PANORAMIC

VERTICAL AGREEMENTS

Netherlands

LEXOLOGY

Vertical Agreements

Contributing Editors

Duncan Liddell and Fiona Garside

Ashurst

Generated on: June 20, 2025

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Contributors

Netherlands

Windt Le Grand Leeuwenburgh

Gerard van der Wal	g.vanderwal@windtlegal.com
Doortje Ninck Blok	d.ninckblok@windtlegal.com
Arthur de Ruiter	a.deruiter@windtlegal.com
Timme Geerlof	t.geerlof@windtlegal.com

LEGAL FRAMEWORK

Antitrust law

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

In the Netherlands, vertical restraints are primarily governed by the Dutch Competition Act (***Mededingingswet***) (DCA), which is harmonised with EU competition law. The cartel prohibition set out in article 6(1) of the DCA mirrors article 101(1) of the Treaty on the Functioning of the European Union (TFEU), prohibiting agreements that prevent, restrict or distort competition in the Dutch market, unless they qualify for an exemption. Article 6(2) of the DCA automatically renders any such prohibited agreements void (as does article 101(2) of the TFEU), whereas article 6(3) of the DCA provides for the possible exemptions from the cartel prohibition (reflecting article 101(3) of the TFEU).

In several instances, the DCA directly refers to EU law. Thus article 1 of the DCA (which lists the definitions under the DCA) provides that the key concepts of 'agreement', 'undertaking', 'association of undertakings' and 'concerted practices' are to be interpreted within the meaning of article 101(1) of the TFEU. Furthermore, articles 12 and 13 of the DCA connect the Dutch competition law framework with the exemptions arising from EU law, as these provisions stipulate that EU (group) exemptions apply to both international and national cases, entailing an exemption from the cartel prohibition under Dutch law as well.

Other available legal sources include policy rules and guidance documents issued by the Dutch national competition supervisor, the Netherlands Authority for Consumers & Markets (ACM), which contain information regarding the ACM's application and enforcement of rules on vertical restraints, as well as the ACM's strategy and prioritisation policy in that respect.

Law stated - 5 februari 2025

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 DCA itself does not define the concept of vertical restraints or list the possible types; instead, it prohibits all types of non-exempted competition agreements, regardless of their appearance. The meaning of vertical restraints does, however, follow from general competition principles and EU law, particularly the general Vertical Block Exemption Regulation (Commission Regulation (EU) 2022/720) (the VBER), which has direct effect in the Netherlands (being an EU member state). 'Vertical restraints' are defined in the VBER as restrictions of competition in vertical agreements falling within the scope of the EU cartel prohibition of article 101(1) of the TFEU (see article 1(1)(b) of the VBER), where 'vertical agreements' are defined as agreements or concerted practices between undertakings operating at different levels of the production or distribution chain, regulating the conditions under which goods or services are purchased, sold or resold (see article 1(1)(a) of the VBER).

In the ACM's 'Guidelines on arrangements between suppliers and buyers' (dated 7 July 2022) (the ACM Vertical Guidelines) the ACM distinguishes between different types of

vertical restraints, which include 'hardcore restrictions', 'non-compete obligations' and 'other restraints'. According to the ACM, the most important 'hardcore restrictions' consist of resale price maintenance, market partitioning and restriction of online sales. Furthermore, as described by the ACM, 'non-compete obligations' include restrictions on producing, purchasing or (re)selling certain (competing) goods or services, as well as minimum purchase obligations, whereas 'other restraints' include selective and exclusive distribution, and exclusive purchasing obligations.

Law stated - 5 februari 2025

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?

Overall, the main objective of EU competition law is market integration in the European Union, which includes fostering 'a highly competitive social market economy' (article 3(3) of the Treaty on the European Union), whereas the objective in national competition law is to protect and enhance unhindered competition on the national market. In its 2015 supervisory strategy paper regarding vertical agreements, the ACM focused on the effect of vertical restraints on consumer welfare. In that respect, the ACM's intended outcome is sustainable welfare growth, broadly defined, which includes welfare growth resulting from both financial and qualitative effects for consumers, in the short and longer term. Since 2019, the ACM has broadened the scope of its strategy to include promoting the good functioning of markets for both people and businesses.

With its policy rule on sustainability agreements (***Beleidsregel Toezicht ACM op duurzaamheidsafspraken***) of 4 October 2023, the ACM also emphasises sustainability initiatives as key aspects that can justify specific vertical agreements, reflecting a broader set of societal goals. On the basis of article 6(3) of the DCA and/or article 101(3) of the TFEU, vertical agreements that promote sustainability can be exempted from anti-competitive scrutiny if they provide significant environmental or societal benefits, such as improving resource efficiency, reducing carbon emissions, promoting biodiversity, contributing to a healthy living environment or fostering green innovation. The ACM thereby demonstrates a commitment to incorporating sustainability into competition policy, applying the law on vertical restraints in a way that promotes and protects societal interests beyond the economic.

Law stated - 5 februari 2025

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 responsible for enforcing Dutch and EU competition law in the Netherlands, including the enforcement of prohibitions on anti-competitive vertical restraints.

Nationally, the ACM collaborates with other regulatory bodies and government institutions to ensure comprehensive oversight and enforcement, often following official cooperation protocols that have been established. This entails partnerships with sector-specific supervisors to coordinate regulatory activities and address overlapping jurisdictional issues. At EU level, the ACM works in coordination with the European Commission and national competition authorities of other EU member states to ensure efficient and consistent enforcement of competition rules across the European Union. The European Commission has jurisdiction over a case only if trade between EU member states is affected. When the Commission commences proceedings on that basis, then under article 11(6) of Council Regulation (EC) No 1/2003 the ACM (unlike national courts) loses the power to apply articles 101 and 102 of the TFEU.

The ACM is an independent administrative body (***zelfstandig bestuursorgaan***) that is part of the Dutch government, falling under the responsibility of the Dutch Minister of Economic Affairs (the Minister), who is in charge of Dutch competition policy in general and appoints the ACM's board members (who are nonetheless independent in their decision-making). Based on articles 3 and 4 of the DCA, the Minister has the power to issue general directions and to instruct the ACM to issue a report on the effects on competition of proposed or applicable regulation or of a proposed or applicable decision. Nevertheless, the ACM's independence is guaranteed by law, meaning that the Minister cannot intervene in an individual ACM decision, also when vertical restraints are concerned. The ACM states that in practice, it is only accountable to the Minister with respect to the spending of its resources and the organisation of its operations.

Law stated - 5 februari 2025

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 test for determining whether a vertical restraint will be subject to antitrust law in the Netherlands is based on the effects doctrine, meaning that if the agreement has an appreciable effect on competition within the Dutch market, it falls under the jurisdiction of the ACM. Thus, the DCA applies (extraterritorially) to agreements that have an effect on the Dutch market (including the territorial sea, the exclusive economic zone and on board of ships and aircraft registered in the Netherlands), irrespective of where the companies involved are based. The ACM therefore has jurisdiction to enforce competition rules against both domestic and foreign entities if their agreements affect competition within the Netherlands.

Law stated - 5 februari 2025

Agreements concluded by public entities

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

Dutch antitrust law applies to vertical restraints in agreements concluded by public entities if these concern economic activities that compete in the market, in such cases qualifying the relevant public entity as an 'undertaking' within the meaning of article 101(1) of the TFEU – a definition that is carried over into Dutch competition law through article 1(f) of the DCA. Activities that are typical public tasks or of a purely social nature are not considered economic activities, which means that activities in the exercise of public authority are by their nature excluded from the application of competition rules, according to EU case law and the ACM's decisional practice.

Article 11 of the DCA stipulates that the cartel prohibition of article 6 also applies to agreements involving an undertaking entrusted by law or by an administrative body with the operation of services of general economic interest (as those, in principle, entail economic activities), but makes an exception insofar as its application obstructs the performance of the special task assigned to that undertaking.

In addition, the DCA sets out behavioural rules that apply to public entities engaging in economic activities (except for specific institutions involved in public education or public media, as listed under article 25h(1) of the DCA) to prevent unfair competition with private companies. The rules are as follows:

- Obligation to charge the integral costs of a product or service to the customer (article 25i of the DCA).
- Prohibition to give preferential treatment to government companies (article 25j of the DCA).
- Prohibition to use exclusive government data when the data is not available under the same conditions to non-public undertakings (article 25k of the DCA).
- Obligation to separate public tasks and economic activities within a public entity at the personnel level (article 25l of the DCA).

Law stated - 5 februari 2025

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.

As the DCA does not differentiate competition rules between different sectors of industry, the Dutch competition framework for the assessment of vertical restraints generally applies across all industries. That said, certain markets – such as the energy, telecommunications, postal services, public transport and healthcare sectors – are regulated in order to guarantee adequate quality, fair pricing and sufficient consumer choice, among other reasons. These sector-specific regulatory frameworks can involve establishing (maximum) tariffs, but are otherwise mostly irrelevant with respect to vertical restraints and therefore beyond the scope of this chapter.

As exceptions to the general Dutch competition framework, two Dutch national vertical block exemptions are currently in force, adopted pursuant to article 15 of the DCA; they cover sector protection agreements and retail cooperation agreements, respectively.

The first national exemption is based on the 'Decree on exemption of sector protection agreements' (***Besluit vrijstelling branchebeschermingsovereenkomsten***), which concerns agreements between undertakings that own or manage a shopping centre, and undertakings established or wishing to establish themselves within that shopping centre. Because of the exemption, such agreements aimed at limiting the admission of undertakings to that shopping centre that offer the same or similar goods to end users as those undertakings already established or wishing to establish themselves will, in principle, not violate article 6(1) of the DCA. However, such arrangement is allowed only during the first six years of the lease for the first undertaking establishing itself in the shopping centre. The second national exemption is based on the 'Decree on exemptions of retail cooperation agreements' (***Besluit vrijstellingen samenwerkingsovereenkomsten detailhandel***), which exempts agreements between undertakings or business associations and retail undertakings from article 6(1) of the DCA, regarding, for example, marketing, joint advertising campaigns and joint purchasing, provided that the specific conditions set out in the decree are met.

Furthermore, a Dutch act on setting fixed prices for paper books in the Dutch or Frisian language (as well as paper sheet music) has been in force since 2005, with the aim to ensure a wide supply of books by preventing competitive retail pricing among Dutch book stores, enabling retailers to offer less profitable books as well. This law is supervised by the Dutch Media Authority (***Commissariaat voor de Media***).

Within EU law, there is one sector-specific vertical block exemption still in place – the Motor Vehicle Block Exemption Regulation (Commission Regulation (EU) No 461/2010) (the MVBER), amended on 17 April 2023 to extend its application until 31 May 2028 – and which has direct effect in the Netherlands. This exemption concerns vertical restraints in the motor vehicle sector, which continues to address the sector-specific distribution of spare parts and the provision of repair and maintenance services. Part of its original scope, namely vertical agreements for the purchase, sale and resale of new motor vehicles, has been covered by the general VBER since 1 June 2013 (according to the Supplementary Guidelines 2010/C 138/05, amended by Communication 2023/C 133 I/01).

Law stated - 5 februari 2025

General exceptions

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

Article 7(1) of the DCA stipulates a general exception to vertical (and horizontal) restraints in the form of a de minimis provision (***bagatelvoorziening***), which in short excludes small businesses from the cartel prohibition. Specifically, this exception applies to all agreements between undertakings that do not exceed combined turnover thresholds of €5.5 million in the case of goods and €1.1 million in the case of services, provided that no more than eight undertakings are involved in the competition agreement in question (article 7(1) of the DCA). This de minimis provision applies irrespective of any hardcore restrictions.

Law stated - 5 februari 2025

TYPES OF AGREEMENT

Agreements

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

The Dutch Competition Act (DCA) defines 'agreement' under article 1(e) as an agreement within the meaning of article 101(1) of the Treaty on the Functioning of the European Union (TFEU). Under Dutch antitrust law, the competition law concept of 'agreement' is therefore explicitly interpreted in accordance with relevant EU (case) law.

Law stated - 5 februari 2025

Agreements

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?

It is not necessary to have a formal written agreement for Dutch antitrust laws to apply to vertical restraints. Article 6(1) of the DCA prohibits agreements regardless of their form, as well as concerted practices, that have the object or effect of restricting competition. In line with the EU law definition, an agreement exists when there is a consensus between different undertakings, either directly or through a third party, to coordinate their competitive behaviour. For this to be the case, it is sufficient for them to intend to take each other's interests into account and submit to economic, social or moral pressure. The cartel prohibition therefore covers both formal written contracts and informal or unwritten understandings that imply a concurrence of wills between parties. In addition, concerted practices with respect to vertical restraints may also engage Dutch antitrust laws – a concept defined in accordance with article 101(1) of the TFEU as well (pursuant to article 1(h) of the DCA). According to EU case law, a concerted practice implies a form of coordination between undertakings which, without coming to an actual agreement, knowingly substitutes de facto cooperation for the risks of competition between them.

Law stated - 5 februari 2025

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)?

Agreements between a parent company and a related company are not subject to vertical restraints rules if they constitute a single economic entity, whereby the related company does not have real (commercial) autonomy. In such cases, the relevant entities are seen as a single 'undertaking' under the DCA and vertical agreements between them therefore fall outside the scope of application of the prohibition on anti-competitive agreements. To illustrate, based on EU case law, a parent company owning (almost) 100 per cent of the shares of its subsidiary is presumed to be able to exercise decisive influence over the commercial behaviour of that subsidiary, thereby together qualifying as a single undertaking, unless

proven otherwise. Less clear are situations of related companies where there are two or more parent companies, which will need to be assessed on a case-by-case basis. For example, in its decision in ***Gosme/Martell – DMP*** (91/335/EEC), the European Commission did not consider a 50:50 joint venture to be a single economic entity with one of its parent companies with which a vertical restraint had been agreed.

Law stated - 5 februari 2025

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?

Under Dutch antitrust law, based on the Netherlands Authority for Consumers & Markets' (ACM) 'Guidelines on arrangements between suppliers and buyers' (dated 7 July 2022) (the ACM Vertical Guidelines) and the European Commission's 'Guidelines on vertical restraints-' (2022/C 248/01) (the EC Vertical Guidelines), agent–principal agreements generally fall outside the scope of vertical restraints rules if the agent does not bear significant financial or commercial risks related to the activities performed on behalf of the principal. In such cases, the principal and agent are considered a single undertaking under competition law, which precludes the application of the cartel prohibition under both article 6(1) of the DCA and article 101(1) of the TFEU (which require an agreement between at least two undertakings). An agent then functions solely as a representative of the principal and not as an economically independent undertaking.

There are three types of financial or commercial risks that are material to determining whether an agreement qualifies as an agency agreement exempt from vertical restraints rules – namely, (1) contract-specific risks, (2) market-specific investments risks, and (3) product market activity risks (see EC Vertical Guidelines, paragraph 31). The significance of the risks that an agent assumes is generally evaluated based on their sales-based commission or other form of compensation they receive for their agency services (see EC Vertical Guidelines, paragraph 32). In addition, in light of such a risk assessment, eight conditions are listed as guidance whose fulfilment generally indicates that the agency agreement in question falls outside the scope of article 101(1) of the TFEU (see EC Vertical Guidelines, paragraph 33).

If any of the above risks are in fact significantly borne by the agent, which is generally the case if not all eight of the conditions referred to above are met, the agency agreement is subject to vertical restraints rules. Moreover, an agency agreement may still fall within the scope of article 6(1) of the DCA and article 101(1) of the TFEU, even when the principal assumes all of the relevant risks, if that agreement contains single branding or post-term non-compete provisions resulting in foreclosure of the relevant market, or if it facilitates collusion (see EC Vertical Guidelines, paragraphs 43 and 44). In specific cases, however, an agency agreement may still escape the prohibition of article 6(1) of the DCA and article 101(1) of the TFEU if it can successfully invoke the exemption under the Vertical Block Exemption Regulation (Commission Regulation (EU) 2022/720) (the VBER).

Law stated - 5 februari 2025

Agent–principal agreements

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 ACM Vertical Guidelines and EC Vertical Guidelines provide guidance on what constitutes a genuine agent–principal relationship from the perspective of Dutch and EU antitrust law. If the agent does not bear any (significant) financial or commercial risk with respect to the activities performed on behalf of the principal, the relationship will be qualified as an agency agreement to which vertical restraints rules are not applicable. The only specific position taken in the ACM Vertical Guidelines, with reference to the EC Vertical Guidelines, is that online platforms generally do not meet the conditions to be considered agents, typically bringing them under the rules on vertical restraints. The reason is that online platforms act as independent market participants and not as part of the company for which they provide services.

Law stated - 5 februari 2025

Intellectual property rights

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

How Dutch antitrust law is applied when the agreement containing the vertical restraint also contains provisions granting IPRs depends on the primary object of the agreement. The general legal framework on vertical restraints, which includes the VBER and the EC Vertical Guidelines, will apply to agreements granting IPRs only where these grants are not the primary object of the agreement and provided that the IPRs are directly related to the use, sale or resale of the contract products by the buyer or its customers (see article 2(3) of the VBER and EC Vertical Guidelines, paragraph 72).

Conversely, where the primary objective of the agreement is in fact the transfer of IPRs (ie, licensing or assignment of IPRs), the European Commission's Technology Transfer Block Exemption Regulation (Commission Regulation (EU) No 316/2014) currently applies as it has direct effect in the Netherlands (the Regulation is due to expire on 30 April 2026).

Law stated - 5 februari 2025

ANALYTICAL FRAMEWORK FOR ASSESSMENT

Framework

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

With respect to vertical (and horizontal) restraints, the assessment under article 6(1) of the Dutch Competition Act (DCA) distinguishes between restrictions of competition ***by object*** and restrictions of competition ***by effect***.

Restrictions by object are considered inherently harmful to competition, for which reason it is not necessary to assess their concrete effects on the market, according to EU case law (see ***Consten-Grundig*** (ECLI:EU:C:1966:41) and ***Expedia*** (ECLI:EU:C:2012:795)). To determine whether a restriction of competition constitutes an object restriction, it has been established in Dutch case law on article 6 of the DCA, in line with EU case law on article 101 of the Treaty on the Functioning of the European Union (TFEU), that all the circumstances of the case must be considered, which include the wording of the provision and its objectives (whereby the intentions of the parties may be taken into account), as well as the economic and legal context. The context should be assessed on the basis of factual circumstances concerning the nature of the goods or services in question and the structure of the relevant market.

Remarkably, Dutch case law had held since 2005 that the party claiming a breach of the cartel prohibition needed to prove that an object restriction did have an appreciable effect on competition. However, the highest administrative and civil Dutch courts later overturned this line of reasoning (ECLI:NL:CBB:2016:184 and ECLI:NL:HR:2017:1354), explaining that the Dutch competition law framework shall align with the Court of Justice of the European Union's (CJEU) ***Expedia*** doctrine, which entails that object restrictions are by their nature regarded as having an appreciable restrictive effect on competition, regardless of their actual concrete effects. Nevertheless, given the de minimis provisions of article 7 of the DCA, the Dutch legislator is of the opinion that object restrictions can be de minimis (provided that, when applying article 7(2) of the DCA, there are no cross-border effects).

As to restrictions by effect, they require a detailed (market) analysis to determine whether there is any appreciable effect on competition. Such effect restrictions (ie, without anti-competitive object) fall under the cartel prohibition only if it is demonstrated that competition is (potentially) appreciably harmed. Such appreciable effect need not have materialised yet, but it must be probable.

A vertical agreement containing effect restrictions and/or non-hardcore object restrictions may be exempted under the Vertical Block Exemption Regulation (Commission Regulation (EU) 2022/720) (the VBER), although this exemption does not extend to individual provisions in such vertical agreement that are considered 'excluded restrictions' (as listed under article 5 of the VBER). Moreover, vertical restraints to which the de minimis provision of article 7 of the DCA applies are exempt from the Dutch cartel prohibition of article 6(1) of the DCA (regardless of any hardcore restrictions), but may still be covered by the EU cartel prohibition of article 101(1) of the TFEU if trade between EU member states is affected, unless they are exempted under the VBER as well (which can only be the case if no hardcore restrictions occur). Lastly, both object and effect restrictions can be exempted from the Dutch (and EU) cartel prohibition if the criteria of article 6(3) of the DCA (and article 101(3) of the TFEU) are fulfilled. However, it is unlikely for an object restriction to meet these criteria in practice (ie, allowing a fair share of the benefit to consumers; necessary to attain the relevant efficiency or innovation objectives; no possibility of eliminating competition).

Although not binding on national competition authorities and national courts, a vertical restraint ***by effect*** that affects trade between EU member states may also be exempted from the application of article 101(1) of the TFEU under the European Commission's De Minimis Notice (2014/C 291/01) (the De Minimis Notice), whereas a vertical restraint ***by object*** affecting trade between EU member states cannot. This is the case because the De Minimis Notice categorically does not cover object restrictions (see Points 2 and 13 of the De Minimis Notice, in which the European Commission also excludes from its scope all hardcore

restrictions listed under article 4 of the VBER), while effect restrictions may benefit from this exemption if the market share thresholds set out therein are not exceeded (see Points 8, 9, 10 and 11 of the De Minimis Notice).

Law stated - 5 februari 2025

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?

When assessing the legality of individual vertical restraints, ***supplier*** market shares are relevant to determine whether an exemption applies. The VBER provides for an exemption in case the market shares held by the supplier and buyer each do not exceed 30 per cent (article 3 of the VBER) and the vertical agreement in question does not contain any hardcore restrictions (as listed under article 4 of the VBER), although this exemption does not extend to individual provisions that are considered 'excluded restrictions' (as listed under article 5 of the VBER). While horizontal agreements can be exempted under article 7(2) of the DCA based on market shares not exceeding 10 per cent (if trade between EU member states is not affected, but regardless of any hardcore restrictions), no market share-based Dutch national exemption exists for vertical agreements.

Although not binding on national competition authorities and national courts, the De Minimis Notice exempts vertical restraints ***by effect*** affecting trade between EU member states from the application of article 101 of the TFEU if the market shares held by the supplier and buyer (if they are non-competitors) each do not exceed 15 per cent (Point 8(b) of the De Minimis Notice), or 5 per cent in case of a cumulative foreclosure effect (Point 10 of the De Minimis Notice), whereby the exemption also covers any 'excluded restrictions' within the meaning of article 5 of the VBER (Point 14 of the De Minimis Notice).

The market positions and conduct of other suppliers, including the degree of inter-brand competition, are relevant when evaluating the anti-competitive effects of vertical agreements. Suppliers seeking to impose vertical restraints may be more reluctant to do so as they face more competitive pressure.

Lastly, it can be relevant whether a vertical restraint is widely used by suppliers in the market, since the benefit of the VBER may be withdrawn by the European Commission by means of a regulation with respect to a certain market if there are parallel networks of similar vertical restraints that cover more than 50 per cent of that market, regardless of individual market shares (see article 7 of the VBER).

Law stated - 5 februari 2025

Market shares

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?

When assessing the legality of individual vertical restraints, ***buyer*** market shares are also relevant to determine whether an exemption applies. The VBER provides for an exemption in case the market shares held by the buyer and supplier each do not exceed 30 per cent (article 3 of the VBER) and the vertical agreement in question does not contain any hardcore restrictions (as listed under article 4 of the VBER), although this exemption does not extend to individual provisions that are considered 'excluded restrictions' (as listed under article 5 of the VBER). While horizontal agreements can be exempted under article 7(2) of the DCA based on market shares not exceeding 10 per cent (if trade between EU member states is not affected, but regardless of any hardcore restrictions), no market share-based Dutch national exemption exists for vertical agreements.

Although not binding on national competition authorities and national courts, the De Minimis Notice exempts vertical restraints ***by effect*** affecting trade between EU member states from the application of article 101 of the TFEU if the market shares held by the buyer and supplier (if they are non-competitors) each do not exceed 15 per cent (Point 8(b) of the De Minimis Notice), or 5 per cent in case of a cumulative foreclosure effect (Point 10 of the De Minimis Notice), whereby the exemption also covers any 'excluded restrictions' within the meaning of article 5 of the VBER (Point 14 of the De Minimis Notice).

The market positions and conduct of other buyers can also be relevant when evaluating the anti-competitive effects of vertical agreements, since the bargaining strength of buyers will influence the likelihood of suppliers successfully implementing vertical restraints.

Law stated - 5 februari 2025

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.

In the Netherlands, EU block exemption regulations are directly applicable, as articles 12 and 13 of the Dutch Competition Act (DCA) have the effect of rendering the Dutch cartel prohibition of article 6(1) of the DCA inapplicable as a consequence of such EU-level exemptions. Specifically, article 12 of the DCA disables the effect of the Dutch cartel prohibition for international cases covered by EU-level exemptions under article 101(1) of the Treaty on the Functioning of the European Union (TFEU), whereas article 13 of the DCA disables the effect of the Dutch cartel prohibition as well by extending the effect of EU-level exemptions to national cases even if there is no effect on trade between EU member states. Thus, the Vertical Block Exemption Regulation (Commission Regulation (EU) 2022/720) (the VBER) and the Motor Vehicle Block Exemption Regulation (Commission Regulation (EU) No 461/2010) (the MVBER) apply in the Netherlands with respect to both international and national cases.

Additionally, article 15 of the DCA provides the Dutch government with the ability to adopt national block exemptions, which is permitted only if the national decision satisfies the conditions set out in article 6(3) of the DCA (or article 101(3) of the TFEU). Currently two Dutch national block exemptions are in force, covering sector protection agreements and retail cooperation agreements, respectively. The first national block exemption is based on the 'Decree on exemption of sector protection agreements' (***Besluit vrijstelling branchebeschermingsovereenkomsten***), which concerns agreements between undertakings that own or manage a shopping centre, and undertakings established or wishing to establish themselves in that shopping centre. Because of the exemption, such agreements aimed at limiting the admission of undertakings to that shopping centre that offer the same or similar goods to end users as those undertakings already established or wishing to establish themselves will, in principle, not violate article 6(1) of the DCA. However, such arrangement is only allowed during the first six years of the lease of the first undertaking establishing itself in the shopping centre. The second national block exemption is based on the 'Decree on exemptions of retail cooperation agreements' (***Besluit vrijstellingen samenwerkingsovereenkomsten detailhandel***), which exempts agreements between undertakings or business associations and retail undertakings from article 6(1) of the DCA, regarding, for example, marketing, joint advertising campaigns and joint purchasing, provided that the specific conditions set out in the decree are met.

As explained in the Netherlands Authority for Consumers & Markets's Vertical Guidelines, vertical agreements fall into the safe harbour if the market shares of the supplier and buyer are each individually 30 per cent or less (see article 3 of the VBER) and they do not contain any of the hardcore restrictions stipulated under article 4 of the VBER. But even if the vertical agreement per se qualifies for exemption, its scope does not extend to individual provisions in such vertical agreement that are considered 'excluded restrictions' (as listed under article 5 of the VBER). Within the safe harbour, neither the Dutch nor EU cartel prohibition applies.

Vertical restraints to which the de minimis provision of article 7 of the DCA applies are exempted from the Dutch cartel prohibition of article 6 of the DCA (regardless of any hardcore restrictions), but may still be covered by the EU cartel prohibition of article 101 of the TFEU if trade between EU member states is affected, unless they are exempted under the VBER as well (which can only be the case if the agreement does not provide for hardcore restrictions).

Although not binding on national competition authorities and national courts, the European Commission's De Minimis Notice provides an exemption from the application of article 101 of the TFEU for agreements containing vertical restraints ***by effect*** affecting trade between EU member states if the market shares of the supplier and buyer (if they are non-competitors) are each individually 15 per cent, or 5 per cent in case of a cumulative foreclosure effect (see Points 8 to 11 of the De Minimis Notice). The safe harbour created by the De Minimis Notice is relevant for agreements already covered by the VBER to the extent that those agreements contain an 'excluded restriction' within the meaning of article 5 of the VBER (ie, not a hardcore restriction but nonetheless not covered by the exemption under the VBER) (see Point 14 of the De Minimis Notice).

Law stated - 5 februari 2025

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) clauses qualify as agreements that, directly or indirectly, restrict the buyer's ability to determine its resale price. Examples of indirectly applied RPM are:

- fixing the resale margin;
- fixing the maximum level of discount that the distributor can grant from a prescribed price level;
- making the grant of rebates or the reimbursement of promotional costs by the supplier subject to the observance of a given price level;
- imposing minimum advertised prices, which prohibits the distributor from advertising prices below a level set by the supplier;
- linking the prescribed resale price to the resale prices of competitors; and
- threats, intimidation, warnings, penalties, delays or suspensions of deliveries or contract terminations in relation to the observance of a given price level.

Decisions of the Netherlands Authority for Consumers & Markets (ACM) and subsequent national court rulings show that (contractual) pressure, sanctions or direct financial incentives are not required factors in this regard. Instead, the ACM examines whether the actions of the supplier affect a buyer's freedom to determine its own resale price. This reasoning follows the European Commission's Vertical Guidelines (EC Vertical Guidelines) and rulings of the Court of Justice of the European Union (CJEU).

Like the European Commission, the ACM also considers RPM to constitute a hardcore restriction. While the EC Vertical Guidelines are not legally binding, the ACM relies on them in its decisions and guidelines when examining and interpreting RPM. This approach was supported by the Dutch Supreme Court in ***Geborgde dierenarts*** (ECLI:NL:HR:2017:1354), where the Court ruled that the interpretation of article 6(1) of the DCA should align as closely as possible with article 101(1) of the Treaty on the Functioning of the European Union (TFEU). Consequently, RPM will almost always fall within the ambit of article 6(1) of the DCA. In this context it is necessary to mention ***Super Bock*** (ECLI:EU:C:2023:529), in which the CJEU ruled that the concepts of 'hardcore restrictions' and 'restrictions by object' are not conceptually changeable. Thus, although RPM qualifies as a hardcore restriction, competition authorities are still required to conduct an analysis to determine whether the RPM sufficiently harms competition. This analysis includes examining the economic and legal context of the RPM and its possible pro-competitive effects. In its ***Samsung/ACM*** judgment (ECLI:NL:RBROT:2023:10490) concerning a €39 million fine against Samsung Electronics Benelux BV (Samsung) imposed by the ACM (reference ACM/UIT/567212), the Rotterdam District Court recognised the recent ***Super Bock*** decision and applied it to the situation at hand. Samsung argued that for the qualification of a restriction by object, the ACM needed to examine whether the inter-brand competition was weakened as a result of the RPM. The Rotterdam District Court rejected Samsung's argument, instead referencing the ***Super Bock*** decision. These proceedings showed that the ACM also follows the new ***Super Bock*** rules.

While the Vertical Block Exemption Regulation (Commission Regulation (EU) 2022/720) (VBER) explicitly excludes RPM from its scope (see article 4 of the VBER), certain exceptions may still apply.

Firstly, the ACM clarifies in its Vertical Guidelines (ACM Vertical Guidelines) that it does not consider price recommendations or the imposition of a maximum resale price to constitute RPM. However, this exception cannot be invoked if the recommendation or maximum price has the same effect as RPM – a difficult distinction to make. To help suppliers and buyers navigate this issue, the ACM has published a blog on its website to serve as a checklist to determine whether a specific conduct qualifies as price recommendation. The guiding principle is that buyers must independently determine their resale prices. In that regard, suppliers are prohibited from attempting to influence the resale price through other means. For example, they may not:

- address retailers about their resale price;
- repeatedly remind them of the recommended price;
- share the resale prices of other retailers;
- threaten to stop supplying them;
- threaten them with less favourable terms; or
- reward them for adhering to the recommended price.

Secondly, suppliers and buyers may seek to invoke the efficiency improvement exception. However, in practice, RPM will seldom meet the necessary requirements.

Lastly, in 2018 the ACM issued a statement on its intent to intensify efforts to monitor and enforce its policy regarding vertical agreements, including RPM. Since then, the ACM has conducted multiple investigations into alleged RPM practices by undertakings operating in the Netherlands.

A recent decision involving a fine, dated 11 July 2023, concerned LG Electronics Benelux Sales BV (LG) (reference ACM/UIT/604321). Between 2015 and 2018, LG violated article 6(1) of the Dutch Competition Act (DCA) by entering into illegal vertical agreements with seven major (online) retailers regarding the prices of LG televisions displayed on their websites. While LG presented these as 'recommended prices,' they were, in practice, more than mere recommendations. LG persistently approached retailers that set consumer prices below the recommended levels, pressuring them to adjust their pricing. Additionally, LG requested that retailers refrain from advertising promotional offers on specific price comparison websites and avoid automatically matching the lower prices of their competitors. LG further instructed retailers to conceal any discounts on the initial web pages consumers would navigate, ensuring such discounts would be visible only at checkout. This anti-competitive conduct was facilitated by LG's use of online price-monitoring tools to track retailer pricing and by complaints from retailers about competitors' lower prices. The ACM uncovered thousands of messages evidencing prohibited coordination between LG and the retailers. Consequently, the ACM imposed a fine of nearly €8 million on LG. LG filed an objection to the fine, but the ACM rejected it as unfounded on 20 September 2024 (reference ACM/UIT/626226). It remains unclear whether LG has initiated legal proceedings against this decision.

Earlier, on 14 September 2021, the ACM had issued a similar decision (reference ACM/UIT/567212), this time against Samsung. According to the ACM, between 9 January

2013 and 7 December 2018, Samsung regularly fixed the online resale prices of seven retailers, thereby restricting their freedom to set independent resale prices. Samsung, like LG, provided retailers with 'price recommendations' and employed similar tactics to ensure compliance. Samsung filed a legal challenge against the ACM's decision. On 13 November 2023, the Rotterdam District Court upheld the ACM's €39 million fine (***Samsung/ACM*** (ECLI:NL:RBROT:2023:10490)). The Court ruled that it was irrelevant whether Samsung contractually compelled retailers to follow the recommended prices or imposed sanctions or direct financial incentives to ensure compliance. Samsung's RPM conduct qualified as a restriction of competition by object, making it unnecessary for the ACM to examine the actual effects of the conduct. Notably, this marked the ACM's first fine for RPM since its 2018 public statement declaring its intent to monitor RPM more diligently. However, the case underscores a critical point for undertakings: the ACM's intensified scrutiny of RPM post-2018 does not preclude penalties for conduct occurring prior to that year. This serves as a cautionary reminder of the ACM's ability to pursue past violations of competition law, subject to the applicable limitation periods.

Law stated - 5 februari 2025

Assessment of restrictions

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'?

Articles 12 and 13 of the DCA provide for the direct effect of all EU block exemptions, even when the vertical agreements do not fall within the scope of article 101(1) of the TFEU, due to their inability to affect trade between member states or distort competition on the internal market. Furthermore, the ACM follows the European Commission's approach with respect 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.

It is recognised in the ACM Vertical Guidelines that RPM can lead to efficiency improvement and thus fall within the exception provided for in article 6(3) of the DCA. However, it is up to the parties involved to substantiate the benefits of their arrangements with objective and verifiable data. The ACM encourages undertakings to provide such evidence as soon as possible.

Certain vertical (and horizontal) agreements may qualify for an exemption under the 'Decree on exemptions of retail cooperation agreements' (***Besluit vrijstellingen samenwerkingsovereenkomsten detailhandel***). This exemption applies to cooperation agreements between a retailer and a supplier, where a maximum price is set during a sales campaign. Such agreements may not be subject to the prohibition set out by article 6(1) of the DCA, provided that the following cumulative conditions are met:

- the sales campaign occurs within the framework of cooperation;
- it does not exceed a duration of eight weeks; and
- the products included in the campaign represent no more than 5 per cent of the supplier's total product offerings.

Law stated - 5 februari 2025

Relevant decisions

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

RPM has been linked to multiple other forms of restraints. Firstly, as RPM makes it impossible for buyers to charge lower prices than their competitors, RPM can facilitate cooperation between different buyers, thereby restricting horizontal competition. Moreover, when the buyers take the initiative to undertake RPM, it can form the basis of a horizontal cartel. An example of this was ***Batavus/Vriend's Tweewielercentrum*** (ECLI:NL:HR:2011:BQ2213). In that case one party (A) sold Batavus bikes through online at much lower prices than all its competitors. The competitors eventually turned towards Batavus, the supplier of the bikes, and demanded that Batavus terminate the distribution agreement with A. Batavus honoured this request, after which A went to court. Following multiple proceedings, the Dutch Supreme Court eventually ruled that the conduct violated article 6(1) of the DCA and saw it as RPM with appreciable effects. A similar case was ***Prijsvrij/Thomas Cook*** (ECLI:NL:RBAMS:2018:6443). The Amsterdam District Court ruled that the decision of Thomas Cook to terminate its agency agreement with Prijsvrij was invalid. This was because the underlying reason for the termination was to prevent (online) discounts by Prijsvrij.

Secondly, the ACM Vertical Guidelines indicate that charging a buyer a higher price (or giving a smaller discount) for products that the same buyer resells online than for products they resell offline (dual pricing) is an indirect form of RPM. Consequently, the ACM deems this conduct to be a hardcore restriction of competition. However, charging different types of buyers different prices – for example, buyers who only sell products online and buyers who only sell products offline – will not be considered a hardcore restriction by the ACM. This close connection between RPM and online sales was already evident when the ACM chose to revise its policy on RPM back in 2018. The emergence of e-commerce was the main driver behind the increased supervision on RPM. This was partly due to the fact that online price comparison tools and algorithms enable suppliers to more easily monitor the prices set by their buyers.

Lastly, there is also a connection between RPM and territorial restrictions. This is demonstrated by the ACM Vertical Guidelines, which indicate that when a selective distribution system can be considered to constitute a viable alternative to RPM, then RPM cannot easily be justified. Furthermore, practice has shown that when distribution agreements contain a certain type of restriction like RPM, usually there will be other provisions that restrict competition, for example, territorial restriction.

Law stated - 5 februari 2025

Relevant decisions

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

Suppliers and buyers can try to invoke the exception for efficiency improvements in order to justify RPM. However, in the ACM Vertical Guidelines the ACM clarifies that because RPM constitutes a hardcore vertical restriction, it will seldom meet the requirements of the exception for efficiency improvements. Article 6(3) of the DCA lists the cumulative conditions an undertaking must fulfil to call upon this exception – namely:

- There needs to be an improvement of production or distribution, or promotion of technical or economic progress – that is, an efficiency improvement.
- A fair share of the efficiency improvement is allocated to the users.
- The restriction to competition needs to be indispensable for attaining the efficiency improvement. In other words, there are no alternatives that are less anti-competitive but can attain the same efficiency improvement.
- There must be sufficient competition left in the market.

With regard to vertical restrictions, the ACM gives the following examples of efficiency improvements (ie, the first condition under article 6(3) of the DCA):

- preventing or reducing the free-rider problem;
- providing an incentive to open up new markets;
- preventing the 'hold-up problem' that discourage undertakings from making valuable investments;
- protecting the product's image by means of quality standards; and
- releasing economies of scale in the distribution.

Furthermore, in the ACM Vertical Guidelines a specific example is given of a possible efficiency improvement relating to RPM. The case concerns a supplier of electric tools that gives its dealers price recommendations; if a dealer chooses not to follow the recommendation, it will receive less favourable supply conditions and its supply contracts are suspended. From the outset, it is easy to identify this as RPM. The supplier of electric tools tries to justify its conduct by arguing that RPM is necessary in order to protect the margins of dealers to stimulate service. Stimulating the service is necessary as some of the qualities of its tools, such as minimal vibrations, can be verified by the consumer only if they are able to try the products before buying. The margins are necessary so that the employees of the supplier are able to take a product-specific course and deliver adequate service.

The ACM recognises that stimulating service falls under the term efficiency improvements. Supplier intervention might be necessary to combat a free-riding problem. However, in the end it is up to the supplier to make a plausible case that RPM is indispensable. The ACM already alludes to the possibility of a selective distribution system to achieve the same effect as the RPM. In this regard it is relevant to note that the ACM applies a strict interpretation of the indispensability requirement, which consequently is the most difficult condition to fulfil. For that reason, it is important for market participants in an investigation to bring any evidence relating to efficiency improvements forward as soon as possible. Furthermore, the benefits of their arrangements need to be substantiated with objective and verifiable data.

One may think of substantiated studies (including market studies), reports or analyses about the efficiency improvement and its magnitude, the necessity of the restriction of competition in order to achieve the efficiency improvement, and the competitive landscape.

Law stated - 5 februari 2025

Relevant decisions

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, the ACM has not taken a position on pricing relativity agreements in any of its decisions or other publications. However, according to the EC Vertical Guidelines, RPM – through indirect means, such as pricing relativity agreements – is a hardcore restriction. The example 'linking the prescribed resale price to the resale prices of competitors' is explicitly mentioned in the EC Vertical Guidelines. The ACM is expected to follow these guidelines.

Law stated - 5 februari 2025

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.

In the context of online platforms, competition law distinguishes between 'wide' and 'narrow' retail price parity clauses. 'Wide' (or across-platform) parity clauses generally require retailers to offer prices and conditions on a price comparison tool or online marketplace that are equal to or better than those available through any other sales channel. By contrast, 'narrow' parity clauses oblige retailers to ensure that the prices and conditions on a price comparison tool or online marketplace are equal to or better than those offered on their own direct website.

With the exception of wide (across-platform) retail parity obligations, parity obligations in vertical agreements can generally benefit from the safe harbour under the VBER. The VBER and the EC Vertical Guidelines provide guidance for the assessment of the wide retail parity obligations.

Over the past two years, the ACM has not dealt with cases regarding most-favoured customer clauses, nor have there been civil law cases on the subject.

Law stated - 5 februari 2025

Suppliers

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.

In ***Booking.com/25Hours Hotel Company Berlin et al*** (ECLI:NL:RBAMS:2023:1242), the Amsterdam District Court referred the following preliminary questions to the CJEU:

- Can the wide and narrow parity clauses within the context of article 101(1) of the TFEU be considered ancillary restrictions?
- How should the relevant market be defined under Commission Regulation (EU) 330/2010 (ie, the former EU Block Exemption Regulation of 2010, which expired on 31 May 2022 and was succeeded by the VBER) when transactions are facilitated by an online travel agency platform (OTA) where accommodations can offer rooms and connect with travellers who can book a room through the platform?

In the legal proceedings, Booking.com, an OTA, requested a declaratory judgment that the wide price parity clauses and narrow price parity clauses in its contracts with German hotels do not infringe articles 101(1) or 102 of the TFEU. The German hotels counter-claimed that Booking.com infringes the cartel prohibition by including the price parity clauses.

The wide parity clauses obliged the German hotels to offer Booking.com the best available price for a hotel room, which meant that the hotels could not offer more favourable prices to other OTAs or directly to customers. In 2015, Booking.com changed the wide parity clause in its contracts to a narrow parity clause, under which hotels are obliged to offer Booking.com no less favourable conditions, including price, than they offered elsewhere, except on other OTAs or via offline sales channels. Therefore, under the narrow parity clause, the hotels can offer more favourable prices to other OTAs and via offline sales channels, but still have to offer Booking.com no less favourable conditions than used on their own website.

On 19 September 2024, the CJEU gave its answer to the two preliminary questions (- ***Booking.com*** (ECLI:EU:C:2024:764)). With regard to the first question, the CJEU ruled that the fact that a transaction might simply be more difficult to realise or even less profitable without the restriction in question does not in itself mean that those restrictions must be objectively necessary, whereas such is required to qualify as ancillary restraint. On the first question, the CJEU therefore ruled that both the wide and narrow parity clauses used in contracts between online hotel reservation platforms and accommodations cannot qualify as ancillary restraints.

Regarding the second question on the method of market definition in the case of an OTA, the CJEU ruled that in a situation where an online hotel reservation platform mediates transactions between accommodations and consumers, the definition of the relevant market for the purposes of applying the market share thresholds laid down in that provision requires a concrete examination of whether the online intermediary services and the other sales channels are substitutable from a supply and demand perspective.

It is now for the Amsterdam District Court, as the referring court, to rule on this issue.

Law stated - 5 februari 2025

Suppliers

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 explicitly ruled on situations where a supplier prohibits a customer from advertising products below a certain price, but subsequently still allows discounts to be given to customers. However, this practice could be assessed under the competition law framework that qualifies agreements and clauses on minimum advertised pricing as a form of vertical price fixing, which is generally considered a hardcore restriction. A minimum advertised price restricts the freedom of buyers to set their own advertising prices, which can limit competition between them. Allowing discounts at the actual point of sale may be seen as a mitigating factor, but it does not eliminate the restrictive nature of the minimum advertised pricing.

In previous civil cases, Dutch judges have ruled differently on the effects on competition of such agreements. In ***Foka/Loewe*** (ECLI:NL:GHSGR:2010:BN9390), the Court of Appeal of The Hague found that a ban on advertising at floor prices was intended to influence the resale price, but a noticeable restriction could not be established. By contrast, the Central Netherlands District Court ruled in ***Voorne Koi/Oase*** (ECLI:NL:RBMNE:2014:6156) that a ban on low-price advertising did indeed cause a noticeable restriction of competition and declared the agreement null and void. In this case, there was sufficient influence on market price formation, limiting competition.

The ACM emphasises that efficiency benefits can outweigh the negative effects, provided that they ultimately benefit the consumer and compensate for the adverse impacts on competition. In a case where a supplier imposes a minimum advertised price but still allows discounts, a concrete assessment of the effects on competition and consumer welfare will depend on the specific market conditions, such as the level of competition between different brands (inter-brand competition) and the impact of the agreement on price levels and price transparency in the market.

Law stated - 5 februari 2025

Suppliers

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 addressed this specific practice and has not provided guidelines regarding the guarantee to purchase products on terms equal to or better than those of the most-favoured supplier. Nor are there any recent civil law cases dealing with this issue.

With the exception of wide (across-platform) retail parity obligations, parity obligations in vertical agreements can generally benefit from the safe harbour under the VBER. In cases where the block exemption does not apply, relevant factors for the assessment of these obligations include the relative size and market power of the supplier and buyer that agree to the parity obligation, the share of the relevant market covered by similar obligations, and the cost of the input in question relative to buyers' total costs. For more guidance on this, refer to section 8.2.5 of the EC Vertical Guidelines.

Law stated - 5 februari 2025

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?

The ACM defines 'territorial restriction' or 'market-sharing' as a supplier prohibiting a buyer to sell in specific areas or to specific customers. For example, a supplier may allow a buyer to sell its products in The Hague but not to customers in Amsterdam. In this regard, the ACM makes a distinction between active sales and passive sales:

- 'Active sales' include situations where a supplier prohibits a buyer from actively approaching customers in other areas. The ACM holds such a prohibition to constitute a hardcore restriction. However, under certain circumstances this may be allowed. An example thereof would be where a supplier prohibits a buyer from actively selling in an area which the supplier has reserved exclusively for itself or has assigned to another buyer. For other examples, the ACM refers to article 4(b) of the VBER.
- 'Passive sales' are sales to customers in prohibited areas that come to the buyer of their own accord. This also includes reaching out to customers through general advertisement or promotion, for example, on the internet. An important caveat in this regard is that online advertisements that specifically target certain customers constitute active sales – for instance, banners on third-party websites that appear only for customers in a specific geographical area. A supplier cannot prohibit passive sales.

In order to clarify the distinction between active and passive sales, the ACM gives the following example in the ACM Vertical Guidelines: a supplier grants Buyer A the exclusive right to sell the products in The Hague but not outside of The Hague. The supplier concludes the same agreement with Buyer B, but with regard to Amsterdam instead of The Hague. The agreements contain two conditions – namely, (1) neither of the buyers is allowed to send any emails to customers who live in the other city, and (2) if a customer from a prohibited city approaches the buyer from the other city of its own accord, the buyer must redirect the customer to the other buyer. Condition (1) constitutes a restriction of active sales, but it is allowed in this situation. Condition (2) restricts passive sales, which is never allowed.

In practice, there have not been many decisions of the ACM about restricting the territory into which buyers can resell contract products. In ***Wasserijen /ACM*** (ECLI:NL:RBROT:2016:3477), four laundromats structured their cartel agreement in the form of a franchise model. The laundromats had a market share of between 35 and 50 per cent and had divided the Dutch market between the four of them. The ACM decided that the agreement should be qualified as an illegal horizontal division of the market and not as a vertical restriction. This finding was upheld on appeal by the Administrative High Court for Trade and Industry (ECLI:NL:CBB:2018:526).

A case which did concern a vertical agreement that restricted the territories into which a buyer is allowed to resell was ***IBTT/Dromenjager*** (ECLI:NL:RBAMS:2020:4908). IBTT designs and produces plush toys for various brands, while Dromenjager is the Benelux and European owner of the WOEZEL & PIP trademarks and brands. The parties entered into a licence agreement. Under that agreement, IBTT was prohibited from selling the plush toys through Kruidvat, a Dutch discount convenience store. IBTT argued that this provision of the licence

agreements violated article 101 of the TFEU and article 6 of the DCA. The Amsterdam District Court agreed, finding that the provisions on territorial restrictions included in the licence agreement constituted hardcore restrictions under article 4(b) of the VBER. These provisions required IBTT to seek Dromenjager's approval for certain actions, closely resembling the infringing provisions in ***NBCUniversal*** (Case AT.40433), which the European Commission had previously considered to be hardcore restrictions. Consequently, the Court ruled that the provisions in the licence agreement violated articles 101(1) of the TFEU and 6(1) of the DCA and were therefore void.

Law stated - 5 februari 2025

Restrictions on territory

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?

Up until now there have been no decisions or guidelines of the ACM concerning the vertical territorial restriction of internet sales or geo-blocking. However, in 2019, the ACM did issue a statement affirming and emphasising its role as a supervisory authority for geo-blocking practices. To accomplish this goal, the ACM closely cooperates with other competition authorities in the European Union.

Law stated - 5 februari 2025

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?

The framework for assessing vertical restrictions is primarily shaped by the VBER, which is directly applicable in the Dutch legal order pursuant to articles 12 and 13 of the DCA. Additionally, the EC Vertical Guidelines provide detailed principles for evaluating vertical agreements under the European Union's competition rules, particularly article 101 of the TFEU. These guidelines specify the conditions for applying the VBER.

While specific vertical restrictions are valid in certain cases – for example, for selective distribution systems, to safeguard exclusive distribution territories or to comply with legal requirements – strict limitations apply. Thus, a supplier may impose restrictions on selling products to specific end-users for safety or brand-related reasons. However, general resale bans or restrictions that unnecessarily hinder competition are considered infringements of article 101(1) of the TFEU. In the Netherlands, the ACM is responsible for overseeing compliance with these rules.

With respect to restrictions targeting specific customer groups, there have been no major recent developments in Dutch case law or the ACM decisional practice. Nonetheless, several noteworthy cases offer valuable insights regarding the legal assessment of such restrictions.

A relevant case is ***IBTT/Dromenjager*** (ECLI:NL:RBAMS:2020:4908). In this case, IBTT was contractually obligated under a licensing agreement to sell products only to a specified customer group listed in an annex to the agreement. The explicit prohibition on selling to the lower market segment was qualified as a hardcore restriction.

Lastly, in ***Claimant/Trek Benelux*** (ECLI:NL:RBAMS:2020:6973), a preliminary relief judge ruled that certain obligations imposed by Trek Benelux – such as requiring assembly and personal delivery of its bicycles – were justified given the nature of the bicycles and the luxury brand image that Trek seeks to uphold.

Law stated - 5 februari 2025

Restrictions on use

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

In recent years, there have been no significant rulings or updates from the ACM regarding restrictions on use under Dutch law. The assessment of such restrictions still follows the general principles of EU competition law, particularly those outlined in the VBER and article 101 of the TFEU. This means that restrictions that unjustifiably hinder competition, such as overly broad field-of-use limitations, are generally considered to be in violation of competition law. The ACM continues to monitor the enforcement of these rules, but there have been no recent changes in practice or guidelines regarding this specific issue.

Law stated - 5 februari 2025

Restrictions on online sales

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

It is emphasised in the ACM Vertical Guidelines that specific online sales restrictions are considered hardcore restrictions of competition under Dutch and EU competition law. Such restrictions include a complete prohibition on online sales or measures aimed at excluding the use of online advertising.

In a recent ACM decision on objection dated 19 July 2024 concerning LG (reference ACM/UIT/626226), the ACM reiterated that the actions of LG went beyond non-binding recommended prices. For example, LG explicitly addressed retailers' commercial practices to ensure consumer prices aligned with LG's desired levels. LG requested that retailers (1) remove lower-priced offers from their own websites, (2) remove lower-priced models from price comparison platforms, (3) avoid advertising checkout discounts in the online price and show them only at checkout (to prevent visibility on price comparison platforms), and (4) limit certain offers to in-store promotions, excluding online sales. As a result, consumers researching LG televisions online were deprived of the price transparency benefits offered by e-commerce. In conclusion, the ACM upheld its original penalty decision of 11 July 2023 imposing a fine on LG (reference ACM/UIT/604321).

In a similar case, on 13 November 2023, the Rotterdam District Court dismissed the appeal of Samsung Electronics Benelux BV (***Samsung/ACM*** (ECLI:NL:RBROT:2023:10490) against the ACM's penalty decision of 14 September 2021 (reference ACM/UIT/567212). This case also involved a violation of the cartel prohibition. Through its actions, Samsung set the online resale prices of retailers, thereby restricting the freedom of retailers to determine their own resale prices.

In addition, there have been several earlier cases in which Dutch courts have dealt with online sales restrictions:

- ***Nike (NEON)/Action Sport*** (ECLI:NL:GHAMS:2020:2004), in which the Amsterdam Court of Appeal held that authorised retailers within a selective distribution system being permitted to offer only Nike products for sale on their own websites, or through authorised e-retailers, is not necessarily incompatible with EU competition law, nor does it necessarily constitute a hardcore restriction that prevents application of the VBER;
- ***Voorne Koi/Oase*** (ECLI:NL:RBMNE:2014:6156), in which the Central Netherlands District Court ruled that making the online sale of products subject to the supplier's approval without specifically indicating any conditions that retailers must meet to ensure a good image is a hardcore restriction; and
- ***Claimant/Trek Benelux*** (ECLI:NL:RBAMS:2020:6973), in which the Amsterdam District Court evaluated Trek's requirement that all bicycles, including those sold online, had to be fully assembled and personally handed over by the dealer. While noting that the requirement could restrict active or passive sales to customers, the preliminary relief judge deemed it justified given the nature of the bicycles and the luxury brand image that Trek seeks to uphold.

Law stated - 5 februari 2025

Restrictions on online sales

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'?

The ACM Vertical Guidelines list the restriction of online sales as one of the main hardcore restrictions that have the object of restricting competition. For example, agreements aimed at significantly reducing online sales or agreements aimed at preventing the use of an entire online advertising channel (eg, price comparison sites or search engines).

Another development regarding online platforms concerns the ACM's investigation into online sales platform ***Bol.com***.com in early 2024. Complainants who reported to the ACM believe that their offers are less visible on the online platform, even if these companies offer the best price and/or quality. They claim that offers from Bol.com itself or from specific retailers are given preferential treatment. There are also signals that the online platform uses data from retailers on the platform to strengthen its own position on the platform. The investigation is ongoing. With the Platform-to-Business Regulation (EU) 2019/1150 applying

since 12 July 2020 and the ACM authorised to enforce it as from 8 November 2024, this is a topic where many developments can be expected in the near future.

Law stated - 5 februari 2025

Selective distribution systems

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

Selective distribution systems in Dutch competition law are assessed in accordance with EU competition law principles. Pursuant to articles 12 and 13 of the DCA, the VBER also applies to agreements within the meaning of article 6(1) of the DCA. While the ACM and Dutch courts are not legally bound by the European Commission's guidelines (as highlighted in the CJEU decision in ***Expedia*** (ECLI:EU:C:2012:795)), they are generally applied in practice due to the strong alignment between article 6(1) of the DCA and article 101(1) of the TFEU. This alignment is further reflected in the ACM Vertical Guidelines.

The above results in the following framework for selective distribution systems. In the first place, a purely qualitative selective distribution system may fall outside the scope of article 101(1) of the TFEU (mirrored in article 6(1) of the DCA) if it fulfils the three conditions established by the CJEU, known as the 'Metro criteria'.

In the second place, irrespective of whether they fulfil the Metro criteria, qualitative and/or quantitative selective distribution agreements can benefit from the block exemption provided under article 2(1) of the VBER. According to the EC Vertical Guidelines, paragraph 151, there is no obligation for suppliers to publish their selection criteria.

Lastly, even if an agreement falls outside the scope of the VBER, it may still be permissible if it satisfies all the conditions under the efficiency exemption in article 101(3) of the TFEU (mirrored in article 6(3) of the DCA), although this seems a rather theoretical option.

Law stated - 5 februari 2025

Selective distribution systems

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 selective distribution systems closely follows the framework established under EU law. According to the EC Vertical Guidelines, paragraph 151, the VBER applies regardless of the nature of the product concerned and the nature of the selection criteria. This principle was reaffirmed and applied by the Amsterdam Court of Appeal in its 2020 decision in ***Nike (NEON)/Action Sport*** (ECLI:NL:GHAMS:2020:2004).

In a recent judgment of the Amsterdam District Court (ECLI:NL:RBAMS:2024:7935), HP's selective distribution system concerning ink cartridges did not meet the Metro criterion that 'the characteristics of the product in question necessitate such a network in order to preserve its quality and ensure its proper use. The Court seemed to apply a restrictive condition for the acceptability of selective distribution, even though this approach is no longer supported by the case law of the CJEU (see ***Coty*** (ECLI:EU:C:2017:941)).

Law stated - 5 februari 2025

Selective distribution systems

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?

Drawing on the EC Vertical Guidelines, the ACM addresses the permissibility of restrictions to online sales in the ACM Vertical Guidelines by listing examples of both hardcore restrictions and permissible restrictions under the VBER. The ACM further notes that hardcore restrictions, such as vertical price fixing and entirely prohibiting a buyer from selling online, restrict competition and rarely meet the conditions for the efficiency exemption of article 101(3) of the TFEU and article 6(3) of the DCA, unless the restrictions could have efficiency benefits that are necessary to maintain both offline and online sales channels.

There have been several cases in which Dutch courts have dealt with online sales restrictions in selective distribution systems:

- *Nike (NEON)/Action Sport* (ECLI:NL:GHAMS:2020:2004), in which the Amsterdam Court of Appeal held that allowing authorised retailers within a selective distribution system to offer only Nike products for sale on their own websites or through authorised e-retailers is not necessarily incompatible with EU competition law, nor does it necessarily constitute a hardcore restriction that prevents application of the VBER;
- *Voorne Koi/Oase* (ECLI:NL:RBMNE:2014:6156), in which the Central Netherlands District Court ruled that making the online sale of products subject to the supplier's approval without specifically indicating any conditions that retailers must meet to ensure a good image is a hardcore restriction; and
- *Claimant/Trek Benelux* (ECLI:NL:RBAMS:2020:6973), in which the Amsterdam District Court evaluated Trek's requirement that all bicycles, including those sold online, had to be fully assembled and personally handed over by the dealer. While noting that the requirement could restrict active or passive sales to customers, the preliminary relief judge deemed it justified given the nature of the bicycles and the luxury brand image that Trek seeks to uphold.

According to the EC Vertical Guidelines, suppliers can impose specific criteria for internet sales that are not equivalent to offline sales (the 'equivalence principle'). The ACM does not mention this principle in the ACM Vertical Guidelines, but given the strong alignment between article 6(1) of the DCA and article 101(1) of the TFEU, it is assumed that the same standard will be applied in the Netherlands.

Law stated - 5 februari 2025

Selective distribution systems

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?

We are not aware of any recent decisions or informal opinions of the ACM in relation to actions by suppliers to enforce the terms of selective distribution agreements. However, there have been several civil cases in which disputes regarding the enforcement of selective distribution agreements have been addressed:

- *Voorne Koi/Oase* (ECLI:NL:RBMNE:2014:6156): in this case, the supplier, Oase, terminated its supply agreement with Voorne Koi, alleging breaches of contractual obligations, including non-compliance with advertisement rules and failing to obtain permission for online sales. The Central Netherlands District Court found that these provisions were not exempt under the VBER and violated article 6 of the DCA. Consequently, the Court ruled that Oase's termination of the supply agreement was unlawful.
- *Claimant/Trek Benelux* (ECLI:NL:RBAMS:2020:6973): Trek Benelux ended its agreement with a dealer, citing non-compliance with two key conditions: assembling bicycles and delivering them to customers in person, and refraining from offering significant discounts (price dumping). The preliminary relief judge of the Amsterdam District Court determined that it is sufficiently plausible that the court of first instance will rule that the termination is invalid because, in any case, one of the grounds for termination violates competition law and, furthermore, the termination contravenes the principles of reasonableness and fairness.
- *Nike (NEON)/Action Sport* (ECLI:NL:GHAMS:2020:2004): in contrast to the above cases, the Amsterdam Court of Appeal upheld Nike's decision to terminate its supply agreement with Action Sport. The Court reasoned that Action Sport had breached the agreement by selling products through an unauthorised e-retailer, which justified Nike's actions within the framework of its selective distribution system.
- *Batavus/Vriend's Tweewielercentrum* (ECLI:NL:HR:2011:BQ2213): in this notable case, the question was whether Batavus was entitled to unilaterally terminate its distribution agreement with retailer Vriend's. The Dutch Supreme Court found that the termination amounted to indirect vertical price fixing, as it was linked to the pricing strategy employed by the dealer. While the Dutch Supreme Court concluded that the termination constituted a restriction of competition, it also found that the Leeuwarden Court of Appeal had failed to evaluate whether this restriction was appreciable. Upon referral, the Arnhem Court of Appeal ruled that the restriction of competition was appreciable.
- *European Lease Company/BMW Nederland* (ECLI:NL:RBDHA:2023:7049): supplier BMW Nederland partially terminated its agreement with European Lease Company, arguing that it had violated a clause prohibiting the sale of vehicles less than four months old or with less than 4,000 kilometres driven. The termination by BMW Nederland was upheld by the District Court of The Hague, finding it lawful under the agreement's terms.
- *Trionios/Dertronics (*ECLI:NL:GHDHA:2015:910): Dertronics faced the termination of its agreement with Trionios due to alleged non-compliance with online and offline advisory pricing. The preliminary relief judge of the District Court of The Hague found that such enforcement of advisory pricing violated competition law, rendering Trionios's termination of the agreement unlawful.

These civil cases show that – although the ACM has not taken any recent decisions – Dutch courts play a crucial role in assessing the boundaries of lawful selective distribution clauses.

Law stated - 5 februari 2025

Selective distribution systems

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

The ACM does not explicitly address cumulative restrictive effects in the ACM Vertical Guidelines. However, this issue was previously considered by the ACM in its 2015 supervisory strategy paper regarding vertical agreements. In that publication, referencing the European Commission's former vertical guidelines of 2010, the ACM highlighted that the use of selective distribution systems across multiple distribution chains within the same market could collectively cover a significant portion of the market (see paragraph 4.1 of the ACM's 2015 supervisory strategy paper regarding vertical agreements). This aggregation could lead to market power, even if individual chains lack such power on their own. Additionally, the ACM noted that the widespread application of similar and restrictive vertical agreements might signal potential collusion between producers or retailers.

Although cumulative effects are not explicitly addressed in the ACM Vertical Guidelines, we assume that the ACM continues to adhere to its earlier approach and aligns its analysis with the EC Vertical Guidelines, which also address cumulative restrictive effects in selective distribution systems (see EC Vertical Guidelines, paragraph 153). However, there have been no examples where a competition authority has addressed this in a formal decision.

Law stated - 5 februari 2025

Selective distribution systems

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 assessment of distribution systems that combine selective distribution with restrictions on approved buyers which limit them to resell the contract products closely follows the framework established under EU law. The ACM does not specifically address this issue in the ACM Vertical Guidelines, and no relevant decisions or informal opinions from the ACM are known to us at the time of writing.

However, guidance can be drawn fro m ***Dealers /Renault*** (ECLI:NL:RBAMS:2012:BX5392), a civil case concerning Renault's selective distribution system. In this case, Renault implemented a policy where dealers received a significant bonus for each car sale, contingent on proving that the vehicle was registered in the buyer's name. Renault refused to pay this bonus if the vehicles were sold to customers abroad. The dealers argued that this effectively imposed an export ban, which violated competition law. In its interlocutory

decision, the Dutch court indicated that such restrictions could breach competition law if the dealers could demonstrate that the registration requirement imposed disproportionate burdens.

Law stated - 5 februari 2025

Other restrictions

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

Case law indicates the following with respect to the assessment of exclusive purchasing agreements. Although in principle such agreements are not regarded to constitute an object restriction, they could be considered anti-competitive under certain circumstances. As such, whether the exclusive purchasing agreement entails a non-compete clause will also be examined. According to established case law (***Gemeente Heerlen/Whizz Croissanterie*** (ECLI:NL:HR:2009:BG3582), the party invoking a violation of the cartel prohibition of article 6(1) of the DCA and/or article 101(1) of the TFEU must allege, and if necessary prove, that there is an appreciable distortion of the market.

The following case illustrates how restricting the buyer's ability to obtain the supplier's products from alternative sources is assessed. In 2013, the ACM launched an investigation following signals regarding the hospitality beer market. It was alleged that there was no effective competition in the beer market due to purchase obligations in the form of non-compete and single branding clauses included in agreements between brewers and hospitality businesses. In summary, the ACM's analysis showed that the beer market exhibited sufficient dynamism, with breweries competing for outlets and hospitality businesses competing among themselves. The ACM observed that most brewers, such as Grolsch, Bavaria, InBev and smaller brewers, held limited positions in the market (with individual market shares below 30 per cent), enabling them to invoke the former EU vertical block exemption of 2010. Thereunder, these brewers were permitted to include non-compete clauses in agreements, provided that these did not exceed a duration of five years. Based on its analysis of the case, the ACM concluded that there are no competition law restrictions that would warrant or require action by the ACM under its powers, considering that it is not uncommon to agree on a non-compete or exclusive purchasing obligation in a distribution relationship.

By contrast, however, such agreements may sometimes be prohibited under the cartel prohibition, as was the case in***BP/Benschop*** (ECLI:NL:HR:2013:2123), where the Dutch Supreme Court upheld the Amsterdam Court of Appeal's ruling on the competition law infringement of an exclusive purchasing agreement. Relevant factors were the long duration of the clause of 20 years, the market share of over 10 per cent and the widespread use of similar vertical agreements in the sector.

Law stated - 5 februari 2025

Other restrictions

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

In general, Dutch practice closely follows EU competition law, including the CJEU's case law, as Dutch competition law is connected and closely aligned in this respect.

A vertical agreement between a supplier and a distributor that prohibits the buyer from obtaining competing products from other suppliers (exclusivity obligations) may fall under this prohibition if it appreciably restricts competition on the relevant market.

Here, the ACM largely follows the EU framework, including the EC Vertical Guidelines. The focus is often on the question to what extent the restriction leads to an effective foreclosure of competitors, either at the supplier level (ie, when other suppliers cannot enter the market) or at the buyer level (ie, when buyers no longer have freedom of choice).

Law stated - 5 februari 2025

Other restrictions

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 case law in the Netherlands applying directly to a type of agreement that restricts the buyer's ability to stock products.

Law stated - 5 februari 2025

Other restrictions

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?

A purchase obligation leading to full exclusivity (ie, where a buyer is caused to purchase more than 80 per cent of its total purchases on the relevant market from one source) is considered a non-compete clause, as defined under article 1(1)(f) of the VBER. Such clauses are exempted only if their duration does not exceed five years (pursuant to article 5(1)(a) of the VBER) and otherwise do not constitute a 'hardcore restriction' within the meaning of article 4 of the VBER. There are no other specific rules on this issue in the Netherlands.

Law stated - 5 februari 2025

Other restrictions

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

In general, Dutch practice closely adheres to EU competition law, including the case law of the CJEU, as Dutch competition law is inherently linked and aligned with it. Restricting the supplier in this situation will often involve an exclusive distribution network.

Although the EC Vertical Guidelines do not specifically address restrictions imposed on the supplier in this type of arrangement, they do recognise that suppliers may accept restrictions on sales themselves. Such arrangements should be evaluated within the framework applicable to the assessment of territorial resale restrictions imposed on buyers.

In the Netherlands, no recent cases have addressed this situation. However, an interesting atypical case from the past is worth mentioning. In 2012, the Court of Appeal of The Hague dealt with a case addressing whether an exclusive supply obligation of a tomato grower towards the Dutch largest cooperative horticultural auction violated competition law (***The Greenery/Oussoren*** (ECLI:NL:GHSGR:2012:BX8559)).

Oussoren (a tomato supplier) terminated its membership of the cooperative (The Greenery) and ceased deliveries, which The Greenery claimed violated the conditions.

The Court of Appeal assessed the competition law aspects of the supply obligation. While the cooperative legal form does not inherently have anti-competitive intent, obligations such as supply requirements and exit costs may fall under the cartel prohibition of article 6(1) of the DCA and/or article 101(1) of the TFEU. Such restrictions are nevertheless permissible if they are necessary for the cooperative's functioning. However, if members are hindered from switching to competitors, this could constitute a prohibited anti-competitive restriction. With reference to the European Commission's former vertical guidelines of 2010, the Court of Appeal concluded that The Greenery, with a mere 4 per cent market share on the downstream sales market, does not hold market power, and there were no appreciable negative effects for consumers. In conclusion, the Court of Appeal found that the limited anti-competitive impact was justified, which made further balancing of pro- and anti-competitive effects unnecessary .

Law stated - 5 februari 2025

Other restrictions

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

In a selective distribution system, the supplier may prohibit selected distributors from selling the contract products to non-selected distributors. However, it may not prohibit selected distributors operating at the retail level from actively or passively selling these products to end-users. Nor may it restrict cross-supplies between selected distributors. There are no known rulings in the Netherlands related to restricting sales to end users.

Law stated - 5 februari 2025

Other restrictions

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

No.

Law stated - 5 februari 2025

NOTIFICATION

Notifying agreements

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

The Dutch Competition Act (DCA) does not provide for a formal notification procedure for possible competition restricting vertical agreements. It is up to the undertakings themselves to assess whether their agreements and/or conduct violates article 6(1) of the DCA, falls under a block exemption or qualifies for an individual exemption under article 6(3) of the DCA. This approach is in line with EU law. Despite the lack of a formal procedure, the Netherlands Authority for Consumers & Markets (ACM) has published various blogs, started campaigns and issued guidance documents to help undertakings make such an assessment. Furthermore, it is possible for undertakings to obtain informal guidance from the ACM.

Law stated - 5 februari 2025

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?

With a so-called 'informal view', the ACM gives an opinion at the request of a market party on the application of a statutory provision that the ACM supervises or implements. An informal view constitutes a preliminary opinion of the ACM.

To consider and honour requests for informal opinions, the ACM – in short – applies the following criteria, which are laid down in the official publication 'ACM Working Method Informal Views 2019' (*ACM Werkwijze Informele Zienswijzen 2019*):

- It concerns a new legal question;
- There are significant economic interests involved;
- It concerns a subject that directly affects the interests of many consumers or a topic that is high on the social agenda;
- There is an agreement or conduct that likely occurs frequently, meaning the question at hand is more broadly relevant;
- The request for an informal opinion relates to an agreement or conduct that has not yet been executed or concluded;
- It must be possible for the ACM to provide an informal opinion based on the information provided by the requester, without the need for investigation by the ACM; and
- The legal question posed is not hypothetical.

If the above criteria are met, the ACM may still decide not to answer a request due to capacity reasons and priority setting. The informal view does not prevent the ACM from launching an investigation or taking a decision at a later stage.

Law stated - 5 februari 2025

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?

Yes, the Dutch General Administrative Law Act (***Algemene wet bestuursrecht***) (DGALA) allows private parties to complain to the authority responsible for antitrust enforcement, the Netherlands Authority for Consumers & Markets (ACM), about alleged unlawful vertical restraints. If the complaint entails a request for enforcement, it qualifies as an 'application' (***aanvraag***) within the meaning of Section 1:3(3) of the DGALA. Any interested party, whether an individual consumer or an undertaking, may submit such formal complaint (to which the procedural rules of Sections 4:1-4:6 of the DGALA apply), provided that the complainant has a direct and personal interest in the matter (see Section 1:2 of the DGALA). The ACM regards tips and notifications that do not entail a request for enforcement as informal complaints or 'signals'. Complaints can be submitted via the ACM's website or by phone.

The ACM then decides on the basis of its current prioritisation policy rule ('Prioritisation of enforcement investigations by the ACM 2023') whether a complaint should lead to an investigation, taking into account the available investigation capacity as well as the individual interest of the complainant. According to the procedural rules of the DGALA, the ACM must respond to all formal complaints and provide reasons if it decides not to investigate these. While the DGALA does not apply to informal complaints or 'signals', those may nevertheless cause the ACM to launch an ex officio investigation. The ACM uses three criteria to decide whether to take on a case, taking into account: (1) the magnitude of potential harm to the proper functioning of markets and the trust therein of consumers and undertakings, (2) the degree of public interest, and (3) the extent to which the ACM can effectively and efficiently address the issue.

Law stated - 5 februari 2025

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?

Since late 2018, the ACM has been stricter in its enforcement of competition law in the field of vertical restraints, focusing on vertical price fixing, online sales restraints, purchasing cartels and agreements on employment conditions. Meanwhile, the ACM has also published a framework for vertical restraints in sustainability agreements, providing undertakings with more opportunities to collaborate. These developments followed the taking office of the

ACM's board chair Martijn Snoep on 1 September 2018, who indicated in a January 2019 interview that the ACM would intensify its enforcement and increase the number of fines. Prior to that, the ACM did not put much emphasis on vertical restraints because of their simultaneously positive and negative effects. It was believed that where there is sufficient inter-brand competition, the positive effects generally outweigh the harm caused. Vertical restraints were only investigated where there was evidence of significant harm to consumer welfare. Consequently, the ACM had not acted actively against vertical restraints in the previous years.

By the end of December 2018, the ACM had conducted several dawn raids at manufacturers and (online) distributors of consumer goods for alleged minimum price agreements or resale price maintenance. In 2020, the ACM further carried out dawn raids at companies active within the home-decoration sector to investigate a possible cartel, although the case was dropped a year later. 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 (reference ACM/UIT/567212). Most recently, in July 2023, the ACM imposed another fine of around €8 million on LG for vertical price-fixing conduct (reference ACM/UIT/604321). Further investigations into vertical restraints are ongoing, with a particular focus on issues within emerging markets, as demonstrated by the ACM's 2023 investigations into illegal arrangements involving IT devices.

In 2024, the ACM continued focusing on vertical restraints as it issued warnings to several suppliers for potentially pressuring retailers to implement higher retail prices for their products. These suppliers operate in various sectors, including construction materials, bicycle and car accessories, batteries and personal care products. Following warning letters from the ACM, the suppliers conducted internal investigations, enhanced compliance training, adjusted agreements and revised communications.

Law stated - 5 februari 2025

Regulatory enforcement

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

Pursuant to article 6(2) of the Dutch Competition Act (DCA), agreements infringing the Dutch cartel prohibition of article 6(1) of the DCA are automatically null and void.

This, however, should be read in conjunction with the provisions on nullity in the Dutch Civil Code (***Burgerlijk Wetboek***) (DCC) – namely, Section 3:41 of the DCC on partial nullity and Section 3:42 on the conversion doctrine. In ***Prisma/Slager*** (ECLI:NL:HR:2009:BJ9439), the Dutch Supreme Court ruled that automatic conversion based on Section 3:42 of the DCC of illegal provisions into provisions not infringing competition rules is not possible, as this is contrary to the spirit of article 6(2) of the DCA (ie, 'absolute nullity' as a deterrent to unlawful restrictions of competition). The Dutch Supreme Court later reaffirmed this in ***BP/Benschop*** (ECLI:NL:HR:2013:2123) and further clarified that – in light of partial nullity under Section 3:41 of the DCC – illegal provisions may be severable from the agreement because in the alternative (ie, 'integral nullity' of the entire agreement), the party invoking competition law

would lose all its contractual rights, which would be to the detriment of private enforcement of competition law as such.

Law stated - 5 februari 2025

Regulatory enforcement

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?

Yes, the ACM can directly impose penalties, taking such decisions independently and not being obliged to petition another entity. Under article 56 of the DCA, the ACM can impose a fine or an enforcement order subject to a periodic penalty payment.

Under article 57(1) of the DCA, a fine shall not exceed €900,000 or 10 per cent of the turnover of the undertaking, or, if the infringement was committed by an association of undertakings, of the aggregate turnover of the undertakings belonging to the association and operating in the market affected by the association's infringement, whichever is higher. Article 57(3) of the DCA further prescribes that if the infringement continued over several years the basic amount of the fine will be multiplied by the number of years, subject to a maximum of four. As per article 57(5) of the DCA, if the same undertaking has been found to infringe a similar rule of competition law in the previous five years, the fine may be doubled. So in total, the maximum fine may amount to 80 per cent of the turnover concerned in case of a repeat infringement that lasted four years or more and where the fine imposed for a similar infringement has become irrevocable in the five years prior to drawing up the report of the repeat infringement.

Furthermore, the possibility to impose a structural remedy through periodic penalty payments, in line with article 7 of Council Regulation (EC) No 1/2003, is provided under article 58a of the DCA, if that measure is proportionate to the infringement committed and is necessary to effectively put an end to the infringement.

The notable sanctions imposed by the ACM include the fine of nearly €40 million imposed on Samsung in September 2021 for actively influencing its retailers' online sales prices for television sets (reference ACM/UIT/567212) and the fine of around €8 million on LG for vertical price-fixing conduct in July 2023 (reference ACM/UIT/604321). A trend that can be identified from such practices is that the ACM is paying increasing attention to vertical agreements and related restraints in the consumer electronics sector.

Law stated - 5 februari 2025

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's general investigative powers are laid down in the ACM Establishment Act (-*Instellingswet Autoriteit Consument en Markt*), the DGALA and the DCA, which are elaborated

in policy rules and working method documents issued by the ACM. The ACM may decide to launch enforcement investigations into vertical restraints based on notifications (ie, enforcement requests or concrete tips by (anonymous) informants or businesses) or ex officio, taking into account its prioritisation policy.

To conduct investigations, the ACM has the authority to enter premises, request information, demand access to documents and copy data. These powers apply not only to business premises, but also to private homes. However, in the latter situation, a court order is required in advance. All parties are in principle obliged to cooperate with the ACM as reasonably required in the exercise of the ACM's (investigative) powers.

Law stated - 5 februari 2025

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?

Both citizens and undertakings can be harmed by infringements of competition and, in principle, both categories of injured parties can seek redress for any damages suffered through private enforcement. This system of private enforcement of competition law is reactive, meaning that it depends on the extent to which a citizen or undertaking takes action in reaction to the competition law infringement, also when such infringement has already been established by a decision of a competition authority.

The damages eligible for compensation in competition cases concern damages directly caused by the infringing participants. In the Netherlands, any injured party can successfully hold an undertaking that has violated competition rules liable, if the usual requirements of tort action under Section 6:162 of the DCC are met. Injured parties claiming damages following competition law infringements have to provide sufficient evidence to support their claim.

In addition, Dutch law has several ways to settle damages collectively by initiating a class action – for example, by setting up an association to bring collective claims on behalf of a group of injured parties, or through a claims vehicle. Since the introduction of the new Dutch act on class actions (which entered into force on 1 January 2020), judgments rendered in these cases will be binding on all potential claimants unless they choose to opt out.

The duration of a private enforcement action can vary significantly depending on the specific facts of the case.

Law stated - 5 februari 2025

OTHER ISSUES

Other issues

Is there any unique point relating to the assessment of vertical restraints in your jurisdiction?

No.

Law stated - 5 februari 2025

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 11 July 2023, the Netherlands Authority for Consumers & Markets (ACM) issued a decision concerning vertical price-fixing agreements, imposing a fine of almost €8 million on LG (reference ACM/UIT/604321). This decision is similar to the ACM's 2021 decision to fine Samsung nearly €40 million (reference ACM/UIT/567212), which Samsung appealed to the Rotterdam District Court.

In the LG decision, the ACM concluded that LG violated the Dutch and EU cartel prohibition by orchestrating price increases between January 2015 and December 2018, during which LG was consistently persuading (online) retailers to maintain prices in line with its price recommendations and discouraging them from matching competitors' lower prices. LG monitored online prices, acted on retailer requests to address lower prices of competitors and reported back to the retailer on its efforts, thereby reassuring retailers they would not be out-competed if they adhered to LG's preferred recommendation price. The ACM found that this coordinated practice unlawfully restricted competition and prevented consumers from benefiting fully from price transparency in e-commerce. Although LG filed an objection against the imposed fine, the ACM rejected it on 19 July 2024 (reference ACM/UIT/626226). This decision on the objection was open to appeal at the Rotterdam District Court, but it is unclear whether LG has done so.

With respect to the Samsung decision, the Rotterdam District Court ruled on 11 November 2023 against Samsung's appeal thereto (ECLI:NL:RBROT:2023:10490). The Court rejected Samsung's claim that its conduct did not amount to an agreement or concerted practice, pointing to substantial evidence in its communications with retailers. Samsung argued that its behaviour did not restrict intra-brand competition because it did not enforce recommended prices, and that the ACM failed to consider the economic context and Samsung's economic reports. However, the Court dismissed these assertions, concluding that retailers had relinquished their pricing autonomy under Samsung's pressure and that Samsung's conduct had an anti-competitive object, also emphasising its large market share. It is understood that Samsung has appealed this judgment to the Administrative High Court for Trade and Industry.

Law stated - 5 februari 2025

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?

Samsung and *LG*

The forthcoming ruling in Samsung's appeal before the Administrative High Court for Trade and Industry will be important as it concerns one of the two recent ACM decisions regarding vertical restraints (alongside ***LG***). In addition, following the ***Samsung*** and ***LG*** decisions, two claims associations filed class actions against both parties at the end of March 2024, claiming damages on behalf of consumers of Samsung and LG televisions during the infringement period. These class actions are currently pending before the North Holland District Court.

Booking.com

In ***Booking.com*** (ECLI:EU:C:2024:764), the Court of Justice of the European Union (CJEU) addressed two preliminary questions referred by the Amsterdam District Court on 19 September 2024:

- Can wide and narrow parity clauses be considered ancillary restraints under article 101(1) of the Treat on the Functioning of the European Union?

The CJEU ruled that restrictions are not objectively necessary merely because a transaction might be more difficult or less profitable without them. As such, wide and narrow parity clauses in contracts between online hotel platforms and accommodations cannot qualify as ancillary restraints.

- How should the relevant market be defined for Regulation (EU) 330/2010 when transactions involve an online travel agency platform (OTA)?

The CJEU held that defining the relevant market requires examining whether online intermediary services and other sales channels are substitutable from a supply and demand perspective.

It is now for the Amsterdam District Court, as the referring court, to rule on this matter.

ACM 2025 agenda

In its 2025 agenda, the ACM indicates that it will focus on:

- encouraging an open and fair digital economy;
- accelerating the energy transition; and
- developing towards a more sustainable economy.

Furthermore, the ACM will launch market studies in five sectors to identify market issues. The five sectors are veterinary practices, (digital) learning materials, computer-controlled consumer prices, the budget segment of fixed internet and hydrogen.

Building on its policy rule on sustainability agreements (***Beleidsregel Toezicht ACM op duurzaamheidsafspraken***) of 4 October 2023, the ACM will continue to advise companies on how they may cooperate within competition rules to foster a more sustainable economy and innovation.

Law stated - 5 februari 2025