



Dutch Court annuls approval of merger

The District Court of Rotterdam has annulled a decision in which the Dutch Authority for Consumers and Markets (ACM) approved the acquisition of Iddink by Sanoma Learning. This is the second time in 12 months that an approval decision by the relevant Dutch authorities has been annulled by the court. The legal consequences for the transactions remain unclear.

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The merging parties

On 1 October 2019 Sanoma Learning completed the acquisition of Iddink, a distributor of schoolbooks. Sanoma Learning is active in the field of media and education. Through its subsidiary Malmberg, Sanoma Learning is a publisher of (digital) educational materials for secondary education. Iddink is a distributor of (digital) educational materials. Iddink also owns Magister, an electronic learning environment (ELO) and student administration system (SIS) that many secondary schools in the Netherlands use. Through ELO, Magister offers teachers and students access to digital materials of publishers such as Malmberg.

ACM's approval under certain conditions

On 28 August 2019, the ACM cleared the concentration under certain conditions. The ACM analysed four theories of harm and concluded that for two of those, the concentration would cause competition issues. The ACM concluded that the merged entity would be able to favour Malmberg's educational materials above those of its competitors' materials by applying more favourable conditions regarding the connection with ELO and SIS materials of Magister. Secondly, according to the ACM, Malmberg could have gained insight into commercially sensitive information of its competitors through Iddink, because Iddink has sensitive information of publishers.

Sanoma Learning provided commitments to address the identified competition concerns. To prevent Malmberg's competitors from having poorer chances of offering their materials through Magister, Sanoma Learning agreed to grant all publishers, i.e. competitors of Malmberg, access to Magister under the same conditions as Malmberg. To address the second competition issue, Sanoma Learning committed to ensuring that no commercially sensitive information of competitive publishers would reach Malmberg through Iddink.

Court or Rotterdam annuls decision

A competitor of Malmberg appealed the clearance decision of the ACM before the District Court of Rotterdam.

According to the competitor of Malmberg, the ACM should have refused to approve the concentration, among other things, because:

- the conditions imposed by the ACM did not take away the identified competition problems, and
- the ACM failed to assess adequately the possibility of bundling the materials of Malmberg with the ELO- and SIS-materials of Magister and the incentive to do so.

The Court confirms that the conditions to the concentration as set out by the ACM are appropriate to take away the identified competition concerns.

However, according to the Court, the ACM should have conducted more research into the possible demand of schools for a bundle of the ELO and the digital materials. If there is demand for a bundled offering, the merged entity may foreclose competitors. Therefore, the Court [annulled](#) the decision of the ACM on 4 March 2021 and ordered the ACM to further assess the need of schools to bundle ELO and the digital learning materials. The decision does not impose any obligations on Sanoma Learning.

Consequences of annulment?

The ACM has announced that it will assess the possibility of bundling and that the decision will be reviewed. It is unclear how long this assessment will take and when a new decision will be taken. Furthermore, it is uncertain what consequences the annulment of the approval decision has for the completed transaction. The decision licensing the transaction has been annulled. Article 41 of the Dutch Competition Act prohibits the completion of a transaction without a licence if a licence is required pursuant to the Dutch Competition Act. The annulment of the decision could potentially lead to an obligation to reverse the transaction. However, the Court did not address these issues.

Previously, we wrote [an article](#) about the annulment of the approval decision granted by the Minister of Economic Affairs and Climate Policy regarding the acquisition of Sandd by PostNL. The Minister stated that the judgment did not mean that the concentration between PostNL and Sandd would be dissolved, but that the concentration does not have the required licence. The Court explicitly stated that it was aware of the far-reaching consequences of the annulment of the contested decision and that it was questionable whether the concentration could still be reversed. The Court found however that allowing PostNL's request to maintain the legal consequences of the license decision would inadvertently affect the legal protection of the possibility to appeal decisions made under Article 47 of the Dutch Competition Act.

The Minister appealed the Court's judgment on 21 July 2020. In a letter dated 21 August 2020, the Minister informed Parliament that she would take a new decision under Article 47 of the Dutch Competition Act, because the appeal would not suspend the Court's judgment. The Minister announced that the decision could be expected before the end of the year 2020. However, the Minister has at time of writing (8 April 2021) not yet taken a new decision. In the meantime, the merged entity still exists.

Although annulment of the approval decision in the PostNL/Sandd case differs from the one involving Sanoma Learning and Iddink, in both situations it is unclear what the consequences are of the annulment of an approval decision. Furthermore, there are no legal time limits within which a new decision should be taken by the ACM or the Minister.

In our opinion the legislator should, for the sake of legal certainty, provide some clarity as to the consequences of the annulment of an approval of a concentration.

A Dutch version of this article is available at <https://www.vandoorne.com/Kennisbank/acm-opnieuw-de-schoolboeken-in/>