obligation for the NV's management board to consult the trade unions only exists if the NV employs at least 50 employees. Under the Merger Code, the NV must consult the following trade unions: (i) trade unions of which at least one member is a member of the NV's works council; (ii) trade unions involved in the negotiation of collective bargaining agreements binding on the NV; and (iii) trade unions that have been regularly active for the NV's employees in the two year period before the takeover.

68. At the same time as the NV informs the trade unions, it must also inform the SER.

69. The Merger Code Adjudication Committee consists of representatives of trade unions and employer organizations and independent members.

70. If a non-Dutch bidder offers shares, it may also be subject to non-Dutch securities laws.

71. In the event of an asset transfer, Dutch securities laws do not apply and no offering memorandum is necessary. If the asset transaction involves all of the NV's assets, as further discussed in our response to Question 10, the view of most Dutch legal commentators is that such a transaction requires the prior approval of the general meeting of shareholders.

72. In the event of a statutory merger, as further discussed in our response to Question 10, the general meeting of shareholders of each of the target NV and the bidder NV would have to approve such merger.

73. A pyramid structure is a group structure characterized by a chain of control using several holding companies. The ultimate shareholders control each company in the chain by majority or controlling minority interests. As a result, the ultimate shareholders may control the whole chain up to and including the company at the bottom on the basis of a small total investment.

74. A person or company that rescues the target of an unfriendly takeover bid by, for instance, acquiring a controlling interest in the target or by making a competing offer for the shares in the target.

75. An anti-takeover measure in which a target company sells its most valuable asset (the 'crown jewel') to a third party so that the target will be less attractive to an unfriendly bidder.

76. An employment contract provision that grants members of management lucrative severance benefits – including long-term salary guarantees or bonuses – if control of the company changes hands.

77. Debt that allows an investor to redeem it before maturity if the issuer of the debt becomes the target of a hostile takeover. 'Poison debt' makes it expensive for the bidder to buy the target because the bidder will have to raise cash to repay the holders of the debt.

78. An anti-takeover measure by which the target attempts to take over the bidder by making a cash offer for the bidder company's shares; the name derives from a video game popular in the 1980s, the object of which was to gobble up the enemy.

- (vii) seeking a 'white knight';<sup>74</sup>
- (viii) 'crown jewel' lock-ups;<sup>75</sup>
- (ix) 'golden parachutes';<sup>76</sup>
- (x) change of control clauses in important agreements (e.g., financing documents) or issuance of 'poison debt';<sup>77</sup> and
- (xi) creation of a 'Pacman' defense.<sup>78</sup>

While certain measures (such as the measures mentioned under (ii), (iii), (vi), (vii), and (xi)) prevent the bidder from acquiring a majority of the outstanding shares, other measures prevent the bidder from exercising effective control over the company (such as the measures mentioned under (i), (iv), and (v)). In addition, others aim at making an acquisition less attractive (see measures under (viii), (ix), and (x)).

In case of friendly takeovers, anti-takeover measures do not present a real obstacle for two reasons. First, during the pre-bid negotiation, the bidder and the NV typically agree to a standstill, which makes it unnecessary for the NV to invoke additional takeover defenses. Second, with the cooperation of the NV's management, any anti-takeover measure that was put in place before the takeover negotiations started can be removed (e.g., depositary receipts may be exchanged for the underlying shares; the Articles of Association may be amended to remove an X%-rule, the 'large company' regime (if adopted voluntarily), or any special quorum, supermajority requirements, or special nomination rights).

The situation is different with respect to hostile takeovers, where the bidder lacks the support of the NV's management and/or supervisory boards. In those circumstances, it is practically impossible to overcome takeover defenses. As there has been no negotiated standstill, the NV can, and often will, invoke takeover defenses. Sometimes, these ad hoc measures are difficult to overcome, in particular, if they involve third parties. In addition, even if the bidder were to obtain a majority of the outstanding shares or depositary receipts, it would often lack control over the NV. Without support of the management and/or supervisory boards, the bidder would not be able to remove the implemented takeover defenses that prevent it from exercising effective control.

All of the above applies equally to both Dutch and non-Dutch bidders.

**Winter Report measures.** The board neutrality rule and the break-through rule as proposed in the Winter Report, if adopted, would lead to some change in the Dutch corporate landscape, but they would not result in a complete ban on takeover defenses.

The board neutrality rule<sup>79</sup> would only affect the use of a limited number of takeover defenses, such as the issuance of special shares, the search for a 'white knight' and the 'Pacman' defense. Certain authors are of the opinion that the pre-bid grant of a call option over preference shares would also be affected.<sup>80</sup> In contrast, the break-through rule proposed in the Winter Report would affect more takeover defenses, such as the voluntary adoption of the 'large company' regime, the issuance of priority shares, and quorum and supermajority requirements in the NV's Articles of Association. The takeover defense of issuing depositary receipts, however, would not be affected, which could limit the impact of the break-through rule for a significant number of NVs (since the voting rights attached to the underlying shares would continue to be exercised by the special-purpose foundation).<sup>81</sup>

The break-through rule as proposed in the draft Act on Break-Through Measures (discussed in detail in our response to Question 12) would affect more takeover defenses than the

rule proposed in the Winter Report (such as the use of depositary receipts). However, under the draft Act it is not certain that the Enterprise Chamber would grant the bidder the requested break-through.

Nevertheless, the introduction of the board neutrality rule and the break-through rule (whether in the form proposed in the Winter Report or in the draft Act on Break-Through Measures) would not affect certain other defenses, such as 'pyramid structures', 'crown jewel' lock-ups, and change of control clauses. In addition, NVs could switch to more structural defenses, such as the engagement of core shareholders (e.g., cross-shareholdings by friendly parties).

#### 8. Do hostile takeovers by companies from other EU jurisdictions in fact take place in your country?

We are not aware of any case where an NV has been the subject of a successful hostile takeover by a Dutch or non-Dutch bidder. We are, however, aware of a number of hostile takeover attempts that have failed for a variety of reasons which include the barriers identified in the Introduction and our response to Question 7. In addition, it is likely that a number of contemplated hostile takeover attempts have simply never materialized due to the freedom permitted, and the anti-takeover measures available to, an NV's management to fend off a hostile bid.

#### 9. To what extent are there any sectors (utilities, financial institutions) that in practice are further protected from hostile takeovers, or foreign takeovers in particular? Are there any policy statements or particular legal mechanisms that give effect to this protection, or is it a matter of informal mechanisms?

Although Dutch law in principle does not discriminate against non-Dutch investors, there are two statutory methods through which certain sectors could be protected from cross-border takeovers (whether friendly or hostile): (i) Dutch or EU nationality or residency requirements, and (ii) governmental or regulatory approval requirements.

79. The board neutrality rule is intended to prevent the board of a target company from autonomously adopting defensive measures once a bid has been announced. It requires a target's board to seek shareholder approval on any action intended to frustrate the bid.

80. W.J. Slagter, L. Timmerman, D.C. Buijs, G. van Solinge & M.P. Nieuwe Weme are of the opinion that an issuance of preference shares pursuant to a call option would violate the board neutrality rule. Others, including P.J. Dortmund, M.J.G.C. Raaijmakers & M. van Olfen, disagree. See L.J. Hijmans van den Bergh & G. van Solinge, *Implementatie van de 13e Richtlijn*, p. 106.

81. According to the Rapport Honcé/Timmerman 2000, 56% of Dutch listed companies use preference shares: L.J. Hijmans van den Bergh & G. van Solinge, *supra* note 80, p. 106.

82. Pursuant to Article 311 of the Commercial Code (*Wetboek van Koophandel*), a seagoing vessel (*zeeschip*) is Dutch if, among other things, it is at least two-thirds owned by individuals or entities from an EU or EEA Member State who are active in the shipping industry in the Netherlands.

83. Pursuant to Articles 16 and 16a of the Act on Aviation (*Luchtvaartwet*), a Dutch aviation operating license is only granted if the intended licensee has its principal place of business and registered office in the Netherlands. Pursuant to Article 4, ¶2 of Council Regulation 2407/92/EEC on licensing of air carriers, it is a condition of an operating license that the licensee is at all times effectively controlled by Member States or nationals of such States.

**Nationality and residency requirements.** There are Dutch nationality and residency requirements set forth in the statutes governing the shipping<sup>82</sup> and aviation<sup>83</sup> sectors, which affect acquisitions of control by non-EU persons over NVs with operations in these sectors.

In addition, in the aviation sector, we believe that acquisitions of control by non-Dutch EU acquirors is also impeded, as a practical matter, because the bilateral aviation treaties – which have been entered into by the Netherlands with many non-European countries to provide landing slots for their respective domestic carriers – typically require that a carrier be controlled by Dutch nationals or the Dutch State in order to obtain the benefits provided by the treaties. As a result, a Dutch target carrier – or another EU target carrier since this issue applies equally to carriers located in other Member States – may lose critical landing slots upon being acquired by an entity controlled by nationals of another Member State.

Furthermore, in the defense sector, contractual change of control clauses incorporating Dutch residency requirements may act as a barrier to cross-border acquisitions of certain Dutch companies, a substantial part of whose business involves the supply of military goods and services to the Government. These clauses could enable the Government to terminate the relevant supply contract upon a non-Dutch party acquiring control over a Dutch supplier.

**Approval requirements.** There are governmental or regulatory approval requirements in the finance, insurance, and utilities sectors.

In the finance and insurance sectors, prior approval is required from the competent authority for the acquisition of a ‘qualified interest’, of 5% or 10%, in a credit institution,<sup>84</sup> investment firm,<sup>85</sup> stock exchange,<sup>86</sup> or insurance company.<sup>87</sup> Such approval can be refused only on a limited number of statutory grounds and is subject to judicial review.

In the electricity and gas sectors, prior approval is required from the Minister of Economic Affairs for a transfer of (i) shares in a licensed electricity or gas distributor or grid operator, or (ii) the title to the grid (*netwerk*).<sup>88</sup> Under the relevant provisions, such approval may be withheld if the acquiror of the shares or the grid is not a Dutch local government (or an entity directly or indirectly controlled by a Dutch local government). The policy guidelines<sup>89</sup> relating to these provisions, further state that such approval will be withheld if, *inter alia*, title to the grid is not retained by, or transferred to, a Dutch local government.<sup>90</sup>

We have not identified any other Dutch laws, regulations or relevant policy statements that could shield NVs active in any particular sector of the Dutch economy from takeovers by non-Dutch acquirors. We note, however, that the Dutch State has various controlling shareholdings in key Dutch listed and non-listed companies, including in the telecommunications (KPN N.V.), postal (TPG N.V.), and aviation sectors (KLM N.V. and N.V. Luchthaven Schiphol, the owner and operator of the Amsterdam airport). The Articles of Association of such companies, under normal company law rules, often grant the Dutch State specific voting rights enabling it to act to protect the public interest.

Although the Government has recently indicated that it intends to manage each of its various shareholdings solely in its capacity as a shareholder (instead of as a government) with the interests of the public perceived to be served by such NVs being safeguarded in other ways (through legislation),<sup>91</sup> this new stance would not prevent the Government, for example,

from deciding not to tender its shares to a non-Dutch bidder solely for political concerns. As a result, depending on the circumstances and the parties involved at the time of any such bid, proposed takeovers of these companies by non-Dutch bidders may be more difficult to accomplish.

*10. What are the company law techniques of completing a takeover or merger that are used in practice where one of the companies is from another EU jurisdiction? Please give particular attention to how this would differ from the usual completion of a takeover or merger where both companies are from your jurisdiction. It would be useful if you could add a comment about the consequences on the techniques used of the taxation regime and of any differential tax treatment of takeovers or mergers where one party is from another EU jurisdiction.*

Generally, there are three methods of acquiring an NV’s business: (i) acquiring the shares of the NV (*aandelenfusie*); (ii) a statutory merger of the acquiror and the NV (*juridische fusie*); and (iii) acquiring the assets and assuming the liabilities of the NV (*bedrijfsfusie*).

**Share acquisitions.** The method most commonly used to acquire an NV is the acquisition (directly or through an affiliate or a special-purpose vehicle) of the shares of the NV through a public offer or a privately negotiated sale. The Securities Act allows three types of public offers: (i) offers to acquire all issued shares of the target at a fixed price or exchange ratio and open to all holders of the target’s shares (a ‘firm offer’ (*vast bod*)); (ii) offers to acquire up to 30% of the issued shares of the target and open, on a *pro rata* basis, to all holders of the target’s shares (a ‘partial offer’ (*partieel bod*)); and (iii) offers to acquire up to 30% of the issued shares of the target and inviting all holders of the target’s shares to tender such shares, on a *pro rata* basis, to the bidder at a price

84. See Article 24 of the 1992 Act on the Supervision of the Credit System (*Wet toezicht kredietwezen 1992*).

85. See Article 16 of the Securities Act.

86. See Article 26a of the Securities Act.

87. See Article 175 of the 1993 Act on the Supervision of the Insurance System (*Wet toezicht verzekeringsbedrijf 1993*).

88. See Article 93 of the 1998 Electricity Act (*Electriciteitswet 1998*) and Article 85 of the Gas Act (*Gaswet*).

89. See policy guidelines concerning the privatization of energy distribution enterprises of July 10, 2001 (*Beleidsregels privatisering energiedistributiebedrijven van 10 juli 2001*). (A copy of the text, in Dutch, can be downloaded from [www.overheid.nl/op](http://www.overheid.nl/op).)

90. A number of legal commentators have expressed the view that the provisions of the policy guidelines and proposed amendments implementing the policy guidelines to the 1998 Electricity Act and Gas Act do not meet the criteria developed by the European Court of Justice in the ‘golden share’ cases (*i.e.*, *Commission v Portugal*, Case C-367/98; *Commission v France*, C-483/99; and *Commission v Belgium*, C-503/99) on the basis that (i) the criteria to be applied to a decision of the Minister of Economic Affairs are not specifically expressed, and (ii) the condition that legal ownership of grids is to be held by Dutch local governments or entities controlled by Dutch local governments constitutes a breach of the principle of proportionality. See W.J. Oostwouder, ‘Het gouden aandeel is dood, leve het gouden aandeel?’, *Vennootschap & Onderneming*, June 2002, p. 98; W. Koster, ‘Europees Hof scherpt regels voor gouden aandeel aan’, *Het Financieele Dagblad*, June 8, 2002.

91. See letter of the Minister of Finance to the Parliament dated December 12, 2001 (*Nota deelnemingenbeleid Rijksoverheid*). (A copy of the text, in Dutch, can be downloaded from [www.minfin.nl](http://www.minfin.nl).)

to be determined by each individual holder (a 'tender offer' (*tenderbod*)). Private share acquisitions typically follow the pattern of such acquisitions in other EU jurisdictions, *i.e.*, the acquirer acquires from the selling shareholder(s) all or a majority of the shares in the NV or the NV's key subsidiaries, in exchange for cash and/or shares of the acquirer. Share acquisitions do not give an advantage to Dutch acquirors over non-Dutch acquirors.

**Statutory mergers.** Although a statutory merger is currently used more in a corporate restructuring than an M&A context, we consider it another key method of acquiring an NV and expect to see an increasing number of statutory mergers in the friendly takeover context in the years to come. The merger provisions in Part 7 of Book 2 of the Dutch Civil Code are based on the Third Company Law Directive and permit 'direct' and 'forward triangular' (*driehoeksfusie*) mergers. In a 'direct' merger, one legal entity (the disappearing entity) merges into another legal entity (the surviving entity). In a 'forward triangular' merger, one legal entity (the disappearing entity) merges into a subsidiary or a special-purpose vehicle of the acquirer, with the shareholders of the disappearing entity acquiring, by operation of law, shares in the acquirer. Dutch company law does not permit 'direct' or 'forward triangular' mergers involving non-Dutch legal entities.<sup>92</sup> (The proposed Tenth Company Law Directive would have permitted EU cross-border mergers but has not been adopted.<sup>93</sup>) The inability to use a statutory merger may disadvantage non-Dutch acquirors in various ways.

First, a Dutch acquiror, by acquiring a sufficient percentage of the NV's shares (possibly even less than 50%), may be able to control the general meeting of shareholders of the target NV, allowing it to effect a 'direct' or 'forward triangular' merger and a 'freeze-out' of the remaining shareholders of the target (unless the NV's Articles of Association contain specific quorum and majority requirements). In contrast, a non-Dutch acquiror, in a share acquisition, would not be able to consolidate an NV's business or effect such a 'freeze-out' unless it managed to acquire at least 95% of the shares of the target, allowing it to initiate buy-out proceedings (discussed in our response to Question 14).

Second, a statutory merger may create certain important tax benefits (that a Dutch acquiror could take advantage of) if the acquisition is financed in whole or in part by debt. For example, a 'forward triangular' merger would allow the Dutch acquiror to create a fiscal unity (*fiscale eenheid*)<sup>94</sup> with the merged subsidiary enabling it to set off losses of the acquiror (taking into account the interest payments on the debt) against profits of the merged subsidiary.

**Asset acquisitions.** This method is commonly used when an acquiror does not desire to assume all of the target's liabilities or when the acquiror wishes to benefit from a stepped-up tax basis. We note that Dutch law does not recognize the concept of universal succession of a business (such as, for instance, the *fonds de commerce* under French law and the *azienda* under Italian law), so the assets and liabilities being acquired must each be transferred separately to the acquiror in accordance with the appropriate method of transfer. Asset acquisitions do not give an advantage to Dutch acquirors over non-Dutch acquirors.

11. A duty on listed companies to disclose capital and control structures is proposed in *Issues Relating to Takeover Bids, the First Report of the High Level Group of Company Law Experts. Would this require amendments to the legislation in your country? How would these amendments be implemented (in company law, securities law, stock exchange regulations, etc.)?*

Current disclosure obligations under Dutch law reveal to a large extent the ownership and control structures of NVs. It may, however, be time-consuming<sup>95</sup> to obtain such information, as it is disseminated through various sources, and sources may not always be up-to-date.<sup>96</sup>

Disclosure obligations under Dutch law on NVs, their board members, and their shareholders are as follows:<sup>97</sup>

(i) The 1996 Trade Register Act (*Handelsregisterwet 1996*), the 1996 Trade Register Rules (*Handelsregisterbesluit 1995*), and Book 2 of the Dutch Civil Code<sup>98</sup> require the members of the management board of an NV to file the following information with the Trade Register (*Handelsregister*) at the relevant Chamber of Commerce (*Kamer van Koophandel*): (a) the number of authorized, issued, and paid-up shares; (b) the different classes of shares, if any; (c) the identity of the sole shareholder of the NV, if applicable; (d) the personal data of all management and supervisory board members and, with respect to members of the management board, whether they are authorized to represent the NV solely or jointly; (e) the number of employees employed by the NV; (f) the NV's deed

92. This is the view of most legal commentators see *e.g.*, G. van Solinge, *Grensoverschrijdende juridische fusie*, 1994, p. 173, 320. See also P. van Schilfgaarde, *Van de BV en de NV*, 2001 p. 337. P. Vlas, *Rechtspersonen*, *Praktijkreeks IPR*, 1999, p. 158, however, takes the view that a cross-border merger should be allowed provided that the relevant jurisdictions each have provisions on statutory mergers.

93. Proposal for a Tenth Council Directive based on Article 54(3)(g) of the Treaty concerning cross-border mergers of public limited companies of December 14, 1984, COM 84/727 final. This proposal contained rules relating to mergers between companies from different Member States.

94. Under Dutch tax law, a fiscal unity can be created if at least 99% of the shares in the subsidiary is held by the parent NV and the companies are consolidated. Under proposed legislation that is expected to enter into force on January 1, 2003, this percentage will be reduced to 95%.

95. Recently proposed changes to Directive 68/151/EEC ('First Company Law Directive') should – to some extent – make company information more easily and rapidly available to the public while at the same time simplifying the disclosure formalities required from companies. The proposal would, if it were adopted, require that the Member States make possible the filing of company documents and particulars by electronic means as of January 1, 2005. Copies of those documents would be accessible to the public by electronic means. The proposed amendment would not alter the original list of documents and particulars that must be disclosed, nor the original provisions whereby Member States must determine by which persons the disclosure formalities are to be carried out. For an electronic copy of the proposal, see [europa.eu.int/comm/internalmarket/en/company/company/news/index.htm](http://europa.eu.int/comm/internalmarket/en/company/company/news/index.htm).

96. See 'Kritiek op vaker melden van belangen', *Het Financieele Dagblad*, June 11, 2002.

97. Additional (and specific) disclosure and/or reporting obligations may apply to companies active in certain industries (*e.g.*, banking and insurance).

98. These sources implement Directives 68/151/EEC, 77/91/EEC, 78/660/EEC, and 83/349/EEC ('First, Second, Fourth, and Seventh Company Law Directives' respectively).

of incorporation, including its Articles of Association<sup>99</sup> and any subsequent amendments; and (g) the NV's annual report<sup>100</sup> and annual accounts, together with certain additional data, such as an auditors' letter and a list of the persons authorized to exercise particular control rights over the NV under the NV's Articles of Association. All the information filed with the Trade Register is available to the public.

(ii) The Euronext Listing and Issuing Rules subject NVs to a prospectus obligation upon the offering of shares. The prospectus is made available to the public, free of charge, by the NV, the paying agent, or Euronext, and contains detailed information on the company's capital structure (including information on convertible securities) and the company's control structure. Dutch residents may consult prospectuses through Euronext's website during and after completion of the share issue. In addition, Euronext rules and regulations require NVs to regularly update previously disclosed information in the press. This includes the obligation to publish changes in the structure of the NV's capital, amendments to the rights attached to different classes of shares, and any fact or circumstance that may have a significant influence on the price of the listed securities.

(iii) The 1996 Act on the Disclosure of Major Holdings requires shareholders to disclose the acquisition or disposition of certain securities meeting certain size thresholds to the NV and to the Netherlands Authority for the Financial Markets (*Autoriteit Financiële Markten*, the 'Financial Markets Authority'), the competent authority under this Act and the Securities Act.<sup>101</sup> In addition, members of the management and supervisory boards must report trades in securities of the NV (or its affiliates) to the Financial Markets Authority. The information is published in a register that is accessible online.<sup>102</sup>

Given these existing disclosure obligations under Dutch law, the disclosure obligations proposed in the Winter Report,<sup>103</sup> if adopted, would require only minor amendments to Dutch legislation, *i.e.*, amendments obligating the disclosure of (i) 'pyramid structures' and circular and cross-shareholdings, (ii) the institution of an Employee Share Ownership Plan ('ESOP') and the control thereof,<sup>104</sup> and (iii) change of control provisions in key agreements. The Winter Report's recommendation that certain information relating to an NV be disclosed in a combined and coherent way would, however, require more substantial amendments.

These amendments could be implemented in company law, securities laws, and/or the Euronext Listing and Issuing Rules. We believe that any changes to the content of disclosures and any provisions mandating the combined and coherent disclosure of information would be best placed in the securities laws, in particular the 1996 Act on the Disclosure of Major Holdings. Reference could be made to the existing disclosure mechanism under this Act. In addition, the Financial Markets Authority seems best equipped to monitor compliance with the disclosure obligations.

Finally, we note that the Winter Report's specific recommendations on disclosure requirements were subsequently incorporated in an independently prepared consultation paper circulated on May 8, 2002 by the Commission's Directorate General for the Internal Market, which paper outlines concrete

99. An NV's Articles of Association contain, among others, the following information: (i) whether the NV has different classes of shares, and if so, the rights attached to each class; (ii) whether the power to issue shares has been delegated to the management board and for what period of time; (iii) the manner in which members of the management board are appointed (*i.e.*, by way of binding nomination of certain class(es) of shareholders or by a simple or qualified majority of all shareholders); (iv) the manner in which the members of the supervisory board are appointed, and, related to this, whether the NV is subject to the 'large company' regime; (v) decisions that the management board cannot adopt without prior supervisory board approval or shareholder approval; and (vi) whether there are limitations on the ownership of shares (*e.g.*, the X%-rule).

100. An NV's annual report not only contains useful information on the past and expected course of business of the NV, but, pursuant to the Euronext Issuing and Listing Rules, also information on any anti-takeover devices involving the use of preference shares, priority shares, or depositary receipts. For example, it indicates to whom the NV has issued preference shares, with whom it has concluded subscription agreements for such shares, and who are the board members of any foundation to which the NV has issued (or granted a call option on) preference shares. It also indicates the names of the members who are on the board of any foundation that has issued depositary receipts as well as the natural or legal persons ultimately responsible for casting votes on priority shares. Pursuant to the recently adopted Act on Disclosure of Directors' Remuneration and Share Ownership (*Wet van 8 april 2002 tot [...] openbaarmaking van de bezoldiging en het aandelenbezit van bestuurders en commissarissen*, Staatsblad 2002, 225, which entered into force on September 1, 2002), an NV's annual accounts will also report the salary of each management and supervisory board member, any agreed termination payments (including 'golden parachutes'), and the number of the NV's shares or other securities that each board member holds.

101. The 1996 Act on the Disclosure of Major Holdings implements Directive 88/627/EEC on the information to be published when a major holding in a listed company is acquired or disposed of. This directive and two other directives (*i.e.*, Directive 79/279/EEC on coordinating the conditions for the admission of securities to official stock exchange listing and Directive 82/121/EEC on information to be published on a regular basis by companies the shares of which have been admitted to an official stock exchange listing) were consolidated into Directive 2001/34/EEC on the admission of securities to official stock exchange listing and on information to be published on those securities. The latter directive is currently under review as part of the Commission's 'transparency agenda'. The Commission is also preparing a revised directive on insider dealing and market manipulation and a revised directive on the prospectus to be published when securities are offered to the public or admitted to trading, both of which would impose additional and continuing disclosures.

102. See [www.autoriteit-fm.nl](http://www.autoriteit-fm.nl).

103. The Winter Report recommends that listed companies in all Member States be required to disclose their capital and control structures, for instance in their annual reports, their listing particulars and in prospectuses required to be published upon the issue of new securities. In addition, listed companies should be under a continuing disclosure obligation and be encouraged to use their websites as a medium to disclose information to shareholders. The information to be disclosed should, *inter alia*, include: (i) direct and indirect significant shareholdings, including holdings through 'pyramid structures' and circular and cross-shareholdings; (ii) board members' and employees' shareholdings and rights to acquire shares; (iii) ESOP control mechanisms, if the employees do not control the plan themselves; (iv) a description of all classes of shares (including non-listed shares) and the rights and obligations attached to these shares; (v) holders of shares with special control rights and a description of their rights; (vi) a description of the rules applicable to the appointment and removal of board members and the amendments to the Articles of Association; and (vii) a description of the powers of the management board, in particular whether the board may issue and cancel shares. See the Winter Report, p. 25.

104. Often NVs include the aggregate number of options granted to employees and their conditions in their annual accounts, in accordance with the Peters Commission Corporate Governance Recom-

proposals for broad disclosure obligations for listed companies.<sup>105</sup> Specifically, these proposals would:

(i) increase the frequency of financial reporting (to at least four times a year) and provide that a listed company's annual report be published publicly within three months of the end of each financial year;<sup>106</sup>

(ii) broaden the scope of the information to be published by listed companies under continuing disclosure obligations;<sup>107</sup> and

(iii) approve additional ways in which information may be disseminated.<sup>108</sup>

As the disclosure obligations proposed in the consultation paper are considerably wider in scope than those recommended by the Winter Report, if such obligations were adopted at EU level or in the Netherlands, they would result in more substantial legislative amendments than those outlined above.<sup>109</sup>

*12. A so-called break-through rule after takeover bids is another of the proposals in Issues Relating to Takeover Bids, the First Report of the High Level Group of Company Law Experts. Would this require amendments in the legislation in your country? How would these amendments be implemented (in company law, securities law, stock exchange regulations, etc.)?*

In the absence of a Dutch rule on break-through measures, the adoption of the break-through rule, as proposed in the Winter Report, would require amendments to Dutch law. These amendments would likely be incorporated in Dutch company law (Book 2 of the Dutch Civil Code).

If the draft Act on Break-Through Measures (see Introduction) were to be adopted by Parliament, however, Dutch law – which allows substantial asymmetry in voting rights – would differ in the following respects from the break-through rule as proposed in the Winter Report:<sup>110</sup>

**(i) Period.** The draft Act on Break-Through Measures only relates to the situation post-closing, after the bidder/majority shareholder has acquired at least 70% of the capital of the target, whereas the Winter Report also proposes a board-neutrality rule for the pre-closing period. In the pre-closing period, *i.e.*, the period before the acquisition of a majority stake, the bidder has little protection under Dutch law against takeover defenses invoked by the target NV, although the lack of a board neutrality rule is to some extent mitigated by the method of calculating compliance with the 70% threshold. Under the draft Act on Break-Through Measures, any shares which the NV issued after it received notice from the bidder/majority shareholder that it acquired 70% of the NV's capital are excluded, as are any preference shares or other shares primarily issued to protect the NV, whenever such shares were issued.

**(ii) Timing.** The draft Act on Break-Through Measures only allows a break-through after the expiration of a one-year waiting period following satisfaction of the 70% threshold. Under the Winter Report, however, a successful bidder may immediately upon the acquisition of the threshold percentage of risk-bearing capital invoke a break-through. The one year waiting period – a result of a compromise between the Association for the Securities Trade and the Listed Companies Association – has been fiercely criticized, as it provides the NV's management board with ample opportunity and time to frustrate the goal of the bidder/majority shareholder, for

recommendations. See S.C.J.J. Kortmann, N.E.D. Faber & E. Loesberg, *Corporate governance in perspectief*, 1998, p. 372.

105. See [europa.eu.int/comm/internal\\_market/en/finances/mobil/transparency/index.htm](http://europa.eu.int/comm/internal_market/en/finances/mobil/transparency/index.htm) for a general discussion of the EU's 'transparency agenda', and p. 8 of the May 8, 2002 consultation paper for a fuller description of the proposed disclosure obligations.

106. See p. 4, 5 and 6 of the May 8, 2002 consultation paper. The proposals include (i) quarterly interim reporting within two months after the end of the quarter, and (ii) a maximum publication period of three months for the annual report (currently this is 5 months, or under special circumstances, 13 months). In addition, with reference to the recommendations included in the Winter Report, the consultation paper proposes to include the following information in the annual report: (i) amounts, content, and identity of holders of shares with special control rights and a description of their rights (under the Euronext Issuing and Listing Rules this information is already included in the annual accounts); (ii) a description of the rules applicable to the appointment, dismissal and the powers of board members, in particular for issuing shares, and the amendment of the Articles of Association (currently this information is available in the NV's Articles of Association); (iii) a description of ESOPs, in particular a description of the control mechanism if they are controlled by a third person on behalf of the employees (currently, in accordance with the Peters Corporate Governance Recommendations, certain basic information regarding ESOPs may be found in the annual accounts); and (iv) information about the number of shares and the right to acquire shares (stock options), held by management (currently the aggregate number of shares and stock options owned by management are included in the annual accounts, pursuant to company law and the Peters Corporate Governance Recommendations. As of September 1, 2002, the number of shares and stock options are to be included on an individual basis in the annual accounts under the Act on Disclosure of Directors' Remuneration and Share Ownership).

107. With respect to continuing disclosure obligations, in particular the obligation to publish price sensitive information, the consultation paper refers to the proposed Market Abuse Directive which is expected to require NVs to publish all insider information immediately. It also proposes to upgrade the disclosure of voting and capital structures and to that effect envisages, among others, the following changes: (i) lower thresholds (starting at 5% and also introducing thresholds of 15% and 30%) to trigger the disclosure obligations regarding the acquisition or disposal of major holdings in companies; (ii) shorter time periods to inform the public that thresholds have been met; (iii) disclosure of voting rights under financial instruments that confer the right to acquire or sell shares; and (iv) disclosure of the contents of shareholders agreements as a whole.

108. NVs should have the possibility to disclose information not only via the press but also via electronic means. In addition, the consultation paper proposes to introduce a central filing as an additional means for NVs to disclose information.

109. The proposals included in the May 8, 2002 consultation paper are preliminary and no draft directive has been prepared yet. It is unlikely that the proposed draft regulation will be implemented into Dutch law in the near future.

110. In essence, the Winter Report seeks to eliminate takeover defenses that rely on asymmetries between the voting and economic rights associated with shares. To that end, it proposes rules that would override disproportionate shareholder voting rights in takeover situations. These override provisions would require votes to be counted strictly in proportion to the shareholders' interests in risk-bearing capital. They would have a pre-closing and a post-closing component. Pre-closing, a proportionality rule would apply at any general meeting of shareholders convened to vote on defensive action against a takeover bid. It would override multiple voting rights, voting caps, voting rights given to securities that are not part of risk-bearing capital (possibly including 'golden shares'), and other features that deviate from strict proportionality between risk-bearing capital and voting rights. Post-closing, the Winter Report recommends a break-through rule that would enable a successful bidder that has acquired some threshold controlling stake of the share capital (not to exceed 75%) to reverse any mechanisms contained in the target's Articles of Association or other constitutional documents that would prevent it from exercising its proportionate voting rights (multiple voting rights, vot-

example, by seeking a 'white knight', selling 'crown jewels', or installing 'golden parachutes'.

**(iii) Procedure.** Under the draft Act on Break-Through Measures, the bidder/majority shareholder must file a petition with the Enterprise Chamber stating its intentions concerning the NV, its proposed composition of the management and supervisory boards, and the measures it considers necessary to remove any relevant anti-takeover measures.<sup>111</sup> The Enterprise Chamber then appoints a panel of three experts, who report on that shareholder's intentions and the consequences of revoking the takeover defenses. The Enterprise Chamber may refuse measures of the first category<sup>112</sup> (i.e., measures aimed at giving the petitioner influence over the composition of management and supervisory boards through its vote in the general meeting of shareholders) if the NV proves that it is likely that the petitioner's intentions fundamentally violate the NV's interests or that it could be reasonably expected that the petitioner would not act in accordance with general principles of reasonableness and fairness. Such intentions and expectations are presumed to exist if the petitioner: (a) has not fulfilled obligations to disclose its shareholding; (b) has seriously violated public offer rules; (c) has, through its conduct, seriously violated the interests of the NV; (d) has, without economic necessity, terminated or endangered the existence of other enterprises under its influence; or (e) has not tried sufficiently hard to reach an agreement with the NV's management.

Besides these factors being vague and of potentially wide application, it is difficult to see the reason for the link between these factors and the refusal of relief in all cases. Nevertheless, the scope to make such presumptions renders the outcome of any court proceedings less certain.

Under the Winter Report, by contrast, a bidder who has reached the required threshold has the right to convene a general meeting of shareholders on short notice, in which he has the right to exercise voting rights in proportion to his holding of risk-bearing capital. The ability to cause any takeover measures to be removed is not dependent upon any judicial approval of the bidder's future intentions or past conduct.

**(iv) Scope.** The measures proposed in the draft Act on Break-Through Measures are broader in scope than those proposed in the Winter Report. The Winter Report limits break-through measures to amendments to the NV's Articles of Association. Under the draft Act, however, the Enterprise Chamber may not only make amendments to the NV's Articles of Association but may also order a special-purpose foundation that has issued depository receipts to exchange them fully for the underlying shares (overriding any provisions to the contrary), cancel preference and priority shares, and annul any board or shareholder resolutions.

As a result, even if the draft Act on Break-Through Measures were to be enacted prior to the adoption of the break-through rule proposed in the Winter Report, amendments to Dutch law would still be necessary to implement those recommendations fully. Since the draft Act is proposed to be included in Part 8 of Book 2 of the Dutch Civil Code concerning Dispute Regulation and the Right of Inquiry (*Geschillenregeling en het recht van enquête*), it is likely that the Winter Report recommendations, whether implemented before or after enacting the draft Act, would be included in that same Part.

13. In your view, would these two new rules as proposed have any material impact on the existing barriers to takeovers in your country (or in others as seen from your point of view)? It would be helpful if you could demonstrate the impact, or lack of it, by going through one or more recent takeover bids that failed in your country (or in some other member state, by a company from your country).

The response to this question differs for the proposed additional disclosure obligations concerning capital and control structures, and the proposed break-through rule. In our view, the proposed additional disclosure obligations are unlikely to have a material impact on cross-border acquisitions of NVs. While such obligations would facilitate the collection of information on capital and control structures, such information is already largely available under current rules.

On the other hand, the introduction of a break-through rule – in particular, in combination with a board neutrality rule, as proposed in the Winter Report – may be expected to encourage hostile takeover bids. At this stage, it is unclear whether a break-through rule will be included in a new proposal for the Thirteenth Company Law Directive on takeover bids. Moreover, it may be questioned whether such rules would achieve their stated objective of leveling the playing field for takeovers within Europe. The following considerations suggest that the proposals might well produce market distortions and other unintended effects.

**(i) Selectivity.** The proposed break-through rule overrides certain voting asymmetries and other takeover obstacles contained in the target's Articles of Association as well as certain resolutions of the board and the general meeting of shareholders. It does not, however, remove (and may be incapable of setting aside) a series of mechanisms with equivalent effect (e.g., 'pyramid structures', voting agreements among incum-

ing caps, voting rights given to securities that are not part of risk-bearing capital, and arguably, supermajority voting requirements in excess of those required by law) or its core control rights (exclusive right of a class of shares to make binding nominations for the appointment of board members, staggered appointments of board members, appointments of board members for fixed terms, etc.).

111. These measures (which may also be taken with respect to certain of the NV's Dutch subsidiaries) can be divided into two categories. The first category contains measures aimed at giving the petitioner influence (e.g., through a court order to exchange depository receipts for shares, to cancel preference shares that have been issued without pre-emptive rights, to undo a voluntary adoption of the 'large company' regime, or to amend the NV's Articles of Association to allow shareholders the power to appoint and to dismiss the members of the management and supervisory boards). The court would have to grant these measures unless the NV proves that it is likely that the requesting shareholder's intentions would fundamentally violate the NV's interests or that it could be reasonably expected that the requesting shareholder would not act in accordance with general principles of reasonableness and fairness. The second category contains measures aimed at providing the petitioner with control over the NV other than through the general meeting of shareholders and which may have more direct and far reaching consequences for other stakeholders (e.g., cancellation of priority shares, annulment of board or shareholder resolutions, or amendments to the Articles of Association other than amendments enabling shareholders to appoint the members of the management and supervisory boards). The court could only take those measures in circumstances where, after taking into account the other stakeholders' interests, it would be unreasonable and unfair to refuse them.

112. See previous footnote for a description of the measures of the first category.

bent shareholders, or control restrictions inherent in protective corporate governance structures provided by law, such as the 'large company' regime).

(ii) *No level playing field within Europe.* The resulting selectivity is likely to play out differently among Member States depending on prevailing mechanisms rooted in different corporate and share ownership traditions. In other words, the proposed break-through rule is too selective to achieve a level playing field. It may produce new distortions. There is a risk that it would cause a shift from takeover defenses within its scope to defenses outside of its scope. The latter include mechanisms that are arguably more harmful to market efficiency and transparency (e.g., 'pyramid structures').<sup>113</sup>

(iii) *No level playing field with the United States.* Although outside the scope of this report, the proposed break-through rule (as well as the proposed proportionality rule) may widen rather than narrow the gap between the European and U.S. 'markets for corporate control', which goes against the sense of increased globalization of the economy. The question is whether, in a longer-term perspective, it is strategically wise to turn Europe into a substantially more open takeover environment than the United States.

(iv) *Other harmful collateral effects.* The break-through rule proposed in the Winter Report may produce other undesirable side effects and market distortions:

(a) Especially when coupled with the proposed board neutrality rule, it would facilitate unfriendly takeover bids and reduce the incentive for negotiated transactions that, by and large, are more likely to produce more balanced solutions taking into account the interests of all stakeholders. There is a significant risk that corporate raids would concentrate on companies that have share ownership structures with asymmetrical voting rights, as such raids may be attracted by the perceived 'hidden value' purportedly suppressed by those voting structures.

(b) More generally, that provision, especially in combination with the proposed board neutrality rule, would effectively place a 'for sale' sign on EU-listed companies and, again, particularly those with asymmetrical voting structures. It is important to recognize the very real costs and inefficiencies in managing a company if it is continuously thought of as being for sale.

(c) The proposed break-through rule could cause increased difficulties for EU companies in raising funds as it would become harder to persuade investors to accept shares with preferential dividend and voting rights in compensation for the increased risk. More generally, companies having multiple classes of shares may face increased equity pricing uncertainties in the market.

The recent *Gucci* and *Rodamco* cases illustrate that the proposed board neutrality and break-through rules in their current form would not have a significant impact on takeovers in the Netherlands if a mandatory bid rule is not introduced simultaneously. Neither *Gucci* N.V. ('Gucci') nor *Rodamco* North America N.V. ('Rodamco') had any takeover defenses in place. In the case of *Gucci*, LVMH acquired a significant minority stake in *Gucci* (34% of the shares) and announced that, although it did not intend to launch a public bid for all remaining outstanding shares, it wanted to appoint a member to *Gucci*'s supervisory board. As the acquired significant minority stake effectively enabled LVMH to control *Gucci*'s general meeting of shareholders, the *Gucci* board felt compelled to invoke two takeover defenses: first, the implemen-

tation of an ESOP; and, second, a transaction with a 'white knight'.

In the case of *Rodamco*, Westfield acquired 24% of *Rodamco*'s outstanding shares from the Dutch pension fund ABP (ABP kept approximately 6% of *Rodamco*'s shares). Following its acquisition of this significant minority stake, Westfield requested that *Rodamco*'s management board change its strategy and call a general meeting of shareholders in which the shareholders could vote on the dismissal of the members of the management and supervisory boards and on the appointment of Westfield's candidates. Prior to its request, Westfield had indicated to *Rodamco* that it was not planning to make a public bid for all outstanding *Rodamco* shares. Since Westfield (together with ABP) effectively controlled the general meeting of shareholders, the *Rodamco* board decided to issue shares, and grant an option to acquire additional shares, to a special-purpose foundation as takeover defenses.

If these cases had occurred following the introduction of the proposed board neutrality and break-through rules, the board neutrality rule would not have been triggered in either case, as LVMH and Westfield each refused to make a public bid for all outstanding shares, although each effectively controlled the general meeting of shareholders. This refusal to make a public bid would have been prevented had there been a mandatory bid rule with sufficiently low thresholds, for example, for bidders that alone or acting in concert hold 30% of the outstanding shares. Furthermore, through introduction of the board neutrality and break-through rules, *Gucci* and *Rodamco* would have been prevented from invoking post-bid takeover defenses, and pre-bid takeover defenses could have been removed.

14. Below are a number of questions which may assist in a comparative analysis.

a. What are the main features of the relevant domestic takeover legislation constituting the company law and financial market regime, and who enforces it (independent regulators, regulatory bodies with appeal to ministry, stock exchange)? What is the extent of intervention by the takeover regulator(s) – to what extent does the regulator have wide or general discretion to block and play a protectionist role (for example, in its capacity as approver of the offer terms/documentation)?

**Domestic takeover legislation.** There are two sets of rules that are relevant to takeovers in the Netherlands, both of which entered into force on September 5, 2001.

First, the Securities Act – and its implementing rules in the Decree – apply to public offers by Dutch and non-Dutch bidders for voting securities that are listed on a recognized stock exchange in the Netherlands (i.e., Euronext) or that are 'reg-

113. The Winter Report, p. 39, states that the Group 'believes [that] pyramid structures should remain outside the scope of the break-through rule. They pose general problems also outside the context of a takeover bid. They undermine the transparency of the ownership structure of listed companies; they affect the pricing mechanism with regard to listed shares at all levels in the structure; they make control over companies belonging to such groups substantially incontestable, even when they are listed, or at least they make the acquisition of control of such companies extremely expensive; and finally, they create minority shareholders at several levels who directly and indirectly in total hold the majority of the risk bearing capital but are unable to exercise control at any level.'

ularly traded in the Netherlands' (*i.e.*, on the over-the-counter market or on an electronic trading platform) or for depositary receipts of, or other securities convertible into, voting securities.

Second, there is a body of 'soft law' rules contained in the Merger Code. In the event of an offer to acquire all issued securities of the target where (i) the bidder holds 50% or less of the securities of the target, (ii) the bidder or the target has at least 50 employees in the Netherlands, and (iii) the transaction would have a significant impact in the Netherlands, the bidder and the target are required to consult the relevant trade unions, if any, before reaching any agreement (if the bid is friendly) or launch of the bid (if the bid is hostile).<sup>114</sup>

**Role of 'supervisors'.** There are two bodies that play a role in the enforcement of the above-identified sets of rules: the Financial Markets Authority, and the Merger Code Adjudication Committee.

The Financial Markets Authority is an independent legal body, responsible for supervision of the Securities Act with wide investigatory and enforcement powers. The Financial Markets Authority does not approve the terms and conditions of any bid but has a ten-day statutory period to review the offering memorandum describing the terms of a bid and may require the inclusion of additional information. In addition, the Financial Markets Authority has the general power to issue instructions aimed at securing the adequate functioning of the securities markets and the protection of investors. Even though the Financial Markets Authority could, in theory, use these powers to delay or obstruct a bid, its discretion is limited and in most cases, subject to judicial review.<sup>115</sup> Moreover, it is our impression that, in the limited period of time during which the Financial Markets Authority has held these powers (since September 5, 2001), it has exercised its powers in an objective and non-discriminatory manner and has not favored or disfavored non-Dutch bidders.

The Merger Code Adjudication Committee, a special dispute resolution committee established by the Social and Economic Council, is empowered to hear complaints of alleged infringements of the Merger Code that are brought by trade unions or other parties involved in a proposed merger. Although the only possible sanction of the Merger Code Adjudication Committee is publication of its findings, bidders typically comply with the requirements of the Merger Code.<sup>116</sup>

*b. Are there restrictions on a board taking action to frustrate a bid that has been made? When do the relevant restrictions start to apply – earlier than a formal announcement/filing of a bid? To what extent can shareholders approve the taking of frustrating action in advance of any bid?*

An NV is, in principle, free to take any measures to prevent an unwelcome shareholder securing a dominant or substantial degree of control over the NV. When faced with a bid, the management board and supervisory board are required to consider the interests of all stakeholders in the NV. They do not owe an overriding fiduciary duty to shareholders.

Each of the four most common anti-takeover devices (*i.e.*, (i) the issuance of depositary receipts, (ii) the issuance of preference shares, (iii) the issuance of priority shares, and (iv) the voluntary adoption of the 'large company' regime) must be authorized by the general meeting of shareholders of the NV at some stage, either through the Articles of Association of the

NV or, in the case of priority or preference shares, through the adoption of a resolution authorizing the management board to issue such shares. All four measures may be implemented prior to the launch of a bid. In the case of preference shares, the issuance may be structured so that the actual issuance of the shares is outside the control of the NV (*i.e.*, through the grant of a call option over the shares to a special-purpose foundation).

The most common anti-takeover defense launched in light of a hostile bid is the issuance of, or the threat of issuing, preference shares. In light of the *Gucci* and *Rodamco* cases – although these cases have to be seen in their particular factual context – it can be said that the issuance of preference shares to a special-purpose foundation is permitted provided that (i) the issuance is aimed at temporarily 'neutralizing' the increasing influence of the bidder who, the management board believes, may not act in the best interests of the NV (including, the interests of the other shareholders), (ii) it is at costs that are not too burdensome to (indirectly, the shareholders of) the NV, (iii) the bidder is offered a fair opportunity to present its plans concerning the target to the target's shareholders, and (iv) the management board of the target is willing and in fact engages in talks with the bidder.

In addition, or as an alternative to issuing preference shares, the management board may decide to seek a 'white knight' or to convince the NV's shareholders that the bidder's offer is insufficient. Such actions may be combined with an undertaking on the part of the management board to distribute any excess cash to shareholders, to restructure the NV, or to alter the NV's strategic direction (including commitments to make particular divestitures or acquisitions).

*c. Are there restrictions on the type of consideration that can be offered in a bid, for example securities only if these are listed in the target country's home state or the EU?*

Except in the case of a 'tender offer', where the consideration offered must be in cash, a bidder may offer shareholders cash or securities or a combination of both. There is no requirement that any securities offered be listed securities.

114. In addition, a Dutch bidder must consult its works council before launching a bid while certain board actions of the Dutch target (*e.g.*, the issuance of preference shares to a foundation) may also be subject to prior works council consultation. See, *e.g.*, R.A.A. Duk, *Onvriendelijke overname en ondernemingsraad*, A-T-D, Opstellen aangeboden aan prof. mr. P. van Schilfgaarde, 2000.

115. Any decision of the Financial Markets Authority (including the refusal to take a decision) concerning a public offer is subject to a right of appeal before the Court of Appeal for Trade and Industry. Any decision of this court is final.

116. Since the adoption by Euronext of the Euronext Rule Book on October 29, 2001, members of Euronext (*toegelaten instellingen*) are no longer under an obligation to refuse to co-operate with a bidder who fails to comply with the provisions in the Merger Code. In theory, there is no penalty on violating the Merger Code, but in practice, we believe that members of Euronext most likely will not be willing to assist a bidder that, for instance, refuses to enter into trade union consultations.

d. Are there effective compulsory acquisition procedures regarding a small non-accepting minority? Can a bidder make its offer conditional on achieving the number of shares required so it can operate a squeeze out?

There are two effective methods to 'freeze out' minority shareholders:

**Buy-out procedure.** A shareholder who holds at least 95% of the issued share capital of an NV may initiate a buy-out procedure before the Enterprise Chamber requiring all other shareholders to transfer their shares to such shareholder at a price which is set by the Enterprise Chamber. The procedure typically takes between 6 to 12 months, but sometimes even longer if, for instance, one of the parties appeals the decision of the Enterprise Chamber to the Dutch Supreme Court (*Hoge Raad*). The Winter Report takes the view that the price offered in a takeover bid should be presumed to be a fair price if the bid has been accepted by shareholders holding 90% or more of the share capital with respect to which the bid has been made. If such a presumption were incorporated into Dutch company law, we believe that it would speed up a buy-out procedure significantly.

**Freeze-out merger.** A shareholder who holds a sufficient number of shares to be able to cause an amendment to the Articles of Association of the NV, may, unless the Articles of Association require a particular qualified majority vote in the case of a proposed merger, cause the target to merge into the bidder, provided that the bidder (which may be a special-purpose vehicle) is also a Dutch legal entity – see also our discussion of 'forward triangular' mergers in our response to Question 10. A freeze-out merger can be effected within 6 weeks.

In both cases, a bid can be made conditional upon the number of tendered shares being sufficient to commence a buy-out procedure or to cause the target to enter into a freeze-out merger.

e. Is there a principle of board neutrality? Can a target board align itself with a particular bidder or agree to measures such as exclusivity arrangements to protect a particular deal?

There is no board neutrality rule. Under Dutch company law, the management and supervisory boards are each under an obligation to act in the best interests of the NV, including the interests of all stakeholders (including, e.g., employees and shareholders), implying that each board should consider in good faith any competing bid or alternative proposal concerning the NV (such as any proposals aimed at keeping the company independent). Although entering into a lock-up or break-up fee arrangement that permanently forecloses a third-party bid or alternative proposal might be inconsistent with this duty, the propriety of the actions of the management and supervisory boards must be assessed in context. In certain circumstances, we believe that foreclosing other bids or proposals through the adoption of such measures may be justified (for example, if the NV simply has no time left to shop the NV around or to consider alternative proposals).

f. Can a target board hand over information to a potential bidder?

In a friendly bid, it is common practice for a bidder to be given the opportunity to perform a limited due diligence investigation. This investigation is sometimes followed by a more extensive due diligence inquiry after the public announcement of a bid. A target would normally require a bidder to enter into a confidentiality agreement (including a standstill provision) before the target shared any confidential information with the bidder. Both the target and the bidder would have to observe the strict Dutch insider trading laws which prohibit both the disclosure of, and trading on, inside information. In practice, parties often consult the Financial Markets Authority and the public prosecutor to seek confirmation that these prohibitions do not apply to their specific situation.

g. Are structures permitted which concentrate control rights in the hands of minority shareholders? Are structures permitted which place limitations/restrictions on voting rights, for example caps on voting rights above a certain threshold?

Dutch company law does not permit non-voting shares or multiple-voting shares.<sup>117</sup> As discussed in the Introduction, however, Dutch company law does allow a number of structures in which key control rights are concentrated in the hands of minority shareholders (e.g., through the issuance of priority shares) or a special-purpose foundation (e.g., through the issuance of depositary receipts or preference shares). In addition, there are a number of permitted corporate structures in which voting rights are not proportional to the shareholders' economic investments. For instance, Dutch company law permits an NV to issue two classes of shares with substantially different nominal values but identical economic rights and obligations. The voting rights must, subject to some limited exceptions, always be proportional to the nominal value of the shares. Consequently, by issuing two classes of shares at the same price but with one class of shares with a high nominal value (such as € 1,000) and the other class of shares with a low nominal value (such as € 0.01), control can be exercised by a party holding a small number of the shares with the high nominal value.

h. Can restrictions be placed on the transferability of shares either by the issuer (in Articles of Association or by other means) or by arrangements between shareholders? Can a board delay registering transfers of shares?

Transfer restrictions (*blokkeringsregelingen*) which require the prior approval of, for example, an NV's management board, can only be placed on non-listed registered shares (as

117. Dutch company law does, however, allow structures in which an NV's Articles of Association limit the number of votes that a shareholder may cast provided that shareholders who own the same amount of shares (as opposed to number of shares) may cast the same number of votes, and the Articles of Association do not favor the holders of larger amounts of shares over the holders of smaller amounts of shares. In addition, Dutch company law allows structures in which (i) a shareholder does not receive more than six votes if the authorized capital is divided into 100 or more shares, or (ii) a shareholder does not receive more than three votes if the authorized capital is divided into less than 100 shares.

opposed to bearer shares), although no transfer restriction may make a proposed transfer impossible or unduly burdensome. Shareholders are free to enter into an agreement preventing one or more shareholders from tendering their shares to another shareholder, but the existence of such an agreement would not void a transfer to a third party if the transferee had no knowledge of the shareholders' agreement. In addition, we do not believe that the provisions of such arrangements would be unenforceable, as is the case in Italy,<sup>118</sup> in light of an offer to acquire all issued (voting) securities of a target. A transfer cannot be delayed by the NV's management board as there is no legal requirement that a transfer be registered by the board in order for it to become effective.

*i. What contractual barriers (including shareholder agreements) to takeover bids are in use in public companies (e.g., 'golden parachutes', change of control provisions triggering default of loan agreements, or winding up or change of control of joint ventures)? What are the prospects of review by courts on the basis of contract or company law and by regulators on the basis of securities laws or stock exchange regulations?*

There are a large number of 'contractual barriers' which might be triggered upon the launch of a bid or upon a change of control, including 'golden parachutes' for key personnel (generally considered to be valid so long as the amounts to be paid out are not excessive and there are no 'single triggering' events), change of control clauses in various contracts (including loan agreements, joint venture agreements, leases or any other key contracts), and break-up fee arrangements (generally considered to be valid provided that the arrangement has the purpose of compensating the non-terminating party for its reasonable costs). In general, management boards of NVs have considerable discretion to adopt such 'contractual barriers' and the limited case law and publications from legal commentators suggest that Dutch courts would only step in to remove a 'barrier' (on the basis that its adoption constituted corporate mismanagement or was *ultra vires*) if there had been no commercial justification for its erection and it had been erected solely to deter a third party from launching a bid or presenting an alternative proposal by destroying the target's value (e.g., through 'crown jewel' arrangements or by having the target run up significant unnecessary costs).

*j. Are there current proposals to change the legislation relating to takeovers?*

As discussed in the Introduction and in our response to the questions, various legislative proposals are pending or expected in the area of takeovers and corporate governance:

- (i) the Government launched a public consultation on January 30, 2002, concerning the introduction of a mandatory bid;
- (ii) the Government set up at the beginning of 2002 a committee consisting of international experts to study possible ways to implement an effective proxy-solicitation system;

(iii) the current public offer rules, contained in the Decree, are being reviewed and a draft Decree amending the current rules is expected to be published in 2003;

(iv) a proposal is pending to reform the 'large company' regime;

(v) a proposal is pending to grant voting rights to holders of depositary receipts and to introduce a requirement that shareholders vote on major corporate resolutions that would affect the nature of an NV's business; and

(vi) a proposal is pending concerning the removal of anti-takeover measures.

## C. Conclusion

Dutch merger control rules do not, in our view, present serious obstacles to cross-border transactions that do not have appreciable adverse competitive effects. Dutch merger control is administered competently and without bias. As always, there is room for improvement – mainly on procedural issues. More fundamentally, the burdens associated with multi-jurisdictional filings could be further alleviated through the harmonization of Member States' notification thresholds, information requirements, and substantive review standards.

Dutch company law presents a greater number of issues relevant to cross-border takeovers. The 'large company' regime under Dutch company law makes an NV a less attractive target and may, therefore, dissuade takeovers. Governmental or regulatory approvals for takeovers are required in a number of industry sectors, including finance, insurance, and utilities. Dutch or EU nationality and residency requirements apply in the shipping and aviation sectors. Finally, the Dutch State maintains controlling shareholdings in key Dutch listed and non-listed companies in certain sectors such as the telecommunications, postal, and aviation sectors. With some possible exceptions, however, these arrangements would appear to meet the criteria developed by the European Court of Justice in the application of the EC Treaty's provisions on the freedom of establishment and the free movement of capital.

Finally, Dutch legal and business culture have traditionally been tolerant of the use of a variety of anti-takeover measures. Specific anti-takeover measures employed by NVs are practically impossible to overcome. Recent political debate and case law, however, show that this tolerance is fading as the Netherlands shifts from a consensus-driven 'stakeholder model' to a more Anglo-American-style 'shareholder model'. This may be expected to reduce some of the existing obstacles to domestic and cross-border acquisitions of NVs – and may foreshadow greater changes to the regulation of M&A activity in the Netherlands.

118. See Article 123(3) of Legislative Decree No. 58 of February 28, 1998, the Unified Financial Act (*Testo Unico dell'Intermediazione Finanziaria*).