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# Below threshold merger control in the Netherlands

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VIII Biennial Conference of the Italian Antitrust  
Association Florence 2025

Markets that work well for people and businesses



# Merger control in The Netherlands

Current status of merger control:

- Turnover threshold of €30 million or more
  - Threshold unchanged since early '00
- Approx. 130 filings a year
- 50-60% of filings approved under 'simplified procedure'
- ACM calls for an update of Competition Act in The Netherlands
  - Call-in power for below threshold mergers
  - New Competition Tool



# Background: the need for a call-in

## Background and need for a call-in (i)

Cause: developments in (EU-) markets in the past years and recent legal developments (for example Illumina/Grail)

- **Digitalization:** emerging and/or rapidly developing markets
- **Consolidation** (see e.g. recent EU-report Protecting competition in a changing world)
- **Increased ‘productivity’ of private equity** companies in various sectors (f.i. health care, day care, digital teaching materials)
- Increased number of **killer acquisitions** and **roll-up strategies** (also by PE)
- Smaller mergers can cause competition risks / referral to EC



# Envisaged call-in system

# Envisaged call-in system (i)

General principles:

- Alignment with the current regime as much as possible
  - Procedure
  - Forms (form CO/prenotification)
- Substantive assessment remains unchanged
- More efficient allocation of ACM-resources: focus on potential problematic transactions by decreasing the number of merger filings, less decisions under simplified procedure

## Envisaged call-in system (ii)

Conditions to call-in:

- **Asymmetrical threshold:** one of the undertakings concerned meets the usual thresholds for a merger filing (EUR 30 mln)
  - Possibility that the regular thresholds will be increased due to inflation (thresholds date back to 2002)
- **Test:** indications of competition risks --> possible significant lessening of competition

## Envisaged call-in system (iii)

Conditions to call-in:

- **Timeline:** between 1 and 3 months. Still open: when does the timeline commence?
  - Possible scenario: When a takeover bid has been announced; a merger agreement has been concluded
  - Undertakings can send a 'notification letter' which can 'start the clock' of thresholds
- Formal and informal guidance eligible





# Current state of affairs

## Current state of affairs (i)

- Extensive discussions with law makers (ministry of Economic affairs)
  - Main question: why are call in powers useful and necessary?
  - Workshop on below threshold mergers and call-in (past July)
    - Lawyers, legal scholars, policy makers, other Dutch authorities
    - Main concerns: necessity, legal certainty and alternatives (f.i. transaction value, share of supply)
- Initiative bill on call-in for ACM, Parliamentary questions on small but (possible) problematic mergers
  - Recently held public consultation: main concerns regarding legal certainty

## Current state of affairs (ii)

- ACM recently investigated a buy & build strategy merger (Foresco)
  - 15 take acquisitions since 2019, 4 above threshold
- ACM is currently investigating a possible KA merger (Brinks) with use of Towercast / art. 102
  - Acquisition already took place (below threshold so no notification needed)
- PE buy & build mergers continue to cause concerns in politics & media
- Business associations: proposal perceived as quite logical, no fundamental objections; concerns mainly on administrative burden & legal certainty
- Parliamentary debate on 12<sup>th</sup> of June concerning the state of competition policy in the Netherlands => delayed



# Questions?