Netherlands

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LEGAL FRAMEWORK

Antitrust law

1 What are the legal sources that set out the antitrust law applicable to vertical restraints?

Article 6 of the Dutch Competition Act (Mw) prohibits restrictive agreements. The Explanatory Memorandum to the Act explicitly states that article 6 Mw applies to both vertical and horizontal agreements. The prohibition mirrors article 101 of the Treaty on the Functioning of the European Union (TFEU). It prohibits agreements between undertakings, decisions by associations of undertakings and concerted practices that have as their object or effect the prevention, restriction or distortion of competition. Articles 12 and 13 Mw provide that Regulation 330/2010/EU (the EU Vertical Agreements Block Exemption Regulation (VBER) and the corresponding guidelines concerning vertical agreements have direct effect in Dutch competition law.

Types of vertical restraint

2 List and describe the types of vertical restraints that are subject to antitrust law. Is the concept of vertical restraint defined in the antitrust law?

The Dutch Competition Act does not contain a definition of vertical restraints. Regulation 330/2010, which applies directly in the Netherlands, provides that vertical restraints include, among others, minimum and fixed resale prices, territorial and customer restrictions, exclusive supply and purchase obligations, as well as selective criteria and obligations imposed in the context of selective distribution and franchise agreements.

Legal objective

3 Is the only objective pursued by the law on vertical restraints economic, or does it also seek to promote or protect other interests?

The aim of the law is to ensure competition and protect consumers. There have been several cases in recent years where parties have argued that the protection of consumers should be interpreted widely to include the consumer of the future and society as a whole, not only in the Netherlands but also abroad. These cases include an agreement relating to the quality of life of chickens and a boycott by supermarkets of farmers who fail to provide such quality; an agreement to close old coal-powered power plants; an agreement to take action to ensure a fair wage for workers in the textile industry in developing countries. The Authority for Consumers and Markets (ACM) found, however, that these agreements did not lead to sufficient advantages of which it could take account under the competition rules and which could counterbalance the restrictive effect.

The ACM has set itself the goal of making markets work for people and businesses. It prioritises cases with the aim of making the greatest impact with the resources available. Economic damage, public interest and the best solution available are all relevant factors in determining priorities.

The ACM has not prioritised vertical restraints in recent years, as such restraints can have both positive and negative effects. For years, the ACM has taken the position that where there is sufficient inter-brand competition, the positive effects generally outweigh the harm caused. It suggested that it would only investigate vertical restraints where there is evidence of significant harm to consumer welfare. This has now changed. Undoubtedly fuelled by developments in markets, e-commerce and a rising trend of more active enforcement by other competition authorities in Europe, the new Chairman of the ACM, Martijn Snoep, has indicated that the ACM shall prioritise vertical restraints. The ACM carried out several dawn raids in respect of alleged resale price maintenance at the end of 2018 and in 2019.

Responsible authorities

4 Which authority is responsible for enforcing prohibitions on anticompetitive vertical restraints? Where there are multiple responsible authorities, how are cases allocated? Do governments or ministers have a role?

The Authority for Consumers and Markets (ACM) is the supervising authority responsible for enforcing the prohibition of anticompetitive vertical restraints. The ACM is the successor to the Dutch Competition Authority (NMa), which was active from 1 January 1998 until 1 April 2013. The ACM is an amalgamation of the NMa and two other regulators: the Dutch Consumer Authority and the Dutch Independent Post and Telecommunications Authority.

The ACM is an autonomous administrative authority without legal personality. It is not officially part of any ministry; however, the Ministry of Economic Affairs and Climate Policy (the Ministry) is politically responsible for the ACM. Despite this, the ACM takes its decisions independently of the Ministry. The Ministry can only annul ACM decisions on general policy and only in the circumstance that the ACM lacks jurisdiction to take the decision. The Minister cannot annul individual decisions, subject to a very limited exception in the case of mergers. Such exception has recently been used for the very first time.

Jurisdiction

5 What is the test for determining whether a vertical restraint will be subject to antitrust law in your jurisdiction? Has the law in your jurisdiction regarding vertical restraints been applied extraterritorially? Has it been applied in a pure internet context and if so, what factors were deemed relevant when considering jurisdiction?

The Netherlands applies an 'effects doctrine'. Article 6, paragraph 1 of the Dutch Competition Act specifically states that agreements that have the aim or effect of restricting competition on the Dutch market are prohibited. The territorial scope is determined by where the effects of the agreement are felt. The location of the companies in question and place where the agreement was concluded, are irrelevant. As a result, if foreign companies enter into an agreement abroad that distorts competition in the Dutch market, regardless of the intention of the parties, the Authority for Consumers and Markets (ACM) is authorised to act. The ACM has, for example, acted against German shrimp producers whose agreement had an effect in the Netherlands. The case concerned a horizontal agreement. As yet, there are no examples of cross-border intervention by the ACM in the case of vertical restraints.

Agreements concluded by public entities

6 To what extent does antitrust law apply to vertical restraints in agreements concluded by public entities?

The Dutch competition rules apply to undertakings. The concept of an undertaking is defined by reference, in article 1 of the Dutch Competition Act, to European rules. An undertaking is an entity engaged in an economic activity, regardless of the legal status of the entity or the way in which it is financed. A public entity may, therefore, qualify as an undertaking and be subject to the Competition Act. This is not the case when the public entity is performing a government task.

Where a public entity engages in an economic activity, the code of conduct laid down in the Dutch Act on Government and Free Markets, which amends the Dutch Competition Act, applies. This provides:

- an obligation to charge integral costs for products or services put on the market;
- a prohibition on favouring public companies;
- a prohibition on using data received as a result of a public task which is not available under the same conditions to non-public undertakings; and
- the obligation of a functional separation between administrative tasks and economic activities.

If the Authority for Consumers and Markets suspects a violation of the code of conduct and thus unfair competition, it can start an investigation and impose penalty payments to ensure termination of the violation. The code of conduct does not apply if a public entity takes a formal decision to the effect that the activity concerned serves the public interest. The current coalition government (the Third Rutte cabinet) wishes to limit this public interest exception. It failed to do so before the law had to be extended. It is likely to apply in its current form until 1 July 2021. However, jurisprudence suggests that the public entity needs to motivate decisions qualifying an activity as in the public interest.

Sector-specific rules

7 Do particular laws or regulations apply to the assessment of vertical restraints in specific sectors of industry (motor cars, insurance, etc)? Please identify the rules and the sectors they cover.

The markets for energy, telecom, post, public transport and healthcare are (partially) regulated with the aim of guaranteeing sufficient choice and quality at an affordable price. The regulation includes, in some cases, the determination of (maximum) tariffs. The Authority for Consumers and Markets (ACM) can also open access to networks for example in the telecom and postal markets.

Furthermore, there is a specific law providing for fixed prices for books. This law aims to ensure broad availability and diversity of books. Fixed pricing, which prevents fierce price competition as concerns best sellers, aims to achieve this goal.

Article 15 of the Dutch Competition Act (Mw) provides that the ACM can adopt national block exemptions from the prohibition. It has adopted two generic exemptions. The first concerns sector protection agreements for shopping centres. Based on this exemption, a company that owns or manages a shopping centre and a retailer can agree that no other undertakings trading in similar goods or services shall establish a shop in that shopping centre. Provided that the agreement meets certain requirements (including a maximum duration of six years), it is exempted from the prohibition of restrictive agreements. The second exemption concerns cooperation agreements in retail; under strict conditions, joint sales campaigns are permissible. The ACM may, under certain circumstances, withdraw the benefit of the block exemption.

As a consequence of articles 12 and 13 Mw, the EU Vertical Agreements Block Exemption Regulation, the Technology Transfer Block Exemption and the specific vertical exemption relating to motor vehicles (Regulation 461/2010), are also directly applicable in the Netherlands.

General exceptions

8 Are there any general exceptions from antitrust law for certain types of agreement containing vertical restraints? If so, please describe.

The third paragraph of article 6 of the Dutch Competition Act (Mw) provides for the individual exemption of certain agreements that otherwise fall within the prohibition of the first paragraph of article 6 Mw. The criteria for the benefit of such exemptions are identical to those of article 101 paragraph 3 TFEU. Article 7 Mw contains the 'bagatelle' or de minimis provision. It provides that an agreement is not caught by article 6 Mw if:

- no more than eight undertakings are involved in the agreement; and
- the combined turnover of all those involved does not exceed €5.5 million (in the case of goods), or €1.1 million (in the case of services).

In these circumstances, even hardcore restrictions are exempt.

Article 7 Mw, paragraph 2, provides an exemption for horizontal agreements between undertakings whose market share does not exceed 10 per cent, provided there is no effect on trade between member states. There is no national exemption for vertical agreements given the exemption under the EU Vertical Agreements Block Exemption Regulation (VBER), which applies where market shares do not exceed 30 per cent. However, unlike the article 7 exemption, the VBER does not exempt hardcore restrictions. Consequently, vertical agreements with a purely national effect are assessed more stringently than horizontal agreements with a purely national effect.

The VBER and the accompanying guidelines are, as a consequence of articles 12 and 13 Mw, directly applicable in the Netherlands.

TYPES OF AGREEMENT

Agreements

9 Is there a definition of 'agreement' – or its equivalent – in the antitrust law of your jurisdiction?

The Dutch Competition Act refers to article 101 TFEU for a definition of 'agreement'. The Explanatory Memorandum to the Act also explains that the concept of agreements in article 6 of the Dutch Competition Act (Mw) mirrors article 101 TFEU as closely as possible.

10 In order to engage the antitrust law in relation to vertical restraints, is it necessary for there to be a formal written agreement or can the relevant rules be engaged by an informal or unwritten understanding?

There are no formal requirements for an agreement. Agreements may be concluded orally as well as in writing. The existence of an agreement may be established based on the conduct of the parties concerned.

Concerted practices are also caught by Dutch antitrust law. According to article 6 Mw, which mirrors the definition in article 101 TFEU, 'concerted practices' are: 'a form of coordination between undertakings which, without having reached the stage where an agreement properly so called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition'.

Parent and company-related agreements

11 In what circumstances do the vertical restraints rules apply to agreements between a parent company and a related company (or between related companies of the same parent company)?

An agreement between undertakings that form part of the same economic entity is not regarded as an agreement between undertakings within the meaning of article 6 of the Dutch Competition Act, but as an agreement within one and the same undertaking. A parent company and its subsidiary form part of the same economic entity if the parent company has decisive influence over the strategic behaviour of the subsidiary. Relevant factors include the level of shareholding, representation of the parent on the board and evidence that instructions are given. The single economic entity concept is thus approached from a functional perspective. When it comes to entities that are subject to joint control of two or more parents, the situation is, however, less clear, calling for a case-specific assessment of all economic, organisational and legal links between the subsidiary and the parent company.

Agent–principal agreements

12 In what circumstances does antitrust law on vertical restraints apply to agent–principal agreements in which an undertaking agrees to perform certain services on a supplier's behalf for a sales-based commission payment?

Article 7:428 of the Dutch Civil Code provides the circumstances in which an agreement qualifies as agency under civil law. In principle, agency agreements fall outside the scope of article 6 of the Dutch Competition Act, provided the principal bears the commercial and financial risks of the sale. In those circumstances, most vertical restrictions contained in the agency agreement do not infringe competition law. Restrictions in the agreement regarding the relationship between the agent and the principal – such as an exclusivity provision whereby the agent agrees only to act for one principle – may comprise an infringement of (Dutch) competition rules.

13 Where antitrust rules do not apply (or apply differently) to agent-principal relationships, is there guidance (or are there recent authority decisions) on what constitutes an agent–principal relationship for these purposes?

The Dutch Competition Act follows the European Guidelines on Vertical Restraints as concerns the assessment of agent–principal relationships.

Intellectual property rights

14 Is antitrust law applied differently when the agreement containing the vertical restraint also contains provisions granting intellectual property rights (IPRs)?

The EU block exemption for Technology Transfers Agreements (TTBER) has direct effect and is consequently applicable to agreements whose primary object is the transfer of IPRs. If the transfer of the IPRs is not the primary objective of a vertical agreement, the EU Vertical Agreements Block Exemption Regulation is applicable.

ANALYTICAL FRAMEWORK FOR ASSESSMENT

Framework

15 Explain the analytical framework that applies when assessing vertical restraints under antitrust law.

Article 6 of the Dutch Competition Act (Mw) distinguishes between agreements that have the object of restricting competition and agreements that, although they lack such object, nevertheless potentially negatively affect competition. Object restrictions are restrictions that on the basis of experience and taking account of the applicable legal and economic circumstances can be presumed to have a sufficiently deleterious effect on competition and are therefore prohibited under article 6 Mw. Restrictions that do not have an anticompetitive object only fall under the prohibition if they (potentially) have a harmful effect on competition. Both object and effect restrictions are permissible if they fulfil the criteria for exemption in article 6(3) Mw (similar to article 101(3) TFEU). In practice, an object restriction is unlikely to meet such criteria.

In line with European case law, the Dutch court rules that, to determine whether a restriction constitutes an object restriction, the economic and legal context must be considered. As a result, in a case concerning the Dutch Institute for Psychologists, the highest Dutch court ruled that an agreement on price does not necessarily qualify as an object restriction if price is not a relevant parameter of competition. The court of Rotterdam came to a similar conclusion in the LHV case concerning alleged market division. Although these cases concerned horizontal agreements, they illustrate that Dutch courts consider all the circumstances when deciding whether a provision qualifies as an object restriction.

The case law of the Dutch administrative and civil courts required for several years that the party claiming a breach needed to establish that a restriction which qualified as an object restriction also met the criterion of appreciability. This is contrary to the jurisprudence of the Court of Justice (in *Expedia*). The line of case law of the Dutch courts has recently been overturned. In cases relating to veterinary surgeons (civil courts) and flour (administrative courts), it was held that if a restriction is held to qualify as an object restriction, the appreciability of the restriction is no longer in question. Effectively, this is part of the assessment of whether the restriction can be held to have a sufficiently deleterious effect to qualify as an object restriction.

However, if the criteria of article 7 Mw are met, an object restriction will not fall under the prohibition of article 6 Mw. It will fall under the EU law prohibition if it has an effect on trade between member states.

Market shares

16 To what extent are supplier market shares relevant when assessing the legality of individual restraints? Are the market positions and conduct of other suppliers relevant? Is it relevant whether certain types of restriction are widely used by suppliers in the market?

Supplier market shares and market coverage are relevant to the assessment of the likely effect of the restriction on competition. If the market share is under 30 per cent, the restraint may benefit from the EU Vertical Agreements Block Exemption Regulation (VBER). However, the benefit of the VBER may be withdrawn if the restriction is widely applied. If there are parallel networks of vertical agreements that have similar anticompetitive effects and these networks cover more than 50 per cent of a given market, the VBER may not exempt restrictive agreements between undertakings, even where their market share is under 30 per cent.

Article 7 of the Dutch Competition Act, paragraph 2, provides an exemption for horizontal agreements between undertakings whose market share does not exceed 10 per cent, provided there is no effect on trade between member states. There is no national exemption for vertical agreements given the exemption under the VBER, which applies where market shares do not exceed 30 per cent. However, unlike the article 7 exemption, the VBER does not exempt hardcore restrictions. Consequently, vertical agreements with a purely national effect are assessed more stringently than horizontal agreements with a purely national effect.

When assessing the negative effects of vertical agreements, the strength of other suppliers and of inter-brand competition will be relevant. If such competition is significant the effect of vertical restrictions is likely to be (more) limited. A party imposing a vertical restriction will have to take into account competition from other suppliers.

17 To what extent are buyer market shares relevant when assessing the legality of individual restraints? Are the market positions and conduct of other buyers relevant? Is it relevant whether certain types of restriction are widely used by buyers in the market?

Buyer market shares and those of the buyer's competitors are also relevant when assessing the likely anticompetitive effect of vertical restraints.

BLOCK EXEMPTION AND SAFE HARBOUR

Function

18 Is there a block exemption or safe harbour that provides certainty to companies as to the legality of vertical restraints under certain conditions? If so, please explain how this block exemption or safe harbour functions.

Articles 12 and 13 of the Dutch Competition Act (Mw) together provide for the application of European Block Exemption Regulations in Dutch cases. Article 12 Mw specifically concerns cases in which article 101 TFEU applies, while article 13 concerns cases where there is no effect on trade and article 101 does not apply. The EU Vertical Agreements Block Exemption Regulation, the Technology Transfer Block Exemption and the specific vertical exemption relating to motor vehicles (Regulation 461/2010) apply in the Netherlands.

Article 15 Mw gives the Dutch government the possibility to adopt national block exemptions.

TYPES OF RESTRAINT

Assessment of restrictions

19 How is restricting the buyer's ability to determine its resale price assessed under antitrust law?

Resale price maintenance (RPM) falls under the prohibition of article 6 of the Dutch Competition Act (Mw). However, such practice is not always easily established; RPM may take the form of a minimum or fixed price. Recommended prices with the same effect also comprise RPM. In its Guidelines on arrangements between suppliers and buyer (Guidelines), the Authority for Consumers and Markets (ACM) gives an example of a supplier forcing an online store to sell their products for €100. If the online store charges a lower price, the supplier will no longer supply to online store. Therefore, the online store charges the resale price imposed by the supplier.

In the past, the Dutch courts have held that, where an object restriction is established, it is still necessary to establish appreciability. This was also held to be the case with RPM. In the 2010 *Secon* case, the Dutch Competition Authority (NMa) (the predecessor of the ACM) found that the agreement on minimum advisory prices had the object of restricting competition. The Dutch court ruled, however, that the NMa had failed to show appreciability. This line of case law has now been overturned.

Until recently, key in the strategy and enforcement priorities of the ACM (set out in its 2015 strategy and enforcement priorities regarding vertical agreements (the Vision Document), which has been overturned by the Guidelines) regarding vertical agreements, and therefore also with regard to RPM, was the eventual effect on consumer welfare. Based on economic literature and empirical research, however, the ACM drew the conclusion that vertical agreements often benefit consumer welfare. Whether an investigation into a vertical restraint such as RPM would be prioritised depends on the level of market power of the relevant distribution chain; whether a similar vertical restriction is applied in parallel networks; whether the restriction is imposed by the retailers itself (which the ACM considers as more problematic as it will not be motivated by efficiency goals); and whether there are efficiency benefits (for example, to ensure high service levels or to prevent free-rider problems). The ACM indicated it believed, if there was sufficient inter-brand competition, vertical restraints, including RPM, will most likely be harmless or even beneficial for consumers.

However, last year, the Chairman of the ACM, Martijn Snoep, first indicated that the ACM shall prioritise vertical restraints. This was followed by dawn raids in respect of alleged RPM in December 2018 and at the beginning of 2019. On 26 February 2019, the ACM replaced its previous Vision Document with new Guidelines, which strictly follow the system of the EU Vertical Agreements Block Exemption Regulation and the accompanying guidelines. This is in clear contrast to the earlier Vision Document. The reason for this change in position of the ACM is not clarified in the Guidelines. According to the Guidelines, the ACM will prioritise RPM but potentially accepts efficiency arguments if parties can support them. ACM asks parties to bring such arguments at an early stage of its investigation and gives the example of a supplier of electric tools that gives its dealers price recommendations, closely resembling the Australian *Tooltechnic* case. The timing of the renewed approach of the ACM is also interesting, especially in the wake of the ongoing revision of the EU Vertical Agreements Block Exemption Regulation and its guidelines. It might mean that the ACM needs to amend its guidelines again in the upcoming year(s).

The law provides for fixed resale prices for Dutch books. This does not apply to e-books.

20 | Have the authorities considered in their decisions or guidelines resale price maintenance restrictions that apply for a limited period to the launch of a new product or brand, or to a specific promotion or sales campaign; or specifically to prevent a retailer using a brand as a 'loss leader'?

Because of articles 12 and 13 Mw, the EU Vertical Agreements Block Exemption Regulation and the corresponding guidelines concerning vertical agreements have direct effect in Dutch competition law. As a result, the EU approach towards RPM for the launch of a new product, brand or sales campaign also applies in the Netherlands.

In addition, certain agreements, both horizontal and vertical, benefit from the exemption for cooperation agreements in the retail sector. According to this exemption, cooperation agreements between a retailer and a supplier where a maximum price is agreed upon during a sales campaign may not fall under the prohibition of article 6(1) Mw, provided that:

- the sales campaign is held in the context of cooperation;
- it does not last longer than eight weeks; and
- the products subject to the campaign do not comprise more than 5 per cent of the products offered by the supplier.

Based on this exemption, the court ruled in *Confectie CV/Setpoint* that a clause regarding promotion and sales campaigns is, in principle, allowed.

Relevant decisions

21 | Have decisions or guidelines relating to resale price maintenance addressed the possible links between such conduct and other forms of restraint?

In its 2015 strategy and enforcement priorities regarding vertical agreements, the Authority for Consumers and Markets (ACM) linked resale price maintenance (RPM) to horizontal (tacit) collusion. Vertical agreements providing for RPM may facilitate a cartel or (tacit) collusion between competitors, either at the level of the manufacturers or the retailers. RPM facilitates the monitoring of prices. Another concern of the ACM is that the RPM may in fact result from a horizontal agreement. This was the case, for example, in *Batavus v Vriend's Tweewielercentrum*. Vriend's Tweewielercentrum sold Batavus bikes primarily through the internet. Its prices were lower than those of other Batavus distributors. Batavus terminated the distribution agreement – under pressure from other distributors – because of the low pricing of Vriend's Tweewielercentrum. This was seen as RPM with appreciable effects. In a similar case (*Auping/Beverslaap*), the Dutch court decided that there was no infringement of competition, as Beverslaap could not prove that Auping had terminated the agreement under pressure of other dealers. More recently, in a case brought by Prijsvrij against Thomas Cook, the civil court also found that termination by Thomas Cook of the agency agreement with Prijsvrij was invalid, as it was motivated by a desire to prevent (online) discounts by Prijsvrij.

In its new Guidelines on arrangements between suppliers and buyer (the Guidelines), the ACM links RPM to restrictions of online sales. According to the ACM, charging a buyer a higher price (or giving a smaller discount) for products that the same buyer resells online than for products they sell offline (dual pricing) is an indirect form of RPM, and thus constitutes a hardcore restriction. However, charging different prices to different types of buyers, for example, buyers who only sell products online and buyers who only sell products offline, does not constitute a hardcore restriction.

22 | Have decisions or guidelines relating to resale price maintenance addressed the efficiencies that can arguably arise out of such restrictions?

According to the Guidelines, hardcore vertical restrictions like RPM seldom meet the requirements of the exception for efficiency improvements. However, suppliers and buyers can still invoke this exception, even in the case of hardcore restrictions.

Efficiencies that the ACM will consider, include:

- the prevention or reduction of free-rider problems, especially regarding service;
- the incentive to open new markets;
- the prevention of hold-up problems which dissuade undertakings from making valuable investments
- the protection of product image by quality standards; and
- the realisation of scale advantages in distribution.

It is up to the supplier to make a plausible case that RPM is indispensable in any given situation. For example, in the context of stimulating service to convince consumers of certain positive qualities of certain products, a supplier must be able to demonstrate that RPM is necessary to make sure that the service is provided and that this is not possible with real alternatives that are not, or less, anticompetitive. As an alternative for RPM, a supplier may, for example, use a selective distribution system with specific criteria or requirements for its buyers to provide a certain level of service or to have a showroom in exchange for a fixed fee. If the supplier can make a plausible case that these are not real alternatives for RPM, then the RPM is indispensable.

23 | Explain how a buyer agreeing to set its retail price for supplier A's products by reference to its retail price for supplier B's equivalent products is assessed.

To date, there have not been any cases regarding pricing relativity agreements.

Suppliers

24 | Explain how a supplier warranting to the buyer that it will supply the contract products on the terms applied to the supplier's most-favoured customer, or that it will not supply the contract products on more favourable terms to other buyers, is assessed.

The Authority for Consumers and Markets (ACM) has not dealt with specific cases regarding wholesale most-favoured nation clauses (MFNs). Nor are there any (recent) civil law cases regarding competition law that deal with wholesale MFNs. However, the ACM has given relatively extensive guidance on retail MFNs, which might give an indication of how the ACM would assess other types of MFNs.

25 | Explain how a supplier agreeing to sell a product via internet platform A at the same price as it sells the product via internet platform B is assessed.

The ACM was actively involved in the *Booking.com* case, explicitly agreeing with the outcome of this coordinated approach on the EU level. This is reflected in the ACM's communication on MFN clauses and in its (old) Vision Document.

In its 2015 strategy and enforcement priorities regarding vertical agreements, the ACM provides extensive details of how it would deal with retail MFN clauses, which it refers to as across-platform parity agreements (APPAs). The ACM puts forth two theories of harm regarding such practices. First, APPAs may foreclose the platform market, since

new players (new platforms) may have difficulty gaining market share because they cannot offer lower prices. Second, APPAs may lead to an increase in the commission suppliers have to pay to participate on the platform. Because APPAs ensure that the lowest price will be offered on the platform, an increase in commission can never lead to a higher price relative to other platforms. This may be an incentive for platforms to increase their commission. This may ultimately lead to less choice and increased prices for consumers.

However, the ACM also puts forward two efficiencies that may counterbalance these theories of harm. First, APPAs may prevent free riding, where suppliers enjoy the exposure created by platforms, but are not prevented from offering a lower price on their own websites. Second, APPAs can increase price competition between suppliers; as consumers can easily compare prices on platforms, suppliers have an incentive to price competitively.

Since APPAs can have both harmful and beneficial effects, the ACM will assess them case by case. The ACM makes a distinction between wide APPAs (price parity with all platforms and other sales channels) and narrow APPAs (price parity only with producers' own sales channels). Wide APPAs may be more harmful than narrow APPAs. A further relevant aspect is whether platforms can offer discounts regardless of the APPA, as this would make foreclosure of new parties less likely. The ACM will also consider whether producers use multiple platforms, since this may lead to competition between platforms, thus preventing the increase of commissions.

The ACM has not dealt with MFN clauses in its Guidelines.

26 Explain how a supplier preventing a buyer from advertising its products for sale below a certain price (but allowing that buyer subsequently to offer discounts to its customers) is assessed.

The ACM has not dealt with this specific issue in its Guidelines or case law. There is, however, relevant civil case law.

In *Tronios/Dertronics*, Tronios called upon its distributors (including Dertronics) to maintain a minimum advertising price (MAP) on their websites. The distributors were, however, free to determine the actual sales price. Tronios terminated the agreement with Dertronics because Dertronics failed to state the correct MAPs on their website. Dertronics claimed before the court that this practice amounted to resale price maintenance, which is – in principle – in breach of competition rules. The court ruled that even if the practice would qualify as resale price maintenance, Dertronics had failed to prove that the effect on competition was appreciable.

In the Foka/Loewe case the dispute concerned a prohibition on advertising products at rock bottom prices. The court ruled that it was the intention of Loewe to influence the prices set by Foka. However, Foka failed to demonstrate that there was an appreciable restriction of competition.

In the *Voorne Koi/Oase* case, the court ruled that the obligation on Voorne Kooi not to engage in advertising campaigns with very low prices had the object of restricting competition. Consequently, this restriction was found to be void. Regarding appreciability, the court only stated that Oase can, by exercising that influence, appreciably restrict competition. The court did not require Voorne Koi to demonstrate this.

27 Explain how a buyer's warranting to the supplier that it will purchase the contract products on terms applied to the buyer's most-favoured supplier, or that it will not purchase the contract products on more favourable terms from other suppliers, is assessed.

The ACM has not yet dealt with cases regarding this specific type of conduct and has not given guidance on this issue. There do not appear to be any (recent) civil law cases that deal with this kind of conduct.

Restrictions on territory

28 How is restricting the territory into which a buyer may resell contract products assessed? In what circumstances may a supplier require a buyer of its products not to resell the products in certain territories?

This will be assessed under the EU Vertical Agreements Block Exemption Regulation and the accompanying guidelines, as they have direct effect. This means that certain territorial restrictions are allowed in the case of exclusive distribution.

To date, the Authority for Consumers and Markets (ACM) has not specifically dealt with territorial restrictions. In the past, the ACM has refused to investigate territorial restrictions brought to its attention through a complaint (see *Basiq Dental v Philips*). The ACM concluded that, insofar the conduct in question comprises a violation of the Competition Act, such violation lacked severity as it concerned vertical behaviour. However, this view dates from the time that the ACM's policy was not to act against vertical restrictions, because the ACM was not convinced that vertical restraints harmed competition.

There has been one case (the laundry cartel – *Wasserijen*) regarding a franchise agreement where territories were divided between various franchisees. The ACM found that this agreement was not a vertical agreement and that the case should be viewed as an illegal horizontal division of markets. The highest administrative court (*College van Beroep voor het Bedrijfsleven*) has recently confirmed this finding.

29 Have decisions or guidance on vertical restraints dealt in any way with restrictions on the territory into which a buyer selling via the internet may resell contract products?

The ACM has not dealt with vertical territorial restrictions specifically aimed at internet sales or with geo-blocking. The Chairman of the ACM has, however, stated that the ACM policy on vertical restraints applies to offline as well as online distribution, remarking that 'online dynamics could lead to new situations of potential harm'.

In 2009, the ACM conducted a sector scan regarding online sales; however, it did not specifically deal with territorial restrictions.

Restrictions on customers

30 Explain how restricting the customers to whom a buyer may resell contract products is assessed. In what circumstances may a supplier require a buyer not to resell products to certain resellers or end-consumers?

This will be assessed in line with the EU Vertical Agreements Block Exemption Regulation and the accompanying guidelines. The Authority for Consumers and Markets (ACM) has not recently dealt with restrictions regarding customers to whom a buyer may sell in vertical relations outside selective distribution systems. In 2012, the ACM decided not to investigate a situation brought to its attention through a complaint. According to the complaining party, Basiq Dental, Philips infringed article 6 of the Dutch Competition Act by prohibiting Basiq Dental from selling products to buyers other than professional dentists. However,

the ACM concluded that investigating such a situation did not have priority, as it was not clear that Philips imposed these restrictions, nor that such restrictions would have significant economic consequences.

Restrictions on use

31 How is restricting the uses to which a buyer puts the contract products assessed?

There have been no recent decisions or guidelines in the Netherlands about a field of use restriction. The assessment will be similar to the assessment under EU law.

Restrictions on online sales

32 How is restricting the buyer's ability to generate or effect sales via the internet assessed?

In its 2015 strategy and enforcement priorities regarding vertical agreements, the Authority for Consumers and Markets (ACM) discussed a case similar to Batavus. In the example given, the ACM concluded that it would investigate such behaviour if the manufacturer had a non-negligible share of the market and the online sales would be affected to an appreciable extent (for example, it would concern a large part of online sales). See also the cases *Batavus v Vriend's Tweewielercentrum* and *Auping/Beverslaap*.

The recent Guidelines on arrangements between suppliers and buyer (the Guidelines) clearly state that certain online sales restrictions constitute hardcore restrictions of competition. This is – in line with EU jurisprudence – the case for a complete online sales ban, dual pricing and maintaining a fixed relation between online and offline sales.

The civil case *Voorne Koi/Oase* also dealt with a prohibition of internet sales. One of the provisions in the distribution agreement prohibited internet sales without the permission of Oase. Because Voorne Koi acted in breach of this provision, Oase terminated the agreement. The Dutch court agreed with Voorne Koi, ruling that the provision prohibiting internet sales had the object of restricting competition, the termination of the agreement was therefore invalid.

33 Have decisions or guidelines on vertical restraints dealt in any way with the differential treatment of different types of internet sales channel? In particular, have there been any developments in relation to 'platform bans'?

There are no specific decisions of the ACM regarding the differential treatment of different types of internet sales channels. In its Guidelines, the ACM confirms, however, that, in line with the European *Coty* case, a restriction on a buyer to sell products via an online platform to protect the products' luxury image, is not a hardcore restriction.

In a civil case regarding this issue (*Nike (NEON)/Action Sport*), the Amsterdam court also followed that line of reasoning with regard to Nike products. Nike had terminated the agreement with one of its distributors, Italian Action Sport, because, by selling via unauthorised web shops and platforms it did not comply with Nike's Selective Retailer Distribution Policy. The Amsterdam court ruled, with reference to the Opinion of Advocate General Wahl in the *Coty* case, that the conditions of Nike's policy are necessary to maintain the brand image of Nike. It therefore found that Nike had validly terminated the agreement.

Selective distribution systems

34 Briefly explain how agreements establishing 'selective' distribution systems are assessed. Must the criteria for selection be published?

Dutch competition law follows European competition law in assessing selective distribution systems. Selective distribution systems are permitted, provided that certain criteria are met. The nature of the product must be such as to justify selective distribution; the selection of distributors must be based on objective qualitative criteria, which are uniformly set for all distributors and apply in a non-discriminatory manner. Furthermore, the criteria must not go beyond what is necessary.

In *Batavus v Vriend's Tweewielercentrum*, the Dutch court held that the principle of freedom of contract cannot be used as an argument against accepting a qualified distributor into the system, since this may be arbitrary. In *Auping/Beverslaap* the court came to a similar conclusion that – in principle – a distributor that fulfils the criteria set for selective distribution must be offered a selective distribution agreement. A refusal to do so will need further motivation (such as bad experiences with a specific dealer in the past) and may not be motivated by an anticompetitive goal.

The Authority for Consumers and Markets (ACM) has not dealt with selective distribution systems in recent decisions. However, in an interim procedure leading up to the case *Reparateurs/KIA Motors Nederland*, the court asked the ACM (then still the Dutch Competition Authority) for advice. The ACM held that KIA was not applying the criteria in a non-discriminatory manner and that thus, the EU Vertical Agreements Block Exemption Regulation could not apply. In the main proceedings the parties agreed that the distribution system failed to meet the criteria justifying a selective system. This meant, according to the court, that the situation had to be assessed considering article 6(1) of the Dutch Competition Act and article 101(1) TFEU.

35 Are selective distribution systems more likely to be lawful where they relate to certain types of product? If so, which types of product and why?

The assessment of (justifications for) selective distribution systems will be similar to the assessment under EU law. The Dutch civil court has explicitly held that luxury products may necessitate a selective distribution system to ensure quality and proper use. See the case *Nike (NEON)/Action Sport*.

36 In selective distribution systems, what kinds of restrictions on internet sales by approved distributors are permitted and in what circumstances? To what extent must internet sales criteria mirror offline sales criteria?

In its Vision Document, the ACM recognises that such issues may increasingly play a role on the market. There have been civil law cases dealing with restrictions of internet sales in selective distribution systems. Too broadly formulated prohibitions on internet sales infringe competition law. This is the case for example with the obligation to obtain permission for online sales, without providing the conditions under which internet sales would be permitted (*Voorne Koi/Oase*). In *Nike (NEON)/Action Sport*, the court ruled in line with EU law that, although platforms are increasingly important, prohibiting the sale through such platforms, provided that the selective distribution network fulfils certain criteria, does not amount to a general prohibition or substantial limitation of sales through the internet.

37 Has the authority taken any decisions in relation to actions by suppliers to enforce the terms of selective distribution agreements where such actions are aimed at preventing sales by unauthorised buyers or sales by authorised buyers in an unauthorised manner?

The civil case *Voorne Koi/Oase* dealt with a prohibition of internet sales. One of the provisions in the distribution agreement prohibited internet sales without the permission of Oase. Because Voorne Koi acted in breach of this provision, Oase terminated the agreement. The Dutch court agreed with Voorne Koi, ruling that the provision prohibiting internet sales had the object of restricting competition, the termination of the agreement was therefore invalid.

Another relevant civil case is *Alfa Romeo Nederland/Multicar*. This case establishes that an unauthorised dealer benefiting from supply by an authorised dealer may be engaging in a tortious act vis-à-vis the supplier and other authorised dealers. The Dutch court ruled that this behaviour comprises a tort if the unauthorised dealer knowingly benefits from the breach of contract of an authorised dealer. The unauthorised dealer will, through its tortious activity, be competing with authorised dealers who are bound by the distribution agreement and therefore in an unfavourable position vis-à-vis the non-authorised dealer.

38 Does the relevant authority take into account the possible cumulative restrictive effects of multiple selective distribution systems operating in the same market?

The ACM's 2015 strategy and enforcement priorities regarding vertical agreements provides that the ACM will consider whether multiple selective distribution systems are operating alongside each other in the same market. In addition, broad usage of vertical agreements in the same market may, according to this document, indicate the existence of collusion between producers or retailers. Although not literally adopted in the new Guidelines on arrangements between suppliers and buyer, there is no reason to assume the ACM has abandoned this line of reasoning in its assessment.

39 Has the authority taken decisions (or is there guidance) concerning distribution arrangements that combine selective distribution with restrictions on the territory into which approved buyers may resell the contract products?

The ACM assessment of selective distribution in combination with territorial restrictions will be in line with EU practice.

In *Dealers/Renault*, a civil Dutch court dealt with what appeared to be, according to the claimants, a forbidden export ban in a selective distribution system. Renault had an arrangement in place that accorded dealers with a bonus for each car sold based on the name registration. The dealers held that it would be impossible to prove this for cars that were sold to foreign customers, as this would be disproportionately burdensome on the administration. The court ruled that this could amount to an export ban, and therefore be contrary to the competition rules, if the registration would indeed be excessively burdensome.

Other restrictions

40 How is restricting the buyer's ability to obtain the supplier's products from alternative sources assessed?

In 2013 and in reaction to signals from the market, the Authority for Consumers and Markets (ACM) conducted a survey of the Dutch beer market. The main issue concerned agreements between breweries and owners of bars and restaurants, which included single branding clauses. These clauses were used as compensation for financial loans or rebates or the loan of machinery or property granted by the brewery. In 2002, the ACM had already exempted similar contracts from the prohibition of restrictive agreements under the notification system that existed at that time. The ACM concluded that the market was sufficiently dynamic and that these contract clauses did not have an adverse effect on purchase prices or the possibility to switch to other breweries, due to a short notice period. The ACM held that most brewers (except Heineken) would fall under the EU Vertical Agreements Block Exemption Regulation, since their market share is below 30 per cent. The non-compete clauses and single branding clauses did not have a substantial effect on competition. Furthermore, the non-compete clauses and single branding clauses agreed upon by the breweries and the bars and restaurants did not exceed the maximum period of five years.

From case law, it may be derived that exclusive purchasing clauses do not in principle have the object of restricting competition. However, they may comprise a violation of article 6(1) of the Dutch Competition Act and article 101(1) TFEU if they restrict competition in practice. It is for the party claiming the violation to substantiate this claim (*InBev Nederland NV/Modern Vught* and *VOF ca/Grolsch*). In practice, this is difficult to achieve as a thorough analysis of the economic and legal context is required to establish the negative effect on competition (*Eiser/Grolsch Bierbrouwer* and *FC Twente/Grolsch*). In the case *BP/Benschop*, the Dutch Supreme Court confirmed the finding by a lower court that an exclusive purchase clause infringed competition law. The lower court based its finding on the duration (20 years, without the possibility of early termination), the market share (11–12 per cent) and the broad usage of vertical agreements of a similar type in the market.

41 How is restricting the buyer's ability to sell non-competing products that the supplier deems 'inappropriate' assessed?

There are no specific rules or cases regarding this issue in the Netherlands. Such a situation will be assessed as under EU law.

42 Explain how restricting the buyer's ability to stock products competing with those supplied by the supplier under the agreement is assessed.

There are no specific rules or cases regarding this type of non-compete clause in the Netherlands. Such a situation will be assessed as under EU law.

43 How is requiring the buyer to purchase from the supplier a certain amount or minimum percentage of the contract products or a full range of the supplier's products assessed?

There are no specific rules or cases regarding this issue in the Netherlands. Such a situation will be assessed as under EU law. If more than 80 per cent of the products must be purchased from the supplier, this amounts to an exclusive purchase provision.

44 Explain how restricting the supplier's ability to supply to other buyers is assessed.

The ACM has not yet assessed exclusive supply arrangements. However, there is civil case law on this topic.

The *Greenery/Teler* case concerns an agreement between the agricultural cooperative the Greenery and one of its members, which contained an exclusive supply provision. The duration of this agreement was eight years. The court assessed whether the provision had the effect of restricting competition by looking at the economic and legal context. In this assessment, the court also looked at possible cumulative effects of multiple agreements containing exclusive supply agreements. The

court found that there was no anticompetitive effect due to the limited duration of the agreement, the fact that the Greenery has no market power and the limited cumulative effects. Even if there were to be an adverse effect on competition, this may well have been compensated by efficiencies. From other cases (*Vromans-De Bruin/VTN*), it appears that, if a cooperative imposes exclusive supply obligations in combination with a high exit fee when leaving the cooperative, this may amount to an infringement of competition law. Such a combination may mean that members are bound to a cooperative for a long time and cannot switch to competitors. In a more recent case dealing with a similar issue (*Deddens cs/Avebe*), the court found that the supply obligation in question did not lead to an appreciable restriction of competition.

45 | Explain how restricting the supplier's ability to sell directly to end-consumers is assessed.

There are no cases specifically related to restricting sales to end-customers; however, they are likely to be assessed similarly to exclusive supply arrangements.

46 | Have guidelines or agency decisions in your jurisdiction dealt with the antitrust assessment of restrictions on suppliers other than those covered above? If so, what were the restrictions in question and how were they assessed?

Not applicable.

NOTIFICATION

Notifying agreements

47 | Outline any formal procedure for notifying agreements containing vertical restraints to the authority responsible for antitrust enforcement.

There is no notification system for agreements containing (vertical) restraints in the Netherlands. In line with EU law, undertakings must themselves assess whether agreements restrict competition within the meaning of article 6(1) of the Dutch Competition Act (Mw), whether the agreement falls under a block exemption, or if an individual exemption within the meaning of article 6(3) Mw applies.

Authority guidance

48 | If there is no formal procedure for notification, is it possible to obtain guidance from the authority responsible for antitrust enforcement or a declaratory judgment from a court as to the assessment of a particular agreement in certain circumstances?

It is possible to ask the Authority for Consumers and Markets (ACM) for an informal opinion on a specific question. The ACM has set out rules of procedure on informal opinions including the criteria it will apply when deciding whether to give such informal opinion. The requirements are:

- that the question must concern a new question of law;
- there must be a sufficiently large economic or social interest at stake;
- the request for an informal opinion must relate to a behaviour or situation that has not yet been carried out or taken place;
- it must be possible for the ACM to give an informal opinion based on the information provided by the applicant; and
- the legal question posed must not be hypothetical.

These rules were officially withdrawn in 2013. However, the ACM still uses them in practice.

ENFORCEMENT

Complaints procedure for private parties

49 | Is there a procedure whereby private parties can complain to the authority responsible for antitrust enforcement about alleged unlawful vertical restraints?

Any interested party, whether a consumer or a company, can file a formal complaint with the Authority for Consumers and Markets (ACM) about alleged unlawful vertical restraints. The party has to have a personal and distinct interest in the complaint. Complaints can be made through the ACM's website or by phone.

The ACM is not obliged to investigate all complaints. It prioritises cases in accordance with its policy paper: 'Prioritisation of enforcement investigations by the Netherlands Authority for Consumers and Market'. In line with procedural rules of the Dutch Administrative Act, the ACM is obliged to respond to all formal complaints and motivate when it decides not to investigate them. In practice, complaints are often withdrawn prior to the publication of the ACM of a decision.

Regulatory enforcement

50 | How frequently is antitrust law applied to vertical restraints by the authority responsible for antitrust enforcement? What are the main enforcement priorities regarding vertical restraints?

The Authority for Consumers and Markets (ACM) has not prioritised vertical restraints in recent years, as such restraints can have both positive and negative effects. For years, the ACM has taken the position that, where there is sufficient inter-brand competition, the positive effects generally outweigh the harm caused. It suggested that it would only investigate vertical restraints where there is evidence of significant harm to consumer welfare. This has now changed. Undoubtedly fuelled by developments in markets and e-commerce and a rising trend of more active enforcement by other competition authorities in Europe, the new Chairman of the ACM, Martijn Snoep, has indicated that the ACM shall prioritise vertical restraints. The ACM carried out several dawn raids in respect of alleged resale price maintenance at the end of 2018 and in 2019.

51 | What are the consequences of an infringement of antitrust law for the validity or enforceability of a contract containing prohibited vertical restraints?

According to article 6(2) of the Dutch Competition Act (Mw) agreements infringing article 6(1) Mw are automatically null and void. However, the Dutch Supreme Court decided in *BP/Benschop* that illegal provisions may be severable from the agreement. The Supreme Court holds that, if severability were not possible, this would lead to a 'boomerang effect'. The party invoking competition law, would by doing this, lose all their contractual rights. This would have an adverse effect on private enforcement of competition law. For similar reasons, the Dutch Supreme Court decided in Prisma that the automatic conversion (based on article 3:42 of the Dutch Civil Code) of illegal provisions into provisions that do not infringe the competition rules is also contrary to the spirit of article 6(2) Mw and thus not possible. The court did not rule on the admissibility of a conversion clause contained in the cooperation agreement itself.

52 | May the authority responsible for antitrust enforcement directly impose penalties or must it petition another entity? What sanctions and remedies can the authorities impose? What notable sanctions or remedies have been imposed? Can any trends be identified in this regard?

The ACM can impose a fine or a periodic penalty payment (article 56 Mw). The ACM can take such decisions independently and does not have to petition any other entity in doing so. According to article 57(1) Mw, a fine may not exceed €900,000 or 10 per cent of the worldwide turnover of the undertaking. The fine will be based on 10 per cent of the annual turnover concerned. If the infringement continued over several years the basic amount of the fine amount will be multiplied by the number of years, subject to a maximum of four (article 57(2) Mw). Recidivism is an aggravating circumstance. If the same undertaking has been found to infringe a similar rule of competition law in the past five years, the fine may be doubled. The maximum fine may, therefore, amount to 80 per cent of the turnover concerned.

Article 58a Mw provides the possibility to impose a structural remedy through penalty payments (similar to article 7 of Regulation 1/2003). However, this is only possible if there is no other effective alternative to correct the infringement or if a structural remedy is less burdensome for the undertakings concerned.

Although the ACM has now become active in the enforcement of competition law in relation to vertical agreements, it has not imposed any fines in this context yet. Investigations are ongoing.

Investigative powers of the authority

53 | What investigative powers does the authority responsible for antitrust enforcement have when enforcing the prohibition of vertical restraints?

The Authority for Consumers and Markets (ACM) has the authority to enter premises, request information, demand access to documents and copy data.

This authority applies not only to business premises, but also to homes. In the latter case, however, a court order must be obtained in advance. All parties are, in principle, required to cooperate with investigations of the ACM. Enforcing this obligation with respect to foreign companies is in practice complicated.

Private enforcement

54 | To what extent is private enforcement possible? Can non-parties to agreements containing vertical restraints obtain declaratory judgments or injunctions and bring damages claims? Can the parties to agreements themselves bring damages claims? What remedies are available? How long should a company expect a private enforcement action to take?

Private enforcement is possible in the Netherlands. Any party that has suffered damage because of a breach of competition law rules can bring an action for damages before a civil court. Claims vehicles to which claims have been assigned also have standing before Dutch courts. Moreover, it is possible to set up an association to bring claims on behalf of (many) claimants. On 1 January 2020, a new law came into force enabling class actions for damages (*Wet afwikkeling massaschade in collectieve actie*). The judgment rendered in such cases will be binding on all potential claimants unless they chose to opt out. The length a private enforcement action takes varies greatly depending on the facts of the case.

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OTHER ISSUES

Other issues

55 | Is there any unique point relating to the assessment of vertical restraints in your jurisdiction that is not covered above?

The unique point is the economic approach which the Authority for Consumers and Markets (ACM) has adopted in setting its enforcement priorities. The ACM used to be reluctant to over-enforce the prohibition of restrictive agreements in the case of vertical restraints. However, as the ACM has now also picked up some vertical cases, it seems to want to bring its enforcement policy more in line with the rest of the European Union.

UPDATE AND TRENDS

Recent developments

56 | What were the most significant two or three decisions or developments in this area in the last 12 months?

Recent developments

The most significant development is the change in the Authority for Consumers and Markets (ACM)'s vision of vertical restraints. The ACM has in the past taken the view that vertical restraints, including resale price maintenance (RPM), do not necessarily harm consumer welfare and are, therefore, not an enforcement priority. The ACM had not brought a case relating to vertical restraints for nearly 20 years, but since December 2018, it is investigating a number of RPM cases, and in February 2019, it published new guidelines illustrating a change in thinking and in enforcement policy.

Furthermore, a recent decision relating to the deletion of material during a dawn raid illustrates the fact that the ACM is willing, also in cases of vertical restraints, to grant reductions in the fine for cooperation beyond the legal obligation to cooperate. Prior to this case, such reductions were only granted to leniency applicants in cartel cases. This is the first time the ACM has granted a fine reduction (exceeding the 10 per cent reduction for settlement) in a case relating to vertical restraints.

Anticipated developments

Given the change in the stated policy of the ACM, we can expect many more vertical restraints cases in the months to come. The recognition of a right to a reduction in the fine in vertical cases if a party cooperates with the ACM could increase the chance of such cases being successfully sanctioned by ACM and not overturned by the administrative courts.