Dutch competition authority prohibits in rare decision merger between baking companies and dismisses divestment remedies as it is not convinced of lasting competitive force of potential buyers

In its decision of 14 December 2012 (Case 7321), the Dutch competition authority ("NMa") concluded that the proposed acquisition of A.A. ter Beek (known from its flagship brand Bolletje) by Continental Bakeries, would result in high market shares for the parties and leave only one credible alternative competitor. Dismissing the proposed remedies, the NMa refused to grant a licence for the merger as it would significantly impede competition. The NMa's decision is remarkable since it is one of the very few instances where it has blocked a merger, notwithstanding the proposed remedies.

In its decision, the NMa first of all concluded that the acquisition would create a large rusk producer with a market share of 70-80%. Furthermore, after the proposed acquisition, retailers would be dependent on two instead of three producers for their tenders of private label rusk. The NMa subsequently assessed whether there would remain sufficient competitive pressure to discipline the parties concerned.

To this end, the NMa assessed whether it was likely for new rusk producers to enter the Dutch rusk market. It concluded that because the rusk market is stable in size and given the fact that there is overcapacity, investments in new production capacity by current rusk producers and new entrants were deemed both risky and unlikely. In addition, it was found that there was insufficient competitive pressure from other rusk producers as well as limited countervailing buying power.

On the basis of the above the NMa concluded that the transaction would result in a significant impediment of effective competition on the rusk production market. To address the NMa's concerns, the parties offered to divest one of the rusk production lines. However, the NMa dismissed the parties' proposal, by holding that the buyers of the production line would need to have the opportunity as well as the incentive to actually remain active on the concerned market.
According to the NMa, it was insufficiently certain that the potential buyers would actually make the required investments. And in the event that they would do so, it would be possible to recoup these investments within a period of one year. Afterwards, the production of rusk by the new producer would not be guaranteed, as the costs of exiting the market were deemed low.

The decision of the NMa seems to be in line with its policy, as set out in the Remedy Guidelines, that the buyer of the divested business must have the incentive to compete in a lasting manner. Unfortunately, it does not follow from the public version of the decision why the buyers that were proposed by the merging parties failed to meet this condition.