NEDERLANDSE VERENIGING VOOR RECHTSVERGELIJKING
NETHERLANDS COMPARATIVE LAW ASSOCIATION

Vertical Restraints of Competition

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1. Framework

This first part aims at providing a sketch of the substantive and institutional framework, and policy context, in which vertical restraints are being assessed.

1.1. Substantive Framework

What are the general Provisions of National Competition Law applicable to vertical restraints?

Competition Act
Article 6(1) of the Dutch Competition Act (DCA) is the Dutch equivalent of article 81(1) EC Treaty and prohibits agreements that have as their object or effect to restrict competition on the Dutch market or a part thereof ('cartel prohibition').

Under article 6(3) DCA, agreements which contribute to improving production or distribution of goods or to promoting technical or economic progress, allow consumers a fair share of the resulting benefit, do not impose restrictions which are not indispensable, nor eliminate competition in respect of a substantial part of the products or services in question, are exempted from the cartel prohibition (legal exemption identical to article 81(3) EC-treaty).

Are some sectors of the industry made subject to specific provisions (retail, telecoms, utilities, healthcare, etc.)? If so, what are these sectors and what are the provisions applicable thereto? How do these sector-specific provisions interact with general provisions?

Retail sector
Under the block exemption for cooperation in the retail sector (*besluit samenwerkingsovereenkomsten detailhandel*), the following restrictions in franchise agreements (and similar agreements) in the retail sector are exempted from the cartel prohibition:

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a. an obligation to respect maximum prices prescribed by the franchisor/ supplier in the course of advertising campaigns for a maximum duration of 8 weeks, provided these prices do not apply to more than 5% of the product range supplied by the franchisor/supplier to the retailer, and

b. an obligation of the retailer to purchase (max.) 60% of the product range of the retailer from the franchisor/supplier, provided the duration of this obligation does not exceed 10 years, the obligation is entered into in connection with credit provided by the franchisor/supplier to the retailer or a lease agreement between the franchisor/supplier and the retailer, and the sale conditions for such products are not less favourable than those applied with respect to third parties.

Publishing sector
Under the Act on fixed book prices (*Wet op de vaste boekenprijs*), publishers must fix the resale prices of Dutch language books and music publications sold for the first time in the Netherlands. Resellers of books are under a legal obligation to apply these prices vis-à-vis end-users, subject to certain exemptions. Even though the result of this Act is vertical resale price maintenance, the cartel prohibition does not apply as it results from obligations imposed under the Act.

Liberalised sectors
Certain (liberalised) sectors are subject to specific regulation. The regulation mainly focuses on obligations to promote the development of competition and to prevent the abuse of market power (e.g. price regulation and (sometimes) access obligations). Although this regulation in principle does not provide for specific competition rules regarding vertical agreements, it often affects vertical agreements entered into by the parties active in the respective sectors. Some examples of sector specific rules that affect vertical agreements are briefly discussed below.

Telecom
The Telecommunications Act (*Telecommunicatiewet*), which is based on the EU-telecommunications directives, provides for sector-specific rules for the telecommunications sector. OPTA, the telecommunications and post regulator can impose obligations on parties with significant market power (‘SMP’) on telecommunications markets. Such obligations can regard both wholesale markets (e.g. access and pricing obligations with respect to infrastructure or services) and retail markets (e.g. pricing obligations).

Post
The Postal Act (*Postwet*), which is based on the EU-postal directives and the secondary legislation based on that Act provides for sector specific rules in the postal sector, among which certain access and pricing obligations for the incumbent postal operator.

Utilities
The Gas Act (*Gaswet*) and the Electricity Act (*Elektriciteitswet*) provide *inter alia* for regulated network access and for purchasing obligations for the manager of the national gas network with respect to gas extracted from Dutch gas fields.

Healthcare
The proposal for the Act on Market Regulation Healthcare (*Wet marktordening gezondheidszorg*) provides that the healthcare regulator (to be established) will *inter alia* have the power to provide for specific rules with respect to agreements regarding healthcare (e.g. conditions, tariffs) in order to promote competition in the healthcare sector.

Sectors which are subject to sector-specific regulation and supervision by sector-specific market regulators, also remain subject to the general competition rules set out in the DCA. To the extent that the sector-specific regulations include competition rules, the sector-specific rules have precedence over the DCA. It should be noted, however, that in a decision regarding the telecommunications sector, the Dutch Competition Authority (*Nederlandse Mededingingsautoriteit*, 'NMa') held that the fact that regulation is intended to promote competition does not automatically mean that such regulation provides for sector-specific competition rules which have precedence over the DCA.[1]

1.2. Institutional Framework

What national administrative and/or judicial authorities are competent, in first and second instance, for enforcing vertical restraints control?

The managing board of the NMa (*Raad van Bestuur van de Nederlandse Mededingingsautoriteit*) is entrusted with enforcing the DCA and is therefore competent to enforce vertical restraints control. Appeal from its decisions may be brought before the District Court of Rotterdam (*Arrondissementsrechtbank Rotterdam*), and subsequent appeal in last instance is possible to the Trade and Industry Appeals Court (*College van Beroep voor het Bedrijfsleven*).

In addition to administrative enforcement, the competition rules may be enforced by private parties in civil proceedings. However, civil enforcement is not dealt with in this report.

When more than one authority is competent, how are powers allocated and coordinated?

The NMa has exclusive jurisdiction to enforce the DCA. Therefore under the DCA concurrent jurisdiction with respect to vertical restraints control cannot exist.

The NMa has entered into cooperation protocols with several sector-specific regulators. Concurrent jurisdiction may occur with such regulators in the area of market definition and with respect to dominance issues. These protocols provide for exchange of information, mutual consultation and cooperation. In cases where concurrent jurisdiction may occur, in principle the sector-specific authority will have priority to act on the basis of the sector-specific legislation.

1.3. Policy Context

When administrative authorities are competent, does their current approach to vertical restraints reveal the existence of policy choices vis-à-vis vertical restraints? If so, which ones?

The DCA is based on the EU competition rules and is construed and applied in accordance with the decision practice of the European Commission and the judgments

[1] Decision of 8 September 2000 in Case 275 (*Libertel*).

of the European Courts of Justice. In its decisions with respect to vertical agreements, the NMa usually refers to the EU-block exemption on vertical agreements (the 'Block Exemption')[2] and the European Commission guidelines on vertical restraints[3] (the 'Guidelines') and applies the principles set out in these documents.

Does their approach also reveal the existence of priorities? For example, have administrative authorities recently studied (e.g. in a report), or focused on, specific types of vertical restraints?

Recent studies and reports by the NMa have not focused specifically on (certain types of) vertical restraints, although certain reports have discussed vertical restraints.

The NMa published a report dealing with buying power, in which the effects of buying power on vertical restraints are briefly discussed.[4] The report states – referring to the Guidelines – that buying power is likely to increase the negative effects on competition with respect to vertical restraints from the 'limited distribution' and 'market partitioning' groups, such as 'exclusive distribution' and 'selective distribution'.[5] According to the NMa, exclusive distribution in combination with buying power leads to an increased risk of cartels, in particular when the exclusive distribution arrangements are imposed by purchasers established in different areas upon one or more suppliers. Buying power may manifest itself with respect to selective distribution in particular through the use of selection criteria that are aimed at imposing restrictions to the distribution channel that benefit in particular the purchasers with buying power.

In addition, together with the *Central Plan Bureau*, the NMa recently published an analysis of competition in the markets for life insurance which concludes that competition in the life insurance markets is weak.[6] It is assumed that better functioning of financial advisors may improve competition, and the report suggests as a policy option to regulate contract terms between life insurance firms and financial advisors (e.g. prohibition on terms that induce an advisor to do business primarily with certain life insurers).

In reaction to a price war in the food retail sector in the Netherlands the government has commissioned research on price regulation, and in particular a prohibition on sales below the purchase price, in other European countries and the desirability of such regulation in the Netherlands. On the basis of the results of the research, it was decided not to establish such rules.

2. Horizontal Aspects

This second part aims at giving an overview of substantive and procedural conditions in which vertical restraints are assessed by national authorities. The questions asked relate, first, to vertical restraints that are deemed to be pro- or anticompetitive, second, to vertical restraints that may be found pro- or anticompetitive and, third, to the assessment of this second category by national authorities.

[2] Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices, *OJ* L 336/21, of 29 December 1999.

[3] *OJ* C 291/1, of 13 October 2000.

[4] NMa 2004, Para. 105-112.

[5] Para. 125 of the Guidelines also mentions exclusive supply.

[6] CPB & NMa 2005.

2.1. Presumptions

2.1.1. Vertical Restraints deemed Legal

Are some vertical restraints deemed to be legal per se? If so, which ones?

Vertical restraints that fall within the scope of the Block Exemption are legal per se. Outside the scope of the Block Exemption, a selective distribution system that meets the criteria set out in the case-law of the European Court of Justice with respect to selective distribution, is deemed legal per se.[7] Other vertical restraints are not legal per se, although vertical restraints which do not qualify as 'hardcore restrictions' are deemed not to have as their object a restriction of competition. Therefore, when assessing such non-hardcore restrictions the NMa investigates whether these may have appreciable restrictions of competition as their effect.

Is this per se rule absolute or modified? If modified, to what extent and under which conditions?

See above.

Are some vertical restraints formerly deemed legal per se now made subject to a rule of reason? If so, which ones?

No, a rule of reason does not exist under Dutch competition law.

2.1.2. Vertical Restraints deemed Illegal

Are some vertical restraints deemed to be illegal per se? If so, which ones?

The approach taken by the NMa is similar (if not identical) to that of the European Commission. Resale price maintenance and market partitioning are therefore in principle deemed illegal per se ('hardcore restrictions').

Is this per se rule absolute or modified? If modified, to what extent and under which conditions?

Maximum or recommended resale prices and a prohibition on active sales in the exclusive territory of other distributors are not deemed illegal per se. Even with respect to vertical restraints that are deemed to restrict competition by their nature, the cartel prohibition does not apply when the parties can demonstrate that the restrictions have no appreciable effect on competition, or that the conditions for the legal exemption are met.

Are some vertical restraints formerly deemed illegal per se now made subject to a rule of reason, or even legal per se? If so, which ones?

The block exemption for the retail sector (exempting limited purchasing obligations and maximum pricing arrangements) suggests that maximum prices and purchasing obligations were deemed illegal per se before the entry into force of the Block Exemption and the Guidelines.

[7] Decision of 9 February 2000 in Case 1122 (*Breitling watches*).

2.2. *Proof*

2.2.1. Standard of Proof

2.2.1.1. Anticompetitive Effects

What standard of proof of the anticompetitive effects attributed to a vertical restraints is imposed on the undertaking which complains about it before the competent authority? Is the standard of proof the same where this authority is administrative and where it is judicial?

The NMa (as an administrative authority) has a wide discretionary power whether or not to investigate complaints, which does not depend on the evidence submitted by a complainant. An appeal by an interested third party against an exemption or negative clearance decision must be sufficiently substantiated, failing which the NMa can dismiss the appeal on the single ground that it was not sufficiently substantiated.[8]

What standard of proof of the anticompetitive effects attributed to a vertical restraint is imposed on the authority competent for investigating and prosecuting it? Is the standard of proof the same where this authority is administrative and where it is judicial?

It should be noted that hardcore restrictions are deemed to violate the cartel prohibition regardless of their effects. As regards the assessment of anticompetitive effects, the NMa has a wide discretionary power and there is no statutory standard of proof to be met by the NMa. The NMa is bound in general to certain general principles of sound administration (*algemene beginselen van behoorlijk bestuur*), such as the requirements of due care, proper preparation and the obligation to provide proper and consistent grounds for a decision. On appeal, the courts assess whether the NMa has applied the principles of sound administration correctly and whether it has substantiated its decisions so as to make (e.g.) the anticompetitive effects sufficiently plausible (*voldoende aannemelijk*).

2.2.1.2. Pro-competitive Effects

What standard of proof of the pro-competitive effects attributed to a vertical restraint is imposed on the undertaking author of this vertical restraint? Are potential effects treated differently from actual effects?

No rule of reason exists under the DCA and pro-competitive effects are only taken into account in the assessment whether the conditions for an individual (now the legal) exemption are met. Before the introduction of the legal exemption, an undertaking that requested an individual exemption with the NMa, had to substantiate sufficiently its request (that the conditions for an exemption were met) so as to enable the NMa to carry out the investigation necessary to assess the request.[9] A pending proposal to amend the DCA provides that the undertaking invoking the legal exemption of Article 6(3) DCA must prove that the conditions for such exemption are fulfilled. There is no statutory standard of proof to be met by the undertakings,

8 Decision of 20 December 2001 in Case 2110 (*Basismedia*).

9 District Court Rotterdam, judgment of 16 May 2001(MEDED 99/2584 – SIMO).

authors of vertical restraints, but the NMa has indicated that 'parties must make plausible' (*aannemelijk maken*) that the conditions for an exemption are met.[10]

What degree of causal link must the undertaking author of a vertical restraint prove between this vertical restraint and the pro-competitive effect expected from it (direct or indirect; probable or possible)? Are certain types of markets treated differently (emerging markets, innovative markets, etc.)?

In order to benefit from the legal exemption, it must be probable that all conditions for applicability of the legal exemption are met.

2.2.2. Type of Evidence

2.2.2.1. Evidence submitted by the Parties

Is the undertaking author of a vertical restraint allowed to submit any type of evidence? Is the rule different where the competent authority is administrative and where it is judicial?

Undertakings are free to submit any type of evidence to the NMa, and on appeal, to the court.

Is the submission of certain types of evidence, i.e. industrial evidence (internal document of the undertaking or of a trade association) and/or economic evidence (market study, expertise, economic model, etc.) made subject to certain conditions? If so, what are these types of evidence and under which conditions are they admissible?

Submission of evidence is in principle not subject to conditions depending on the type of evidence. The degree in which the NMa (or on appeal, the court), will take such evidence into account in its assessment may vary depending on the type of evidence.

Are third parties allowed to ask to intervene in the proceedings to represent an individual or collective interest? If so, are they granted access to the evidence in the file? Are they allowed to submit their own evidence?

The participation of third parties is only relevant in infringement procedures, as the possibility to request an individual exemption from the NMa no longer exists. Third parties that have an interest 'of their own' which is 'objectively determinable', 'current', 'personal', and 'directly related to the case' (it appears that only complainants are deemed to qualify as such), have access to the file (with the exception of information deemed confidential) and can submit written and oral statements and supporting documents.

2.2.2.2. Evidence requested by the Authority

What are the main investigative powers enabling the national authorities to complement and evaluate evidence submitted by the parties? Are these powers different where the authority is administrative or judicial?

The NMa has wide powers of investigation, and the General Administrative Law Act (*Algemene Wet bestuursrecht*) provides for a general duty to cooperate with the NMa in its investigations. The NMa can request (both written and oral) information from

[10] Decision of 9 July 2002 in Case 1994 (*Astra Zeneca*).

relevant market parties (e.g. customers, suppliers, competitors, the authors of the vertical restraint, etc.), visit the premises of such parties and inspect and copy books and records (including digitally stored files). In addition, the NMa may engage third party experts (e.g. IT-experts and/or economists) to assist it in its investigations. On appeal, the court in principle must decide on the basis of the file submitted to it, although it can and does ask questions during oral hearings.

In particular, are they vested with the power and the means to carry out their own inspection? How is this power used in practice?

Yes (see above). The NMa employs officials with investigative power and IT-experts, and has its own detective force. The power to actually carry out unannounced inspections at business premises, is generally used only when investigating hardcore violations of the DCA (e.g. horizontal price cartels). With respect to less serious infringements, the NMa may suffice with written questions and possibly an announced visit.

Are they empowered to order an independent expertise? If so, according to which procedure and under which conditions is the independent expert selected? How is this power used in practice?

Yes. No specific procedure and/or conditions that apply to the selection of an expert have been published.

Are they empowered to consult third parties? How do they use it in practice?

The NMa is empowered to ask written and oral questions to third parties who are under a duty to cooperate. The NMa frequently uses this power in the assessment of cases, by sending questionnaires to relevant market parties.

2.2.3. Substance of Evidence

2.2.3.1. Anticompetitive Effects

How is market power pre-existing to the vertical restraints assessed in practice? In particular, how are countervailing powers taken into account (market power of actual or potential competitors; of resellers; of end-users; barriers to entry; regulatory framework; etc.)?

In the limited cases available to date, the NMa has taken into account (in cases dealing with exclusive dealing arrangements) the market share of the parties involved, the number of competitors and their overall size and market shares (level of market concentration), the market share of the customers and their countervailing power (e.g. evidence that the supplier has not been able to exert pressure on a customer to enter into a contract), the level of product differentiation and the availability of substitutes, the existence or absence of barriers to entry (e.g. as a result of cumulative effects of long term purchasing obligations entered into by the supplier involved and its competitors, alternative distribution methods, customer loyalty etc.), the level of potential competition, excessive prices or competitive pricing (e.g. discounts granted to customers may provide evidence of the competitive circumstances in which the contract was concluded and of the availability of alternatives to the customer), the extent to which the supplier has been able to impose onerous contract conditions upon

purchasers, etc.[11] A high market share may be offset by evidence (on the basis of market activity and development in the past) of actual competition, loss of market share in the past, switching behaviour of customers, the inability to increase prices, market entry by new competitors, etc.[12]

How is the increase in market power caused by the vertical restraints assessed in practice?

In cases dealing with exclusive dealing arrangements, the NMa has investigated whether these lead (or have led) to foreclosure effects by creating entry barriers (e.g. by looking at actual market entry despite the existence of vertical restraints).[13] In this investigation, the NMa has taken into account inter alia the duration of the exclusivity, possibilities for the purchaser to terminate the agreement on relatively short notice, the tied market share resulting from the contract involved, the availability of alternative distribution methods to competitors,[14] and high discounts that cannot be matched by new entrants (in view of significant development costs, short period in which recoupment of investments must take place and the importance of economies of scale).[15]

Must market power become superior to a given threshold to be caught (minimum/appreciable power)? If so, how is this threshold measured?

The NMa has acknowledged that as the market position becomes stronger, appreciable anticompetitive effects become more likely. However, other than the 30% threshold set out in the Block Exemption and the 15% market share in the Commission De Minimis notice, there are no fixed market share thresholds that must be met for an appreciable restriction to exist.

Are there successive thresholds, the overcoming of which implies treatment under different rules or different tests (substantial power; dominance; monopoly)? If so, how are these threshold measured?

Referring the Guidelines, the NMa has indicated that an undertaking with a dominant position, can only enter into vertical restraints to the extent that these can be objectively justified, in which event nor the cartel prohibition nor the prohibition on abuse of dominance applies.[16]

How are vertical effects measured? In particular, is the allocation of profit within the distribution channel taken into consideration, or left to provisions other than those of competition law (unfair trading practices, etc.)?

The NMa uses no clear specific test to measure vertical effects. The NMa focuses primarily on horizontal effects. To our knowledge, the NMa has not taken the

[11] E.g. decision of 28 May 2002 in case 2036 (*Heineken*), para. 88 and onwards, decision of 1 September 2003 in case 1941 (*Waterbedrijf Europoort*), para. 63 and onwards, and decision of 21 December 2001 in case 757 (*Chilly and Basilicum*), para. 94 and onwards, decicion of 11 August 2000 in case 1405 (*Metro*), para. 77 and onwards.

[12] Case 2036 (*Heineken*).

[13] Case 1405 (*Metro*), para. 78.

[14] E.g. case 2036 (*Heineken*), case 1941 (*Waterbedrijf Europoort*), and cases 1405 (*Metro*) and 2110 (*Basismedia*).

[15] Case 1994 (*Astra Zeneca*), para. 107.

[16] Case 2036 (*Heineken*), para. 84 and Guidelines at para. 141.

allocation of profit within the distribution channel specifically into account in the assessment of VR. Allocation of profit is mostly a matter of abuse of a dominant position, or of specific legislation. Recently proposals to enact pricing legislation in reaction to the price war in the food retail sector were rejected.

How are horizontal effects measured? In particular, what test is used to measure market foreclosure?

The NMa has acknowledged that any vertical restraint has horizontal effects as it restricts an undertaking in its freedom of action vis-à-vis its competitors. For example: vertical price maintenance with respect to a number of resellers has the same effect as horizontal price fixing between such resellers, as differences in efficiency and service level cannot result in differences in price levels.[17]

Such restrictive effects are increased when a supplier enters into similar agreements with a considerable number of distributors.[18] No specific test is used, however, to measure market foreclosure. Foreclosure effects resulting from an exclusive purchasing agreement are investigated on the basis of the tied market share resulting from the agreement, the other exclusive agreements entered into by the supplier (tied market share resulting from all similar agreements entered into by supplier), the cumulative effects of similar agreements entered into by competitors (total tied market share on the basis of similar agreements), the level of trade on which the agreement is entered into (market foreclosure is considered less likely with respect to intermediary products), the duration and extent of exclusive purchasing obligations and possibilities to terminate the agreement.[19]

In the case of a network of similar vertical restraints, how is cumulative effect measured?

The NMa has not published any detailed investigation of cumulative effects in the assessment of a vertical restraint. It is therefore not entirely clear how exactly the NMa measures cumulative effects. In cases where cumulative effects were considered, the NMa has taken into account the share of the market (or alternative distribution outlets) that is covered by similar agreements, the influence such vertical restraints have to access to the market, and the extent to which the vertical restraint at issue and similar vertical restraints entered into by the party involved, contribute to this tied market share.

Are other elements taken into account? If so, which ones?

In the analysis of vertical restraints, the NMa has inter alia taken into account that the market involved is a new dynamic market that is in full growth, the nature of the product involved[20] and the fact that the legislator intended to stimulate competition on certain markets which is frustrated by the vertical restraint involved.[21]

[17] Decision of 14 October 1999 in Case 587 (*Nederlands Uitgeversverbond*), para. 33.
[18] Case 757 (*Chilly and Basilicum*), para. 19.
[19] E.g. case 2036 (*Heineken*) and case 1941 (*Waterbedrijf Europoort*).
[20] Case 1405 (*Metro*), para. 74 and 82 and onwards.
[21] E.g. case 1994 (*Astra Zeneca*), para. 105.

Is the analysis of vertical mergers taken as a point of comparison?

No. In one case, it has been stated explicitly that theories on analysis of vertical mergers are excluded when assessing agreements under the cartel prohibition.[22]

2.2.3.2. Pro-competitive Effects

Which positive effects on vertical competition are admissible (solving a problem of double marginalization, of cost, of hold-up, of incentive, of free-riding, of image and/or service; entry on a new market; etc)? Under what conditions?

It is noted that positive effects on competition are only taken into account in the assessment whether the conditions of (now) the legal exemption have been met. In principle any effects on competition (that contribute to improving the production or distribution of goods or to promoting technical or economic progress) are admissible, provided that the positive effects are sufficiently substantiated and the other conditions of article 6(3) DCA are met.

Which positive effects on horizontal competition are admissible? Under what conditions?

In principle any effects on competition (that contribute to improving the production or distribution of goods or to promoting technical or economic progress) are admissible, provided that the positive effects are sufficiently substantiated and the other conditions of article 6(3) DCA are met.

Is any positive effect on competition admissible? In particular, in which conditions is an effect benefiting to a market other than the relevant production or distribution market, i.e. an upstream market (for instance, the R&D market) or a neighbour market, admissible?

In principle any effects on competition (that contribute to improving the production or distribution of goods or to promoting technical or economic progress) are admissible, provided the effects are sufficiently substantiated and the other conditions of article 6(3) DCA are met.

Are positive effects for the economy admissible (environment, regional development, etc)? If so, which ones and under what conditions?

Positive effects on the economy are admissible (under the same conditions as other positive effects on competition), provided they qualify as contributing to improving the production or distribution of goods or to promoting technical or economic progress. Positive effects on the environment have previously been deemed to qualify as such.[23]

Is the analysis of vertical mergers taken as a point of comparison?

No.

[22] Case 2110 (*BasisMedia*), para. 47.

[23] E.g. decision of 10 December 2003 in case 3007 (*Stichting Papier Recycling Nederland*), para. 74.

2.3. Evaluation and Control of Evidence

2.3.1. Evaluation in First Instance

2.3.1.1. Standard of Evaluation

What standard of evaluation of pro- and anticompetitive effects of a vertical restraint is imposed on the authority competent for adjudicating in first instance? Is it required to ascertain possible effects ('reasonableness') or likely effects ('balance of probabilities')? In the second case, it is a simple ('likely') or a qualified ('very likely') balance of probabilities?

The NMa has wide discretion in the assessment of the pro- and anticompetitive effects of behaviour of undertakings. In its assessment, the NMa is bound to the general principles of due administration. On appeal the court assesses whether the NMa has in reasonableness been able to come to the conclusion whether or not the conditions for an individual (now legal) exemption are met.[24] In this assessment, the court has investigated whether (positive or negative) effects have been made sufficiently plausible (*voldoende aannemelijk gemaakt*).

2.3.1.2. Substance of the Evaluation

Does the evaluation carried out account only for consumer surplus or also for producer surplus? If so, under which conditions?

The evaluation may take account both of both consumer surplus and producer surplus, in the latter case provided that a fair share of the benefit will accrue to consumers.

May other interests be taken into account (public interest, shareholder interest, etc.)? If so, under which conditions?

In principle, only objective economic efficiency improvements are taken into account in the competition assessment of vertical restraints.

Is the regulatory framework taken into account, in particular in the case of regulated markets? If so, how?

The regulatory framework is taken into account in particular when defining the relevant market, and in determining the scope for competition between market participants. In addition, the NMa has explicitly held that where the legislator has intended to create room for competition or to enhance competition in a market, market participants must refrain from frustrating these intentions through restrictive agreements.[25]

Are these elements balanced ('consumer welfare') according to certain criteria? If so, which ones?

No, they are not.

[24] E.g. judgments of the District Court of Rotterdam of 29 september 2001 (*Inter Partner Assistance S.A. v NMa*) and of 16 May 2001 (*Vereniging Koninklijke Nederlandse Maatschappij voor Diergeneeskunde v NMa*).

[25] Case 1994 (*Astra Zeneca*), para. 105.

Are these criteria prioritized ('structured rule of reason') or not ('unstructured rule of reason')?

No. Under Dutch competition law a rule of reason does not exist. If an agreement appreciably restricts competition, positive effects are taken into account under the assessment whether the conditions for the legal exemption are met.

Has the authority taken the step of formalizing and publishing these criteria, through a document such as guidelines or an opinion? If so, what is the legal value of this document? Is this document updated so as to reflect accumulated experience, in particular with respect to economics? Is it possible to challenge the substance of this document before a superior authority? If so, has it already been the case? With what result?

The NMa has not issued guidelines on the assessment of vertical restraints, but has indicated that it will apply article 6 DCA in accordance with the guidelines and notices issued by the European Commission (including the Guidelines).[26] In addition, the NMa has indicated that it will assess the applicability of the legal exemption of article 6(3) DCA in accordance with the European Commission guidelines on this subject.[27] The NMa guidelines on cooperation between enterprises[28] (which were recently updated, reflecting accumulated experience and court decisions) do not deal with vertical restraints. Guidelines and notices of the NMa are considered to be policy rules (*beleidsregels)* which cannot be challenged before a court directly, but may be challenged together with a decision in which such guidelines and/or notices are applied.

2.3.1.3. Conclusion of the Evaluation

In the case of residual doubt as to the balanced effects of a vertical restraint, do the decisional practice and the case-law allow to say if the authority currently prefers to make a 'type I error' (over-applying the law: prohibiting a perhaps pro-competitive vertical restraint) or a 'type II error (under-applying the law: allowing a perhaps anticompetitive vertical restraint)? Is this preference a statistical trend or the result of an explicit choice?

No rule of reason exists, and pro-competitive effects are only taken into account in the assessment whether the conditions for the legal exemption are met. As the parties involved must establish that these conditions are met, this system may be more likely to lead to 'type I errors' than 'type II errors'.

Where the authority concludes that the vertical restraint is, on balance, anticompetitive, is it empowered to suggest, negotiate and/or impose remedies?

The NMa can impose remedies in a sanction procedure in the form of an order to bring an infringement to and end subject to a periodic penalty payment. The Ministry of Economic Affairs is currently investigating whether to include the instrument of commitments as set out in article 9 of Regulation 1/2003 in the amendment of the DCA. Informally the NMa has frequently suggested/negotiated remedies by indicating it would prohibit an agreement in the form as submitted to the NMa if not amended,

[26] European Commission 2005, para. 37.
[27] Directeur-generaal 2005.
[28] NMa 2005.

or by sending a notice indicating the NMa will open a formal procedure if certain behaviour or a certain agreement is not changed ('negotiated decision making' as the NMa calls it).

Is it also empowered to test these remedies on the market and/or to monitor their implementation? How are these powers applied in practice? With what results?

The NMa is free to test remedies on the market and to monitor their implementation. There is no general formula as to the specific application of these powers in practice.

2.3.2. Review in Second Instance

What degree of review of the (administrative or judicial) decision of first instance is applied by the authority of second instance (appeal or judicial review)? Is first instance adjudication on the remedy reviewed differently from adjudication on the vertical restraint itself?

The NMa has wide discretion in applying article 6 DCA. In its assessment, the NMa is bound, however, to the general principles of due administration (e.g. the duty of due care, proper preparation and the obligation to provide proper and consistent grounds for a decision). On appeal the court assesses whether the NMa has in reasonableness been able to come to its conclusion, whether (positive or negative) effects have been sufficiently made plausible (*voldoende aannemelijk gemaakt*) and whether the NMa has acted in accordance with the general principles of sound administration.

In practice, does the case-law of the last five years offer examples of confirmation or reversal, in second instance, of new legal or economic theories elaborated in first instance? If so, which ones?

The case law with respect to vertical restraints in the last five years offers no clear examples of confirmation or reversal of new legal or economic theories.

3. Vertical Aspects

This third part aims at providing a panorama of the legal treatment of the most current vertical restraints. National rapporteurs are invited, insofar as possible, to answer in a table. An indicative table is attached to the questionnaire.

3.1. Price-related Vertical Restraints

What rule is currently applicable to the main types of vertical restraints relating to the level or components of the price (per se illegality; per se legality; rule of reason)?

Resale price maintenance is in principle illegal per se. This is different only if the parties can demonstrate that this restriction has no appreciable effect on competition, or that the conditions for the legal exemption are met. Maximum or recommended resale prices are not deemed illegal per se, provided that they do not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties.

Has the authority set up, for any of them, a test intended to assess its pro- and anticompetitive effects? If so, which one?

No.

Are there exceptions to this test?

Not applicable.

Have significant decisions been taken over the last five years concerning these types of vertical restraints? If so, which ones?

No significant decisions have been taken over the last five years concerning these types of vertical restraints. Worth mentioning, however, is the decision (on objections) of the NMa of 21 December 2001 in Case 757/153 (*Chilly/Basilicum v Secon Group/G-Star*), and the subsequent judgment in appeal of 13 February 2004.

What were the main factual elements of the cases?

Following a complaint filed with the NMa by a distributor (*Chilly/Basilicum*) against a resale prohibition in the general conditions of a supplier of clothes (*G-Star*), the NMa decided that a clause regarding recommended minimum prices constituted an infringement of the cartel prohibition. In this respect, the NMa noted that the wording of the clause was such that the distributors were in practice obliged to apply the recommended minimum prices (unless the supplier granted prior approval to deviate from these prices) and that therefore the recommended minimum prices in practice were fixed resale prices. According to the NMa, the clause was therefore restrictive of competition by its very nature, in which case it has to be assumed that competition is restricted appreciably. The same applied to a clause in subsequent general conditions, according to which the distributors were advised to ask G-Star's permission in case the recommended resale prices were not applied. According to the NMa, such clause had as its object to verify if the recommended prices were observed by the distributors, at least to have prior control or influence on the price policy of the distributors. The decision of the NMa was upheld by the District Court of Rotterdam in its judgment of 13 February 2004.

Have the decisions led to an evolution in the legal and economic evaluation of these types of vertical restraints?

No.

Have significant decisions imposing remedies been taken over the last five years concerning these types of vertical restraints? If so, which ones?

No.

Has the implementation of these remedies been monitored and assessed? With what results?

Not applicable.

3.2. Non-price Non-territorial Vertical Restraints

What rule is currently applicable to the main types of vertical restraints relating to quantity, quality, variety, services, clients, etc. (per se illegality; per se legality; rule of reason)?

Non-price non-territorial vertical restraints that appreciably restrict competition are illegal unless they fall within the scope of the Block Exemption or meet the criteria of article 6(3) DCR. However, most non-price and non-territorial vertical restraints (with

the exception of customer restrictions and other restrictions mentioned in article 4 of the Block Exemption) are not deemed to have a restriction of competition as their object.[29] These vertical restraints only infringe the cartel prohibition if these can be demonstrated to have an appreciable restriction of competition as their effect. To the extent that the thresholds set out in the De Minimis Notice[30] are not exceeded, an appreciable effect is deemed not to exist and such vertical restraints are legal.

Has the authority set up, for any of them, a test intended to assess its pro- and anticompetitive effects? If so, which one?

No.

Are there exceptions to this test?

Not applicable.

Have significant decisions been taken over the last five years concerning these types of VR? If so, which ones?

Decisions worth mentioning are the decision of the NMa of 28 May 2002 in Case 2036 (*Heineken*), and the decision of the NMa of 9 July 2002 in case 1994 (*Astra Zeneca*).

What were the main factual elements of the cases?

Heineken

Heineken notified the standard agreements it entered into with pubs and other licensed outlets ('on premises outlets') to the NMa requesting (to the extent necessary) an individual exemption. The agreements provided for exclusive purchasing obligations for the outlets which Heineken gave financial and commercial support to. Heinekens market share in the Netherlands with respect to beer sold through on premises outlets was 50-60% and the Block Exemption therefore did not apply. The exclusive purchasing obligations regarded only draught pilsner, and could be terminated by the purchaser at any time observing two months notice and subject to the repayment of any outstanding loans.

The NMa conducted a detailed investigation as to whether the agreements resulted in market foreclosure (at the level of the market as a whole). The NMa concluded that this was not the case and therefore the Heineken agreements did not result in a restriction of competition. First of all, the NMa established that 50% of the on premises outlets were not tied to a specific brewer and therefore there were plenty of alternative outlets available for competing brewers. Secondly, competing brewers were not foreclosed from supplying the outlets that were tied to Heineken. Although the agreements were entered into for indefinite duration, the outlets could terminate the exclusivity at any time (with two months notice), while evidence showed that in the past significant switching behaviour took place. For Heineken, therefore, there was no 'safe period' during which its purchasers could not switch to competing

[29] E.g. case 2036 (*Heineken*) para. 98 (regarding exclusive purchasing obligations), case 1405 (*BasisMedia*) para. 67 (regarding exclusive right to distribute products), and case 1437 (*Monuta*) para. 45 (regarding exclusive right to provide services).

[30] Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community, *OJ* C-368, of 22 December 2001.

suppliers. In addition, the exclusivity only applied to draught pilsner and not to other draught beers and bottled beers. In addition there were no practical impediments to terminating the agreement (e.g. fines or other financial barriers, cellar tanks owned or financed by Heineken could easily be used for other brands and therefore refinanced by a new supplier). The NMa also took into account that Heineken could not terminate the agreements unilaterally at any time, and that Heineken undertook to notify the outlets annually of their possibility to terminate their agreements with Heineken.

AstraZeneca
AstraZeneca notified the agreements it entered into with in-hospital pharmacists and public pharmacists to the NMa requesting an exemption. The agreements provided (*inter alia*) that the pharmacists were under the obligation to sell medicines that AstraZeneca supplied with special discounts, only to patients in hospitals or nursing homes ('intramural patients'). Such medicines could therefore, not be sold to patients outside such institutions or to other pharmacists. AstraZeneca argued that this prohibition was necessary to maintain the discounts granted to intramural patients. In its assessment the NMa took into account that a recent amendment of the regulatory framework with respect to sales of medicines, intended to create competition between hospitals and public pharmacists in the supply of medicines to extramural patients. The prohibition in the agreement resulted in an inability for intramural purchasers to sell the medicines against lower prices in the extramural segment and resulted in preservation of the different segments, contrary to the intention of Government. The NMa held that the contractual prohibition was a market partitioning arrangement which had a restriction of competition as its object. The prohibition prevented increased competition from in-hospital pharmacists on the extramural segment which could lead to increased efficiency, quality and lower prices of pharmacists outside hospitals. In addition, the prohibition resulted in increased (already significant) barriers to entry into the intramural segment, as new entrants could not match the extremely high discounts (up to 80%) on the intramural segment. Impossibility to enter the intramural segment would have the result that actual market entry becomes very difficult.

Have the decisions led to an evolution in the legal and economic evaluation of these types of vertical restraints?

No. The Heineken and AstraZeneca decisions apply the principles set out in the case law of the European Court of Justice and the Commission and the Guidelines. Nevertheless, the Heineken decision does clarify that exclusivity arrangements entered into by undertaking with high market shares do not necessarily restrict competition.

Have significant decisions imposing remedies been taken over the last five years concerning these types of vertical restraints? If so, which ones?

In the Heineken case discussed above, Heineken amended the notified agreements following comments by the NMa after a first assessment of the notification. The amendments provided that exclusivity was limited to draught pilsner, and Heineken undertook to notify its purchasers annually of their right to terminate the agreements. Although technically these amendments cannot be qualified as remedies, it is likely that these amendments are the result of pressure from the NMa.

Has the implementation of these remedies been monitored and assessed? With what results?

It is not clear if the NMa has monitored whether Heineken applies the amended agreements in practice.

3.3. Territorial Vertical Restraints

What rule is currently applicable to the main types of territorial vertical restraints (per se illegality; per se legality; rule of reason)?

Territorial vertical restraints are illegal unless they fall within the scope of the Block Exemption or meet the criteria of article 6(3) DCR.

Has the authority set up, for any of them, a test intended to assess its pro- and anticompetitive effects? If so, which one?

No.

Are there exceptions to this test?

Not applicable.

Have significant decisions been taken over the last five years concerning these types of vertical restraints? If so, which ones?

No.

What were the main factual elements of the cases?

Not applicable.

Have the decisions led to an evolution in the legal and economic evaluation of these types of vertical restraints?

Not applicable.

Have significant decisions imposing remedies been taken over the last five years concerning these types of vertical restraints? If so, which ones?

No.

Has the implementation of these remedies been monitored and assessed? With what results?

Not applicable.

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