

VERTICAL AGREEMENTS

Netherlands



Vertical Agreements

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Quick reference guide enabling side-by-side comparison of local insights, including into the legal framework; types of agreement; analytical framework for assessment of supplier and buyer positions; block exemption and safe harbour provisions; types of restraint; notification procedure and scope for guidance from applicable authorities; enforcement; other jurisdiction-specific issues; and recent/anticipated trends.

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LEGAL FRAMEWORK

Antitrust law

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

Article 6 of the Competition Act prohibits restrictive agreements. The Explanatory Memorandum to the Act explicitly states that article 6 of the Competition Act 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 of the Competition Act provide that the block exemption regulations of the European Union, including Regulation (EU) No. 330/2010 (the current Vertical Block Exemption Regulation) (VBER), and its successor, have direct effect in Dutch competition law.

Law stated - 18 December 2021

Types of vertical restraint

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 Competition Act does not contain a definition of vertical restraints. Such restraints include 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.

Law stated - 18 December 2021

Legal objective

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

The law aims 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 (1) an agreement relating to the quality of life of chickens and a boycott by supermarkets of farmers who fail to provide that quality and (2) an agreement to close old coal-fired power stations. The Authority for Consumers and Markets (ACM) found in both cases that these agreements did not lead to sufficient advantages of which it could take account under the competition rules and that could counterbalance the restrictive effect.

On 21 January 2021, the ACM published a second draft of its guidelines relating to sustainability initiatives (the Sustainability Guidelines). These clarify the extent to which initiatives with a goal relating to sustainability fall within the prohibition of restrictive agreements and in what circumstances they can benefit from an exemption. Although the Sustainability Guidelines make clear that a sustainability goal does not set aside the competition rules, they also explain that in some cases the advantages of such an initiative can outweigh the restrictive effects. An innovative aspect of the Sustainability Guidelines is the proposed approach to the assessment of initiatives providing a valuable contribution to achieving an environmental goal to which the Dutch government is bound. Concerning these initiatives, it is not necessary for the direct and indirect purchasers of the products or services concerned to be fully compensated for any negative effects of the initiative (usually a price increase) by the advantages to which the initiative gives rise. This deviates from the previous ACM policy and that of the European Commission. The ACM justifies its proposed

change in policy as concerns environmental initiatives by stating that the purchaser of the polluting product or service is partly to blame for the pollution.

Whether the draft Sustainability Guidelines will be adopted by the ACM in their current form will depend on the reaction to the consultation, not least that of the European Commission. If the European Commission takes a different view from that of the ACM, the parties that intend to engage in a sustainability initiative, particularly an environmental initiative, will be unable to rely on the ACM's Sustainability Guidelines.

The ACM has not prioritised vertical restraints in recent years, as these 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. It has now amended its position. Undoubtedly fuelled by developments in markets, e-commerce and increased active enforcement by other European competition authorities, the ACM Chairman, Martijn Snoep, indicated that the ACM shall prioritise vertical restraints. The ACM carried out a number of dawn raids in respect of alleged resale price maintenance in 2018, 2019 and 2020.

Law stated - 18 December 2021

Responsible authorities

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 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 grounds of general policy and only in the circumstance that the ACM is not empowered to take the decision. The Minister cannot annul individual decisions, subject to a very limited exception in the case of mergers. This exception has recently been used for the first time. The Minister granted a licence for the acquisition by PTT Post of its competitor, Sandd, after the ACM prohibited the concentration. The Minister's licence has, however, since been annulled by the Court of Rotterdam. The Minister has issued a new more extensively reasoned licence. Such licence will be reviewed by the Trade and Industry Tribunal together with the appeal by the Minister of the decision of the Court of Rotterdam.

Law stated - 18 December 2021

Jurisdiction

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'. Paragraph 1, article 6 of the Competition Act specifically states that

agreements with the aim or effect of restricting competition in 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 ACM is authorised to act. The ACM has, for example, acted against German shrimp producers whose agreement affected 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.

Law stated - 18 December 2021

Agreements concluded by public entities

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 article 1 of the Competition Act, which is transposed from the EU rules. An undertaking is an entity engaged in an economic activity, regardless of the legal status of the entity or how 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 governmental task.

Where a public entity engages in economic activity, the code of conduct laid down in the Act on Government and Free Markets, which amends the 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 that is not available under the same conditions to non-public undertakings; and
- an obligation of 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 government wished to limit this public-interest exception. It failed to do so before the law was extended. The code is likely to apply in its current form until 1 July 2023. From case law, it is apparent that the public entity needs to show that the activity serves the public interest.

There is a bill for a new law that, at time of writing, is before the House of Representatives. The bill contains the following amendments:

- governments must provide uniform reasons for taking a public interest decision. This justification must take account of the consequences of the decision for companies;
- for each decision of public interest, a uniform public preparatory procedure must be followed, so that companies have more opportunity to participate in advance;
- public interest decisions must be evaluated (at least) every five years. The evaluation will result in a decision (to maintain, adapt or revoke the public interest decision) that is open for appeal; and
- the law will no longer be temporary. As a result, the Act will become a permanent part of the Dutch Competition Act and will not need to be extended in the future.

Law stated - 18 December 2021

Sector-specific rules

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 energy, telecoms, post, public transport and healthcare markets are (partially) regulated to guarantee sufficient choice and quality at an affordable price. The regulation includes, in some cases, the determination of (maximum) tariffs. The ACM can also open access to networks (eg, in the telecoms and postal markets).

Further, there is a specific law providing for fixed book prices. This law aims to ensure broad availability and diversity of book choice. Fixed pricing, which prevents fierce price competition regarding bestsellers, aims to achieve this goal.

Article 15 of the Competition Act provides that the government can adopt national block exemptions from the prohibition of restrictive agreements. 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 of the Competition Act, the VBER, the Technology Transfer Block Exemption and the specific vertical exemption relating to motor vehicles (Regulation (EU) No. 461/2010) are also directly applicable in the Netherlands.

Law stated - 18 December 2021

General exceptions

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

Article 6(3) of the Competition Act provides for the individual exemption of certain agreements that otherwise fall within the prohibition of article 6(1) of the Competition Act. The criteria for the benefit of these exemptions are identical to those of paragraph 3, article 101 of the TFEU.

Article 7 of the Competition Act contains the 'bagatelle' or de minimis provision. Article 7(1) of the Competition Act provides that an agreement is not caught by article 6 of the Competition Act 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).

Article 7(2) of the Competition Act, provides an exemption from article 6 of the Competition Act for horizontal agreements between undertakings whose market share does not exceed 10 per cent.

In either of the above circumstances, even hardcore restrictions are exempt from the prohibition of article 6. This de minimis provision does not, however, prevent the application of article 101 of the TFEU if the agreement affects trade between EU member states.

It is worth noting that the national exemption of article 7(2) based on market shares does not apply to vertical

agreements. This would arguably be superfluous given the exemption under the VBER, which applies to vertical agreements where the parties have market shares of up to 30 per cent. However, unlike the article 7 exemption, the VBER does not exempt hardcore restrictions. Consequently, vertical agreements with a purely national effect can be assessed more stringently than horizontal agreements with a purely national effect.

The VBER and the accompanying guidelines are, on the basis of articles 12 and 13 of the Competition Act, directly applicable in the Netherlands.

Law stated - 18 December 2021

TYPES OF AGREEMENT

Agreements

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

The Competition Act refers to article 101 of the Treaty on the Functioning of the European Union (TFEU) for a definition of 'agreement'. The Explanatory Memorandum to the Act also explains that the concept of agreement in article 6 of the Competition Act mirrors article 101 of the TFEU as closely as possible.

Law stated - 18 December 2021

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.

Concerted practices are also caught by Dutch antitrust law. According to article 6 of the Competition Act, which mirrors the definition in article 101 TFEU, 'concerted practices' are:

Law stated - 18 December 2021

Parent and related-company agreements

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 Competition Act, but as an agreement within the same undertaking. A parent company and its subsidiary form part of the same economic entity if the parent company has a 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 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.

Law stated - 18 December 2021

Agent–principal agreements

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?

Agreements that qualify as agency agreements under the competition rules fall outside the scope of article 6 of the Competition Act. The title of the agreement is not the determinant factor. An agreement qualifies as an agency agreement under the competition rules if 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.

Law stated - 18 December 2021

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 Competition Act follows the EU Guidelines on Vertical Restraints concerning the assessment of agent-principal relationships.

Law stated - 18 December 2021

Intellectual property rights

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

The EU Technology Transfer Block Exemption has direct effect and applies to agreements whose primary object is the transfer of IPRs. If IPR transfer is not the primary objective of a vertical agreement, the EU Vertical Block Exemption Regulation is applicable.

Law stated - 18 December 2021

ANALYTICAL FRAMEWORK FOR ASSESSMENT

Framework

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

Article 6 of the Competition Act distinguishes between agreements that have the object of restricting competition and agreements that, without such object, still potentially negatively affect competition. Object restrictions are restrictions that on the basis of experience have a sufficiently detrimental effect on competition that they can be prohibited without the need for the competition authority to assess whether there are material effects. Restrictions that do not have an anticompetitive object only fall under the prohibition if the ACM shows that they (potentially) harm competition. Both

object and effect restrictions are permissible if they fulfil the criteria for exemption in article 6(3) of the Competition Act (similar to article 101(3) of the Treaty on the Functioning of the European Union) (TFEU). In practice, an object restriction is unlikely to meet this criterion.

In line with EU 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 the price is not a relevant parameter of competition. The court of Rotterdam came to a similar conclusion in a case concerning alleged market division by general practitioners. 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.

For several years, the case-law of the Dutch administrative and civil courts required that the party claiming a breach needed to establish that a restriction that qualified as an object restriction also met the criterion of appreciability. This is contrary to the jurisprudence of the EU Court of Justice (see Expedia). The line of case law of the Dutch courts has since 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 detrimental effect on competition to qualify as an object restriction.

However, if the criteria of article 7 of the Competition Act are met, an object restriction will not fall under the prohibition of article 6 of the Competition Act. It will fall under the prohibition of article 101 of the TFEU if it affects trade between EU member states.

Law stated - 18 December 2021

Market shares

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 less than 30 per cent, the restraint may benefit from Regulation (EU) No. 330/2010 (Vertical Block Exemption Regulation (VBER) or its successor. 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 less than 30 per cent.

Article 7(2) of the Competition Act 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 EU member states. There is no market-share based national exemption for vertical agreements given the exemption under the VBER, which applies where the parties have market shares of up to 30 per cent. However, unlike the article 7 exemption, the VBER does not exempt hardcore restrictions.

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

Law stated - 18 December 2021

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. If the market shares are less than 30 per cent, the agreement may, subject to a similar limitation of the size of the market share of the supplier, benefit from the VBER.

Law stated - 18 December 2021

BLOCK EXEMPTION AND SAFE HARBOUR

Function

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 Competition Act both provide for the application of EU block exemption regulations in Dutch cases. Article 12 of the Competition Act specifically concerns cases in which article 101 of the Treaty on the Functioning of the European Union applies, while article 13 concerns cases where there is no effect on trade and article 101 does not apply. Regulation (EU) No. 330/2010 (Vertical Block Exemption Regulation), the Technology Transfer Block Exemption and the specific vertical exemption relating to motor vehicles (Regulation (EU) No. 461/2010) apply in the Netherlands.

Article 15 of the Competition Act gives the Dutch government the possibility to adopt national block exemptions.

Law stated - 18 December 2021

TYPES OF RESTRAINT

Assessment of restrictions

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 Competition Act. However, this 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 (the Guidelines), the Authority for Consumers and Markets (ACM) gives an example of a supplier forcing an online shop to sell their products for €100. If the online shop charges a lower price, the supplier will no longer supply an online shop. Therefore, the online shop charges the resale price imposed by the supplier.

Until recently, key among ACM strategy and enforcement priorities (as set out in its 2015 strategy and enforcement priorities regarding vertical agreements (the Vision Document)) was the eventual effect on consumer welfare. Based on economic literature and empirical research, the ACM concluded that vertical agreements often benefit consumer welfare, where:

- an investigation into a vertical restraint such as RPM would be prioritised depending on the level of market power of the relevant distribution chain;
- a similar vertical restriction applied in parallel networks;

- 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
- there are efficiency benefits (for example, to ensure high service levels or to prevent free-rider problems).

The ACM indicated that it believed, if there was sufficient inter-brand competition, vertical restraints, including RPM, will most likely be harmless or even beneficial for consumers.

However, since December 2018, this policy has fundamentally changed. First, in December 2018, the AMC Chairman, Martijn Snoep, indicated that the ACM will prioritise vertical restraints. This was followed by dawn raids in respect of alleged RPM in December 2018 and early 2019.

In September 2021, this has resulted in the ACM imposing a fine of over€39 million on Samsung Electronics Benelux BV (Samsung). According to the summary fining decision, communications between Samsung associates and retailers reveal that, during the violation period, Samsung actively exercised influence on the online retail prices of retailers, and expected retailers to stick to the prices communicated by Samsung. The retailers allegedly agreed to comply, but it was Samsung that is said to have played the central role in the coordination. Surprisingly, ACM notes that one mitigating factor circumstance is that this case concerned price coordination that did not involve any sanctions (or the threat thereof) or incentives (financial or otherwise). According to the applicable legal standard for RPM, as set out in the VBER and the Vertical Guidelines, RPM involves either pressure or the provision of incentives. According to the ACM, providing suggested price recommendations as well as Samsung's monitoring of retail prices do not, in and of themselves, violate the cartel prohibition if retailers are genuinely free to set their own price. However, the interactions between Samsung and individual retailers went further than simply providing suggested list prices or non-binding price recommendations. Samsung de facto announced market prices, and acted accordingly, instead of letting retailers set their own retail prices independently.

In September 2020, the ACM launched an investigation into a possible cartel and RPM in the home furnishings sector. This is the first time the ACM conducted inspections since the covid-19 pandemic. In August 2021, the ACM indicated it had closed its investigation because it had thus far uncovered insufficient evidence for establishing a violation.

Second, on 26 February 2019, the ACM replaced its previous Vision Document with new Guidelines, which strictly follow Regulation (EU) No. 330/2010 (Vertical Block Exemption Regulation) (VBER) and accompanying guidelines. This is in clear contrast to the earlier Vision Document. The reason for AMC's change in position is not clarified in the Guidelines. The timing of the renewed ACM approach is interesting, especially given the ongoing revision of the VBER and its guidelines. It might mean that the ACM needs to amend its guidelines again soon.

Last year, an interim relief judge of the District Court of Amsterdam dealt with a case that included RPM (IBTT/ Dromenjager , 2020). The case concerned IBTT (a company engaged in the design and production of stuffed toys for different brands) and Dromenjager (the trademark proprietor of the Benelux and European brands of Woezel & Pip). In 2017, IBTT entered into a licence agreement with Dromenjager. Under this agreement, IBTT could produce children's toys against payment of an annual licence fee (royalty) and market these in the Benelux. The agreement provided that IBTT was not free to determine the resale price of the contract products; IBTT was obliged to set these prices in consultation with Dromenjager. Also, IBTT required prior permission from Dromenjager for discount campaigns. The maximum discount was set in the licence agreement at 25 per cent of the consumer recommended price. Finally, the licence agreement contained a provision that pertains to the imposition of sanctions if a price agreement was not adhered to. These were all considered hardcore competition law restrictions.

Another recent civil case regarding RPM relates to Trek bikes (2021) . A wholesale supplier of Trek bikes provided recommended resale prices to its dealers. One of the dealers regularly applied large discounts. The supplier pressured the dealer to apply the recommended resale prices and eventually terminated the dealer contract because of (inter alia) the large discounts the dealer applied. In court, the supplier argued that a certain margin is necessary to ensure all required service can be offered to customers. The court found however that pressuring dealers to apply recommended

prices is a hardcore restriction of competition. The contract was therefore not validly terminated and had to be continued.

Law stated - 18 December 2021

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 of the Competition Act, the VBER and the corresponding guidelines concerning vertical agreements have a 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.

According to its 2019 guidelines, the ACM prioritises RPM but potentially accepts efficiency arguments if parties can support them. The ACM asks parties to bring their arguments at an early stage of its investigation, citing the example of an electric-tool supplier requiring its dealers to impose minimum prices to allow a sufficient margin to provide the service required in demonstrating the tools. This closely resembles the Australian Tooltechnic case.

Also, 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) of the Competition Act, 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.

Law stated - 18 December 2021

Relevant decisions

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 ACM linked 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 ACM concern is that the RPM may result from a horizontal agreement. This was the case, for example, in *Batavus v Vriend's Tweewielercentrum* (2011). 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 Vriend's Tweewielercentrum's low pricing. This was seen as RPM with appreciable effects. In a similar case (*Auping/Beverlaap*), the Dutch court decided that there was no competition infringement, as Beverlaap could not prove that Auping had terminated the agreement under pressure from 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 online sales restrictions. 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.

Law stated - 18 December 2021

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 that dissuade undertakings from making valuable investments;
- the protection of a product's 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 RPM alternative, 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. The ACM encourages market participants in an investigation to bring any evidence that their vertical agreement meets the exceptions as soon as possible. If the ACM is convinced that the requirements have been met, it will stop the investigation.

Law stated - 18 December 2021

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 been no cases regarding pricing relativity agreements.

Law stated - 18 December 2021

Suppliers

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 ACM has neither 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 indicate how the ACM would assess other types of MFNs.

Law stated - 18 December 2021

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 at EU level. This is reflected in the ACM's communication on MFN clauses and 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 sets out two theories of harm regarding these 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.

Law stated - 18 December 2021

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 RPM, which is – in principle – in breach of competition rules. The court ruled that even if the practice would qualify as RPM, 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 Loewe intended 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.

Law stated - 18 December 2021

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.

Law stated - 18 December 2021

Restrictions on territory

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 VBER and the accompanying guidelines, as they have a direct effect. This means that certain territorial restrictions are allowed in the case of exclusive distribution.

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 a violation lacked severity as it concerned vertical behaviour. However, this view dates from when the ACM's policy was not to act against vertical restrictions, because it was not convinced that vertical restraints harmed competition.

Subsequently, 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 in which territorial restrictions could have been permitted 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.

Last year, an interim relief judge of the District Court of Amsterdam dealt with a case that included territorial restrictions (*IBTT/Dromenjager*, 2020). The case concerned IBTT (a company engaged in the design and production of stuffed toys for different brands) and Dromenjager (trademark proprietor of the Benelux and European brands of *Woezel & Pip*). In 2017, IBTT entered into a licence agreement with Dromenjager. This agreement included various territorial restrictions that were considered to constitute hardcore restrictions under Article 4(b) of the VBER. The interim relief judge held that these provisions were very similar to those used by NBC Universal that the EU Commission

classified as hardcore restrictions and in respect of which it considered:

the hardcore nature of these restrictions means that the exemptions in the [Block Exemption] and in the [Block Exemption Technology Transfer] would not apply in this case.

Incidentally, the interim relief judge considered that in this case, the licence agreement did not provide for a selective or exclusive distribution system based on which Dromenjager could have protected its brand by imposing legal restrictions.

Law stated - 18 December 2021

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 geo-blocking. The ACM Chairman has, however, stated that the ACM policy on vertical restraints applies to offline as well as online distribution; saying, '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.

Law stated - 18 December 2021

Restrictions on customers

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 VBER and the accompanying guidelines. 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 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 these restrictions would have significant economic consequences. In IBTT/Dromerjager (2020), IBTT had undertaken under the licence agreement to sell the contract products (toys) only to customers listed in an annex to the agreement. In the relevant appendix, a distinction was made between customers that had been approved in advance by Dromenjager (including Bijenkorf, HEMA, Albert Heijn, Blokker and Intertoys) and customers for which Dromenjager had to give written permission in advance (including Kruidvat, Trekpleister and Carrefour). IBTT was explicitly prohibited from selling contract products in the lower segment of the market (including Action, Big Bazar, Aldi and Zeeman). This was considered to constitute a hardcore restriction. In Trek (2021), Trek held that one of the supplier's reasons for terminating the contract with one of its dealers is because the dealer violated the conditions of Trek's selective distribution system with its dumped prices and unassembled sales. In this case, the judge in preliminary relief proceedings left open the question of whether Trek actually had a selective distribution system. The dealer submitted that online sales (and therefore passive sales) were limited by the assembly obligation and the obligation to hand over bicycles in person. According to Trek, online sales were indeed possible, as long as the assembly and delivery obligations were met. The judge followed Trek. After all, this case concerned expensive bicycles made of lightweight and delicate material with applications of the latest

technology that require precise assembly and adjustment. The preliminary relief judge ruled that the obligations are justified by the segment of bicycles that Trek supplies and the luxury image that Trek aims to maintain.

Law stated - 18 December 2021

Restrictions on use

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.

Law stated - 18 December 2021

Restrictions on online sales

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

The ACM's 2019 Guidelines on arrangements between suppliers and buyer 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. This approach will most likely become more nuanced with the new VBER.

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. In a recent civil case regarding Trek bikes, the court found that although the requirement to fully assemble and personally hand over bikes (including bikes bought online) would likely restrict active and passive (online) sales to end users, such requirement was justified in this case. The court stressed that online sales were not entirely impossible.

Law stated - 18 December 2021

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 ACM decisions regarding the differential treatment of different types of internet sales channels. In its Guidelines, the ACM confirms, however, that, in line with the EU Court of Justice case *Coty*, 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 followed the same line of reasoning concerning Nike products. Nike had terminated the agreement with one of its distributors, Italian Action Sport, because by selling via an unauthorised platform (Amazon) Action Sport did not comply with Nike's Selective Retailer Distribution Policy. By referring to the Opinion of Advocate General Wahl in *Coty*, the Amsterdam court ruled that the conditions of Nike's policy are necessary to maintain Nike's brand image. Therefore, the court found that Nike had validly terminated the agreement. In the appeal case, the Amsterdam Court of Appeal confirmed that within its selective distribution system, Nike can indeed prohibit authorised resellers from selling Nike products through non-authorised (e-)resellers, such as Amazon. Interestingly, the Amsterdam Court of Appeal explicitly stated that the conclusion in *Coty* – that a provision restricting only a specific type of internet sales is not a hardcore restriction

within the meaning of the VBER – was not limited to the situation where the product can be qualified as a luxury product.

Law stated - 18 December 2021

Selective distribution systems

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

Dutch competition law follows EU competition law in assessing selective distribution systems. Selective distribution systems are permitted, provided that certain criteria are met. The nature of the product must 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. Further, 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 (eg, a bad experience with a specific dealer in the past) and may not be motivated by an anticompetitive goal.

The ACM has not dealt with selective distribution systems in recent decisions. However, in an interim procedure leading up to the case of *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; therefore, the VBER 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 Competition Act and article 101(1) of the Treaty on the Functioning of the European Union (TFEU).

Law stated - 18 December 2021

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 *Nike (NEON)/Action Sport*.

Law stated - 18 December 2021

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 in 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 these 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.

In another civil case (Trek), the Dutch court found that Trek's distribution system had selective characteristics, but ultimately left open whether there was indeed a selective distribution network. One of Trek's qualitative criteria was that all bikes (including the ones sold online) had to be fully assembled and personally handed over to the customer by the dealer. Although such criterium likely limits passive or active sales to end users, the court found it justified in light of the bike segment and luxury brand image that Trek is aiming to maintain.

Law stated - 18 December 2021

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 the supply by an authorised dealer may be engaging in a tortious act vis-a-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-a-vis the non-authorised dealer.

In the civil case Nike (NEON)/Action Sport , the Dutch (appeal) court ruled that Nike validly terminated the agreement with its authorised reseller Action Sport because the latter sold products to an unauthorised reseller (Amazon).

Law stated - 18 December 2021

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 provide that the ACM will consider whether multiple selective distribution systems are operating alongside each other in the same market. Also, 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 adopted in the new Guidelines on arrangements between suppliers and buyer, there is no reason to assume that the ACM has abandoned this line of reasoning in its assessment.

Law stated - 18 December 2021

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 Dutch civil 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 new car owner's registration details. 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 to administrate. 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.

Law stated - 18 December 2021

Other restrictions

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

In 2013, following calls from the market, the ACM surveyed the Dutch beer market. The main issue concerned agreements between breweries and bar and restaurant owners, 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 extant at that time. The ACM concluded that the market was sufficiently dynamic and that these contract clauses did not adversely affect purchase prices or the possibility to switch to other breweries owing to a short notice period. The ACM held that most brewers (except Heineken) would fall under the VBER since their market share is below 30 per cent. The non-compete clauses and single branding clauses had no substantial effect on competition. Further, 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 Competition Act and article 101(1) of the 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 a negative effect on competition (*Eiser/Grolsch Bierbrouwer and FC Twente/Grolsch*). In the case of *BP/Benschop*, the 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, with no 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.

Law stated - 18 December 2021

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.

Law stated - 18 December 2021

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.

Law stated - 18 December 2021

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.

Law stated - 18 December 2021

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 a 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 the 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.

Law stated - 18 December 2021

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.

Law stated - 18 December 2021

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.

Law stated - 18 December 2021

NOTIFICATION

Notifying agreements

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 Competition Act, whether the agreement falls under a block exemption, or if an individual exemption within the meaning of article 6(3) of the Competition Act applies.

Law stated - 18 December 2021

Authority guidance

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 behaviour or a 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.

Law stated - 18 December 2021

ENFORCEMENT

Complaints procedure for private parties

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 must 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 under its policy paper 'Prioritisation of enforcement investigations by the Netherlands Authority for Consumers and Market'. In line with the procedural rules

of the Administrative Act, the ACM is obliged to respond to all formal complaints and motivate when it decides not to investigate them. The ACM applies three criteria to determine whether it will pursue a case: (1) what is the damage for consumers, (2) what is the public interest and (3) is the ACM able to solve the problem effectively.

Law stated - 18 December 2021

Regulatory enforcement

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 ACM did not prioritise vertical restraints for many years, as these restraints can have both positive and negative effects. For years, the ACM took 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 approach changed at the end of 2018. Undoubtedly fuelled by developments in the markets and e-commerce and a growing trend of more active enforcement by other competition authorities in Europe, the Chairman of the ACM, Martijn Snoep, indicated that the ACM will prioritise vertical restraints. The ACM carried out several dawn raids in respect of alleged resale price maintenance (RPM) at the end of 2018 and in 2019. In 2020, the ACM carried out dawn raids at companies active within the home-decoration sector because the ACM suspected RPM. A year later the ACM dropped this case. In September 2021, the ACM imposed a fine of nearly €40 million on Samsung for 'actively influencing its retailers' online sales prices' for television sets.

Law stated - 18 December 2021

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 Competition Act, agreements infringing article 6(1) of the Competition Act are automatically null and void. However, the 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 harm private enforcement of competition law. For similar reasons, the Supreme Court decided in Prisma that the automatic conversion (based on article 3:42 of the Civil Code) of illegal provisions into provisions that do not infringe the competition rules is also contrary to the spirit of article 6(2) of the Competition Act, and thus, not possible. The court did not rule on the admissibility of a conversion clause contained in the cooperation agreement itself.

Law stated - 18 December 2021

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 of the Competition Act). The ACM can take such decisions independently and does not have to petition any other entity in doing so. According to article 57(1) of the Competition Act, 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) of the Competition Act). 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 of the Competition Act provides the possibility to impose a structural remedy through penalty payments (similar to article 7 of Regulation (EC) No. 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.

In September 2021, the ACM imposed the first fine (nearly €40 million) concerning vertical agreements on Samsung. Other investigations are ongoing.

Law stated - 18 December 2021

Investigative powers of the authority

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

The 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 ACM investigations. Enforcing this obligation on foreign companies is complicated in practice.

Law stated - 18 December 2021

Private enforcement

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 the 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. Judgments rendered in these cases will be binding on all potential claimants unless they chose to opt-out. The duration of a private enforcement action varies greatly depending on the facts of the case.

Law stated - 18 December 2021

OTHER ISSUES

Other issues

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 that 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 several 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

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

On 14 September 2021, in line with the Authority for Consumers and Market's (ACM) policy change prioritising vertical restraints after 20 years of minimal enforcement, the ACM issued a remarkable decision in a vertical restraints case. Consumer electronics producer Samsung received a fine of nearly €40 million for 'actively influencing its retailers' online sales prices' for television sets.

According to the summary of the ACM decision (the full decision is not published yet), systematic pricing coordination took place between Samsung and its retailers. Samsung expected retailers to comply with the resale prices it regularly communicated to them. Samsung monitored the online prices and intervened (eg, by directly contacting retailers via email or WhatsApp) when online prices diverged too much from Samsung's desired market prices. According to the ACM, Samsung tried to prevent a downward price spiral and therefore wrongfully intervened in the competition between retailers. Samsung's practice was not commercially necessary, it was merely aimed at protecting both the retailers' and its own margins. The ACM finds this an illegal restriction of competition, which Samsung, as a large player in the television market, should have known. In determining the fine, the ACM took into account that (1) there were no (threats of) sanctions and no (financial) incentives to apply recommended prices and (2) this is the first time that the ACM has imposed a fine for this type of infringement. The ACM does not refer to resale price maintenance (RPM) and the behaviour seems to fall short of RPM. The ACM nevertheless qualified the behaviour as having the objective of restricting competition. It is to be expected that similar decisions in vertical restraints cases will follow in the near future.

The ACM also granted a reduction in fine level for a party that cooperated with it concerning a vertical-restraint infringement. The parties have not been disclosed. Despite being commonplace in cases of horizontal infringement as a result of a leniency notice, no notice relates to cooperation in vertical cases. The ACM is following the example of the European Commission that granted reduced imposed fines concerning vertical restraints in the electronics sector (relating to Philips, Asus, Pioneer and Denon & Marantz) and, subsequently, published a fact sheet explaining the cooperation framework in non-cartel cases.

An interesting Dutch civil court case was IBTT/Dromenjager, in which the court found that the licensing agreement between IBTT and Dromenjager contained hardcore restrictions (territorial, customer and price restrictions) within the meaning of Regulation (EU) No. 330/2010 (Vertical Block Exemption Regulation). According to the court, provisions qualifying as hardcore restrictions are contrary to competition law, irrespective of the position and size of the parties and products involved and the (potential) effects of such restrictions. In another recent civil case (Trek), the court found that one of the supplier's reasons for terminating the contract with one of its dealers constituted a hardcore restriction of competition (forcing the dealer to apply recommended resale prices or at least limit its discounts). This made the termination invalid. Interestingly, the court found that the dealer's obligation to fully assemble and personally hand over bikes to customers (including bikes bought online) was justified in this case.

Law stated - 19 October 2021



Anticipated developments

Are important decisions, changes to the legislation or other measures that will have an impact on this area expected in the near future? If so, what are they?

The full text of the decision in the Samsung case has not been published yet. Samsung will most likely appeal this decision. Other RPM cases the ACM initiated in 2018 and 2019 are still under investigation to the knowledge of the authors. It seems reasonable to expect that more of these investigations will be completed and lead to a decision in 2022.

Law stated - 19 October 2021

Jurisdictions

	Argentina	Allende & Brea
	Brazil	Pinheiro Neto Advogados
	China	DeHeng Law Offices
	European Union	Sidley Austin LLP
	France	Kramer Levin Naftalis & Frankel LLP
	Germany	Glade Michel Wirtz
	India	Chandhiok & Mahajan, Advocates and Solicitors
	Japan	Momo-o, Matsuo & Namba
	Netherlands	Van Doorne
	Sweden	Advokatfirman Cederquist KB
	Switzerland	Homburger
	Turkey	ELIG Gurkaynak Attorneys-at-Law
	United Kingdom	Sidley Austin LLP
	USA	Sidley Austin LLP